Westchester Municipal Planning Federation
November 2, 2017
Zoning Board Primer – What You Need to Know

Prepared By:
Leslie J. Snyder, Esq.
Leonard Cohen, Esq.

Powers of the Zoning Board of Appeals (hereinafter "ZBA")
The ZBA is both an administrative and quasi-judicial body that does not have legislative powers. Its principal responsibilities are:

- **I.** Area Variances
- **II.** Use Variances
- **III.** Interpreting zoning ordinances
- **IV.** Special Permits where the ZBA is delegated authority
- **V.** Addressing nonconforming uses and structures

The following materials will focus on variances.[1]

I. AREA VARIANCES— *"the authorization by the zoning board of appeals for use of land in a manner, which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."*

A Zoning Board's determination to grant or deny an area variance will be upheld if it is rational and not arbitrary and capricious. A determination is rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition. In determining whether to grant an area variance, the ZBA must engage in a balancing test, which is to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. The ZBA is also required to consider the following five (5) statutory factors:

(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
(2) whether the benefit sought by the applicant can be achieved by some method, feasible to the applicant to pursue, other than an area variance;
(3) whether the requested area variance is substantial;
(4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
(5) whether the alleged difficulty was self-created. With respect to this factor, New York Law provides that its consideration is relevant to the decision of the ZBA, but is not determinative.

See New York Town Law Section 267-b(3)(b) (see also Village Law Section 7-712-b(3); General City Law Section 81-b(4)). New York courts have ruled that the standards set forth in the five factors are exclusive so that no other factors other than those recited in the five factors can be considered.

SEQR Note: Pursuant to 6 NYCRR Part 617.5(c)(12), the "granting of individual setback and lot line variances" are Type II actions under the New York State Environmental Quality Review Act

[1] Disclaimer: These materials are to be used for educational purposes only. These materials are not legal advice, nor are they intended to be legal advice.

("SEQR"), which have been determined to categorically not have a significant adverse impact on the environment, and therefore do not require any further environmental review, including the preparation of an environmental assessment form ("EAF").

Sample Cases:

A. *Feinberg-Smith Associates Inc. v. Town of Vestal Zoning Bd. of Appeals*, 56 Misc. 3d 1217(A) (N.Y. Slip Op. 2017) **(Balancing test and rational basis)**

Facts: Developer sought area variances regarding proposed expansion of student housing development at Binghamton University. After the first ZBA meeting, the Board received over 80 emails or letters in opposition to the requested variances. The Board held a second meeting in which they made a SEQR determination of no adverse impacts. At the final meeting, the Board denied the variance requests and petitioner commenced an Article 78 proceeding alleging the Board's decision denying the variance requests was illegal, arbitrary, capricious and without substantial evidence.

Holding: The Supreme Court affirmed the ZBA's denial of the requested area variances.

Judicial Standard: A ZBA "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community." The five factors to be balanced are listed above. "A ZBA is not required to justify its determinations with supporting evidence as to each of the five factors, so long as its determinations balance the relevant considerations in a way that was rational."

Analysis: The Supreme Court found that the ZBA properly weighed the five criteria and found that there was evidence in the record to support their decision. The record indicated that although the Board granted a negative declaration with regard to the project, it found that there would be a moderate to large impact in the following areas 1) a change in the use or intensity of use of the land; 2) an impairment of the character or quality of the existing community; and 3) an adverse change in the existing level of traffic. The Court held that the Board concluded that those findings did not preclude a negative declaration, but they certainly could have rationally reached a different conclusion on the ultimate granting of the variances. The Court found that the ZBA properly noted that there was an alternative that was code compliant, and that the variances for minimum living area (750 square feet to 474 square feet permitted) and parking spaces (818 required and 309 provided) were substantial. While petitioner alleged that the ZBA was improperly influenced by public opposition to the project, the ZBA argued that it properly considered, but did not bow, to public concern and comment. The Court further held that reliance by the ZBA on specific testimony of neighbors was an appropriate consideration.

B. *Cohen v. Town of Ramapo Bldg., Planning & Zoning Dept.*, 150 A.D.3d 993 (2d Dep't 2017) **(Relaxed standard for evaluating area variance applications for schools & religious uses)**

Facts: A yeshiva sought several area variances so that it could construct and operate a religious school on its property in Monsey. The ZBA granted the area variances after it heard testimony both in favor of and against the requested variances. The ZBA's grant of area variances was affirmed by the lower court and neighbors appealed.

Holding: The Appellate Division affirmed the ZBA's granting of area variances where ZBA engaged in the required balancing test and considered the five relevant statutory factors in granting the area variances.

Judicial Standard: While religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.

Analysis: The record revealed that the ZBA's determination had a rational basis and was not arbitrary or capricious. A zoning board is not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations is rational.

C. *L & M Graziose, LLP v. City of Glen Cove Zoning Bd. of Appeals*, 127 A.D.3d 863, 4 N.Y.S.3d 344 (2d Dep't 2015) (**Arbitrary & capricious denial overturned based on failure to perform balancing test and prior precedent)**

Facts: City of Glen Cove ZBA denied application for area variances (minimum lot area, lot width, and rear yard setback requirements for two-family dwelling) after a public hearing. Petitioner brought this article 78 proceeding to challenge the ZBA's denial, alleging that it was inconsistent with minimum lot area and width variances granted by the ZBA in 2009 for a two-family dwelling two parcels away. The lower court annulled the ZBA's determination and remitted the matter back to the ZBA, directing them to issue the requested variances. The City appealed and the Appellate Division affirmed the lower court's determination that the ZBA's denial of the requested variances was arbitrary and capricious.

Holding: Lower Court overturned ZBA's denial of area variances as irrational, arbitrary and capricious

Judicial Standard: In applying the 5 Factor balancing test listed above, ZBA "is not required to justify its determination with supporting evidence with respect to each of the 5 Factors, so long as its ultimate determination balancing the relevant considerations was rational."

Analysis: While there was evidence that the variances were substantial, there was no evidence in the record showing that the requested variances would have an undesirable effect on the character of the neighborhood, adversely impact the physical or environmental conditions of the area, or otherwise result in a detriment to the health, safety and welfare of the neighborhood or community." Moreover, similar variance requests were granted for properties in very close proximity to the subject property showing that the neighborhood is not negatively affected by variances.

D. *Crowell v. Zoning Bd. of Appeals of Town of Queensbury*, 151 A.D.3d 1247, 56 N.Y.S.3d 618, (3d Dep't 2017) **(Time to Bring The Article 78 proceeding)**

Facts: Respondent sought to reconstruct two single-family dwellings situated on their property which contained a density provision limiting each lot to one single-family structure. The two structures at issue predate the adoption of the Town's zoning code and, therefore, constitute prior nonconforming structures. Respondent applied to the ZBA for the necessary variances and variances were granted, despite petitioner's argument that a use variance, rather than an area variance was required. The ZBA resolution approving such variances was filed in the office of the Town Clerk on January 23, 2014. On November 26, 2014, the Town's Code Enforcement Officer issued building permits for the proposed reconstruction. On January 16, 2015, petitioner filed an appeal with the ZBA challenging the issuance of the building permits, again arguing that the construction of two single-family homes on the Respondents' lot requires a use, rather than an area variance pursuant to the Town's zoning code. At the conclusion of that hearing, the ZBA upheld its original determination and petitioner commenced an article 78 proceeding challenging the issuance of the building permits.

Holding: The lower court overturned the ZBA's determination granting the area variances, rescinded the building permits and enjoined any further construction of a second residence on the property. The Appellate Division reversed the lower court, finding that petitioner's challenge to the issuance of the building permits should have been dismissed as untimely.

Judicial Standard: In order to determine the applicable limitations period and the event that triggered its commencement, we must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner.

Analysis: The crux of petitioner's challenge to the issuance of the building permits is that a use variance, not an area variance, was required for the respondents' reconstruction of the two nonconforming structures on their property. That issue was squarely resolved by the ZBA in its resolution from January 2014, when it considered and rejected petitioner's claim that a use variance was required for the project and granted the respondents an area variance from the density requirement of the Town's zoning code. To challenge that determination, petitioner was required to commence an article 78 proceeding within 30 days after the filing of the resolution granting the variance. Petitioner failed to do so and, under these circumstances, "could not sit idly by and extend [his] time to commence a proceeding for judicial review until after the building permit[s] had been issued."

E. *Wenz v. Brogan*, 149 A.D.3d 970 (2d Dep't 2017) **(ZBA Procedure)**

Facts: After a hearing, the ZBA approved an application for area variances permitting the respondent to make improvements to his residential property, but the minutes of the ZBA meeting did not record each board member's vote. A short-form decision filed with the Village Clerk 20 days after the hearing set forth the vote of each ZBA member, but contained no specific findings as to the factors on which the ZBA based its determination. A notation on the short-form decision stated that any aggrieved party could, within 30 days, serve a written demand on the Village Clerk for a written long-form decision setting forth the ZBA's findings. The petitioner brought an article 78 proceeding to review the ZBA's determination which granted the variances. Specifically, petitioner contends that the ZBA violated several provisions of Village Law § 7–712–a with respect to the time in which a decision was required and in not setting forth the reasons for its determination in the short-form decision.

Holding: The Appellate Division affirmed the lower court which dismissed the Article 78 petition. The Court found that the village was not preempted from regulating issues of whether the ZBA renders a short form or long form decisions or the timing within which such decisions maybe made. Also, the Court found (i) ZBA's failure to file written decision to village clerk within requisite five-day period did not mandate annulment of its determination, (ii) ZBA's failure to record vote of each member in minutes of hearing did not render decision a nullity, and (iii) ZBA's determination to grant area variances had a rational basis and was not arbitrary and capricious.

Judicial Standard: Although local laws that are inconsistent with state laws are generally invalid, the Municipal Home Rule Law allows incorporated villages to amend or supersede provisions of the Village Law as they relate to zoning matters. Nevertheless, local lawmaking power under the supersession authority is of course in all instances subject to the State's transcendent interest where the Legislature has manifested such interest by expressly prohibiting a local law, or where a local law is otherwise preempted by State law.

Analysis: Village Law § 7–712–a does not preempt the Village from regulating the issues of whether its ZBA renders short-form or long-form decisions, or the time periods within which those decisions must be issued. The Legislature has not evinced an intent to preempt the field, and the legislative history of that section indicates that the Legislature envisioned no comprehensive and detailed regulatory scheme with respect to the form or timing of decisions of a zoning board of appeals. Additionally, contrary to the petitioner's contention, the ZBA's failure to file its short-form decision in the office of the Village Clerk within five business days after it

was rendered at the hearing does not mandate the annulment of its determination. Village Law § 7–712–a(9) does not specify a sanction for the failure to comply with the five-day filing requirement and, while the ZBA offered no explanation for its delay, the delay was not extensive and the petitioner did not demonstrate any prejudice resulting from the late filing. The Court would not let procedural defects in ZBA's determination to require petitioner's relief to be granted.

II. USE VARIANCES - "*the authorization by the zoning board of appeals for the use of land for a purpose, which is otherwise not allowed or is prohibited by the applicable zoning regulations."*

In connection with a use variance, the applicant must demonstrate "unnecessary hardship" for each and every permitted use under the zoning regulations for the particular district where the property is located. To meet this standard, the applicant must demonstrate the following:

(1) the applicant cannot realize a reasonable rate of return for every permitted use, provided that lack of return is substantial as demonstrated by competent financial evidence;
(2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
(3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
(4) that the alleged hardship has not been self-created.

See New York Town Law §267-b(2)(b); Village Law §7-712-b(2)(b); General City Law §81-b(3)(b).

Sample Cases:

A. *Expressview Development, Inc. v. Town of Gates Zoning Bd. of Appeals*, 147 A.D.3d 1427 (4th Dep't 2017) **(Substantial evidence and unnecessary hardship)**

Facts: Owner of landlocked, undeveloped parcels of land and potential purchaser of parcels brought an Article 78 proceeding challenging denial by town ZBA of application for use and area variances to construct billboards that would be visible from highway. The Petitioner also asked for a declaration that the town code section prohibiting commercial signs not located on site of business for which they advertised was unconstitutional.

Holding: The Appellate Division affirmed the lower court's decision upholding the ZBA's denial of the use and area variance for the billboards.

Judicial Standard: When reviewing the determinations of a ZBA, courts consider "substantial evidence" only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination. "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them."

Analysis: The Court concluded that there was substantial evidence supporting the ZBA's determination that the billboards would have a negative and adverse effect upon the character of the neighborhood inasmuch as the relevant area could not aesthetically support additional signs. The billboards in the area which had been approved was pursuant to a federal lawsuit in 1999 and not a determination of the ZBA. Petitioners failed to establish the existence of earlier determinations by the ZBA that were based on essentially the same facts as petitioners' present application. The court found that members of the ZBA did not act upon consideration of their own surveys, and thus the members of the ZBA were not required to place on the record their

personal observations of the area inasmuch as there was evidence contained in petitioners' submissions, including maps and photographs, establishing the quantity and nature of the billboards already in existence along the relevant portion of the highway. The Appellate Division also rejected petitioners' contention that the Town Code was an unconstitutional restraint of freedom of speech under the First Amendment on the ground that it improperly distinguishes between on-site and off-site commercial signs.

B. *Rehabilitation Support Services, Inc. v. City of Albany Bd. of Zoning Appeals*, 140 A.d.3D 1424, 34 N.Y.S.3d 256 (3d Dep't 2016) **(Reasonable return, self-created hardship, and prior precedent)**

Facts: Petitioner challenged ZBA's denial of use variance application to raze an abandoned school building and adjacent residence so as to build a 24-bed alcohol and substance abuse rehabilitation center.

Holding: The Appellate Division affirmed the ZBA's denial, determining that the board addressed the relevant factors regarding a use variance and that its decision had a rational basis supported by substantial evidence.

Judicial Standard: The determination of a ZBA must be sustained if it has a rational basis and is supported by substantial evidence.

Analysis: (i) REASONABLE RETURN: Petitioner could not prove by dollar and cents proof that it cannot realize a reasonable rate of return. Although petitioner paid approximately $40,000 for both properties, when accounting for grant monies received from the County, the petitioner had only invested less than $500 in the properties. Petitioner presented limited and incomplete proof regarding whether a reasonable return could be realized on this small investment by any of the allowable uses within the zone. (ii) SELF-CREATED HARDSHIP: at the time the petitioner acquired the properties, it was aware that the project would be nonconforming, and the board rationally concluded that the applicant's hardship was self-created. (iii) PRIOR PRECEDENT: although in 2008, a use variance was granted for a similar rehabilitation center on the school property, the application at issue sought to raze the historical building previously sought to be repurposed, and would create a nonconforming use replacing the existing conforming use. Additionally, the board distinguished the grant of the 2008 variance since at the time petitioner acquired the property it was aware of the non-conformity. Accordingly, the ZBA rationally decided that the petitioner could realize a reasonable rate of return without the use variance, any hardship was self-created, and that the board's departure from its prior precedent in granting a use variance for a similar use on this property was not arbitrary or capricious, but had a rational basis supported by substantial evidence.

C. *Holimont, Inc. v. Vill. of Ellicottville Zoning Bd. of Appeals*, 112 A.D.3d 1315, 977 N.Y.S.2d 514 (4th Dep't 2013) **(Substantial evidence/self-created hardship)**

Facts: Operator of ski area obtained a residential parcel near the base of its existing resort and sought a use variance to build a ski lift over its land. The ZBA denied the application and property owner sued. The Supreme Court affirmed the ZBA's denial.

Holding: The Appellate Division affirmed the ZBA's denial because the petitioner failed to show that it was entitled to a use variance since it failed to establish it could not realize a reasonable rate of return without the use variance.

Judicial Standard: The issue of credibility is the sole province of the ZBA as factfinder.

Analysis: Petitioner failed to show it was entitled to a use variance to build a ski lift over a parcel of land it had acquired. Petitioner failed to show that it could not realize a reasonable rate of return without the use variance and that the hardship was not self-created. The record

establishes that permitting petitioner to maintain an active ski lift and snowmaking equipment on its parcel will alter the quiet residential area surrounded by nature in which that parcel is located because of the increased use of the parcel. Finally, the record establishes that petitioner's hardship was self-created inasmuch as petitioner previously had stipulated to restrictions calling for an "undisturbed green area" in the location petitioner now seeks to develop for the ski lift.

Note: Different Standards for Public Utilities: The Public Necessity Standard

It is important to note that where a zoning board is considering a variance application by a public utility, such as an electric company or wireless telephone company, there is a relaxed standard and the "unnecessary hardship" standard does not apply. See *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598 (1979); *Cellular Telephone Company d/b/a Cellular One v. Rosenberg*, 82 N.Y.2d 364 (1993).

In Hoffman and Rosenberg, the New York Court of Appeals held that since utilities such as Con Edison and Cellular One are required by law to provide such service, an applicant must be granted a variance if the proposed use is necessary for the applicant to render safe and adequate service. The Court further found that customer needs were to be considered and, "where the intrusion or burden on the community is minimal, the showing required by the utility shall be correspondingly reduced." Finally, the Court made clear that a zoning board may not exclude a utility from a community where the utility has shown a need for its facility.

This year, another variance case cited to the important Rosenberg decision but the case was in the context of an area variance. In *Decarr v. Zoning Bd. of Appeals for Town of Verona*, --- N.Y.S.3d (2017), the court found that the telecommunications provider seeking an area variance need only establish that there is a gap in service, the location of the proposed facility will remedy said gap and the facility presented a minimal intrusion. The applicant did not have to show that its proposal was the least intrusive means to address a significant gap in service like in a use variance case. In *Decarr*, Petitioners brought article 78 proceeding seeking to annul determination of ZBA, which granted a special use permit and area variance to telecommunications provider for construction of wireless telecommunications facility. The Appellate Division affirmed the Supreme Court's decision and upheld the ZBA's granting of a special permit and area variance to permit construction of the facility. The Court found that when addressing an area variance, telecommunications provider is not required to establish that their proposal is the "least intrusive means" to address a "significant gap" in service in order for the ZBA to grant their application. Rather the Court held that the provider only needs to establish the existence of a gap in service, that the location of the proposed facility would remedy that gap, and that the facility presented a minimal intrusion. The court concluded that there was a rational basis supporting the ZBA's decision to grant the special permit and area variance since the provider established the existence of a gap in service, that the location of the proposed facility would remedy that gap, and that the facility presented a minimal intrusion.

III. THE TELECOMMUNICATIONS ACT, THE SHOT CLOCK AND THE 2014 ORDER REGARDING ELIGIBLE FACILITY REQUESTS

In 1996, Congress adopted the Telecommunications Act as "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced

telecommunications and information technologies and services."[2] 47 U.S.C. § 332(c)(7)(A) preserves the "authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities…." However, 47 U.S.C. § 332(c)(7)(B) makes it clear that there are five (5) limitations on state or local regulation of the placement, construction and modification of personal wireless facilities which are as follows:

1. Regulations shall not unreasonably discriminate among providers;
2. Regulations shall not prohibit or having the effect of prohibiting the provision of personal wireless services;
3. Regulations shall not regulate the placement, construction or modification of personal wireless service facilities on the basis of the "environmental effects of radio frequency emissions" so long as the facilities meet the FCC standards;
4. Any denial of an application to place, construct, or modify personal wireless services shall be in writing and supported by substantial evidence; and
5. Any request to install wireless service facilities shall be acted on within a "reasonable period of time".

After the enactment of the Telecommunications Act, the "reasonable period of time" language of 47 U.S.C. § 332(c) (7) (B) was subject to different interpretations and implementations among municipalities, which had the cumulative effect of delaying and hindering the deployment of personal wireless services nationwide. On November 18, 2009, the FCC issued a Declaratory Ruling regarding the timely review of applications for siting of wireless facilities, WT Docket NO. 08-165 ("Shot Clock Order" or "Shot Clock").[3] The Shot Clock Order was intended to ensure the timely review of "zoning approvals" and "siting requests" for wireless facilities. To this end, the Shot Clock Order finds that a "reasonable period of time" for a local government to act on a collocation application is 90 days, and 150 days for all other applications.[4] The attachment of transmission equipment to an existing structure, building or tower is referred to as a collocation. The 90 day or 150 day period begins to run when the reviewing municipality has determined the subject application is "complete." The Shot Clock provides municipalities with an initial 30 day period to review applications for completeness. If the municipality fails to reach a determination as to completeness of the application within 30 days, the application is deemed "complete" and the Shot Clock is deemed to run from the date of submission. If the municipality determines the application is incomplete and requests further information from the applicant, the applicable Shot Clock period begins to run from the later of (a) the applicant providing the requested information or (b) the expiration of the 30 day completeness review period. *See* *Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit*, 848 F.Supp.2d 391 (W.D.N.Y. 2012) (wireless application deemed complete upon the filing of supplemental papers required for the original application triggering Shot Clock).

[2] H.R. Conf. Rep. No. 104-458, at 113 (1996). The Telecommunications Act has been referred to by the U.S. Supreme Court as "an unusually important legislative enactment," establishing a national goal of encouraging the "rapid deployment of new telecommunications technologies." *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, 24 F.C.C.R. 13994, 1400, 2009 WL 3868811 (F.C.C. 2009), petition for review denied, 668 F.3d 229 (5th Cir. 2012) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

[4] Rule, ¶71.

Despite the fact that it has been over 20 years since the TCA, municipalities have still been enacting moratoriums. However, as decided in *Upstate Cellular Network v. City of Auburn*, 2017 WL 2805820, the Court found that the moratorium did not toll the TCA's 150-day "shot clock". Here, the City Council passed a six month moratorium prohibiting the "acceptance and review of new applications seeking approval for new telecommunications facilities and towers". One day later, Upstate Cellular Network d/b/a Verizon Wireless' application was received by the City and promptly returned citing the newly enacted moratorium. Thereafter, Verizon made repeated attempts to resubmit the application and urged the City to accept and review it regardless of the moratorium. Verizon's application was received on March 4, 2016, and as a consequence, the 150 day shot clock period expired August 1, 2016. On August 23, 2016, Verizon commenced an article 78 action seeking injunctive relief and declaratory judgment. The District Court held that the City's moratorium did not toll the TCA's 150-day "shot clock" period, the City's delay in action on Verizon's application was unreasonable, the City's failure to act on Verizon's application effectively prohibited wireless service in the City and a mandatory injunction directing the City to approve provider's application was appropriate remedy. The TCA imposes procedural limitations on local zoning decisions and requires that local governments "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. Further, in 2014, the FCC issued additional guidance to clarify that the 150 day time frame, commonly referred to as the "shot clock", "runs regardless of any moratorium." The City argued that the 150 day shot clock never began because the application was not "duly filed", an argument which the Court rejected. In fact, the Court found that the TCA and FCC orders support the conclusion that a municipalities' moratorium does not toll the shot clock period. The Court also noted that the 2014 Order (as hereinafter defined) was clear that any moratorium that results in a delay of more than 90 days for a colocation application or 150 days for another application will be presumptively unreasonable. The Court held that the City unreasonably delayed Verizon's application in violation of Section 332 of the TCA and ordered the City to approve the application pursuant to the City Code as it existed prior to the amendment of the Code that took place during the moratorium.

On October 17, 2014, the Federal Communications Commission adopted the Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies order ("2014 Order"). The 2014 Order implements Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, which provides that a municipality may not deny, and shall approve certain applications for co-location of new transmission equipment on existing wireless towers or base stations. Under the 2014 Order, municipalities shall approve an "eligible facilities request" within 60 days of receiving all materials required to determine whether the proposed facility is in fact an "eligible facilities request" or the request will be deemed granted. The 2014 Order deems an "eligible facilities request" as the co-location of transmission equipment on a tower or base station that does not constitute a "substantial change". The 2014 Order lists six criteria for a "substantial change":

1. Increase in the height of a tower by more than 10% or 20 feet, or a base station by more than 10% or 10 feet, whichever is greater;
2. Protrusion from the edge of a tower more than twenty feet, or protrusion from the edge of a base station more than 6 feet;
3. The installation of more than four equipment cabinets; or
4. Excavation or deployment outside the site of the tower or base station.
5. If the existing concealment elements of the tower or base station would be defeated; or

6. It does not comply with conditions associated with the prior approval of construction other than conditions related to height, width, cabinets, or excavation.

See Village of Portchester 2016 Local Law No. 05 as an example of a municipality codifying the streamlined process for "eligible facilities requests".

Biography

Leslie J. Snyder is a founding partner with her late husband, David, of the law firm Snyder & Snyder LLP located in Tarrytown, New York. Leslie heads the firm's real estate transaction practice. She has appeared before numerous municipal agencies throughout the New York metropolitan area and garnered approvals for various projects ranging from retail centers, private schools, telecommunication switching facilities, medical facilities and transfer stations. She is a frequent lecturer on real estate, environmental and telecommunications matters. She is a graduate of the University of Pennsylvania's Wharton School, and New York University School of Law. Leslie has served as outside counsel to the Town of Harrison in connection with environmental, real estate and land use matters, and currently serves as director of the Westchester County Municipal Planning Federation.

Leonard Cohen, Esq. is an associate at Snyder & Snyder, LLP, concentrating in land use and environmental permitting. He graduated Pace Law School in 2017 (J.D. cum laude, Real Estate & Land Use Certificate) where Lenny was an Associate Editor for the PACE ENVIRONMENTAL LAW REVIEW. At Pace, Lenny was selected to participate in the New York State Pro Bono Scholars Program where he spent his final semester of law school as a student attorney at Legal Services of the Hudson Valley working on a variety of landlord/tenant and family law matters. Lenny was also chosen as the 2015/2016 American Planning Association - Planning and Law Division Daniel J. Curtin Fellow. As Fellow, Lenny organized a training webinar for municipal officials offering insight into how municipalities can manage sharing economy services such as Airbnb and Uber in their communities.

About the Firm

Snyder & Snyder, LLP is a regional law firm founded in 1990 with a team of 15 attorneys and paralegals. The firm maintains practice areas in land use and zoning, environmental law, real estate development, commercial transactions, telecommunications, and litigation. The firm's attorneys have been responsible for securing land use approvals for a wide variety of projects including wireless communications facilities, private schools, religious institutions, medical facilities, retail complexes, fiber optic networks, landfills and resource recovery plants. For additional information, please contact Leslie Snyder at lsnyder@snyderlaw.net, 914-333-0700.