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1. *LOCAL CELLULAR TELEPHONE REGULATION MORATORIA; Outside Counsel*

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C ELLULAR radiotelephone systems, more commonly referred to simply as ***cellular telephones***, operate in a portion of the radio frequency band-width formerly utilized by Channels 70 through 83 on the old UHF television sets. The Federal Communications Commission (FCC) assigned this limited bandwidth, between 800 and 900 MHz, exclusively for use by ***Cellular*** Radiotelephone Service providers.[1] The use of these bandwidths is ***regulated*** by the FCC in accordance with the Communications Act of 1934[2], which authorized the establishment of a rapid, efficient, nationwide network of ***cellular*** radiotelephones, with the FCC's primary goal of providing interconnected service from a ***cellular telephone*** located anywhere in this country to any other ***telephone*** in the world.[3]

To encourage competition while ensuring the establishment of this nationwide ***cellular telephone*** network, the FCC licensed only two ***Cellular*** Radiotelephone Service providers in each ***cellular*** market. In the ***Cellular*** Geographic Service Area which includes the New York metropolitan area, the two service providers are (1) ***Cellular Telephone*** Company d/b/a ***Cellular*** One* and (2) NYNEX Mobile Communications.

Cellular radiotelephone systems operate by sending radio signals at low level frequencies from ***cellular telephones*** to the nearest cell site, where the radio signal is then routed to a mobile switching center and finally to the public ***telephone*** network (or landline system), which delivers the call to the receiver.

A cell site is a combination of receiving and transmitting antennas operating at low level radio frequencies of about 10 watts per channel and emitting a maximum of about 100 watts per channel. To better understand the level of power involved herein, these low level radio emissions should be compared with other familiar radio systems such as AM, FM and television broadcast stations which operate upwards of 50,000 watts per station.

In the licensees' ***Cellular*** Geographic Service Area, each licensee has a large number of small geographic areas called cells comprising their network system. Each of the two licensees' cell sites operate in a distinct portion of the radiofrequency bandwidth assigned by the FCC. When ***cellular telephone*** users travel distances during their calls,

the original cell site will pass the radio signal along, without interruption, to the cell site that covers the area they have just entered.

Since ***cellular telephones*** operate on low wattage radio frequencies, the range of signals is more significantly impacted by topographical conditions and other obstructions (including trees, buildings, etc.), than if it operated at higher levels of power. Therefore, the selection of an available cell site relies upon an evaluation the adequacy of ***cellular*** coverage which would be provided.

Where the volume of calls in any one area is significant (i.e., highway interchanges, etc.), multiple cell sites may be needed even though topographical conditions are otherwise optimal because each cell site has a limited capacity for handling calls. By the end of the decade, nearly 100 million consumers, including emergency medical, fire and police services, are expected to use ***cellular*** telecommunications services.

In addition to FCC ***regulation***, in New York State both ***cellular*** licensees are legally recognized as public utilities, in accordance with an Order Issuing Certificate of Public Convenience and Necessity from the State of New York Public Service Commission (PSC). Pursuant to PSC and FCC ***regulations***, the licensees are required to provide reliable and readily available ***cellular*** service that is comparable to a landline system. In accordance with FCC ***regulations***:

[c]ellular system licensees must provide ***cellular*** mobile radiotelephone service upon request to all ***cellular*** subscribers in good standing, including roamers, while such subscribers are located within any portion of the authorized ***cellular*** geographic service area where facilities have been constructed and service has commenced.[4]

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If a licensee refuses a request for ***cellular*** service because of a lack of system capacity, it must report that fact to the FCC in writing, explaining how it plans to increase capacity.[5]

Balancing Needs

This background frames the current scenario in which ***local*** municipalities receive applications from ***cellular*** radiotelephone licensees for installation of cell sites in various communities and where neighbors have pressured their governments to limit the number and location of such cell sites.

As a result of this situation, there is considerable scrutiny over balancing the community needs in the region against the demands of the individual neighborhoods in which the cell sites are proposed.

Accordingly, both the federal government and New York state mandates to establish a nationwide network of ***cellular telephone*** communications must weigh heavily in evaluating these issues when a particular community is asked to host a cell site.

In the leading case in this area, ***Cellular Telephone*** **Company v. Rosenberg,**[6] the New York Court of Appeals reviewed an Article 78 proceeding challenging the denial of a use variance by the Zoning Board of Appeals of the Village of Dobbs Ferry in connection with the installation of a cell site on the water tower at Children's Village, a not-for-profit corporation licensed to provide treatment and a home for neglected children.

Cellular One had leased land to permit the installation of nine, approximately 4 feet by 1 foot, ***cellular*** antennas on an existing 70 foot tall water tower, located 400 to 500 feet from the nearest private residential dwelling. The erection of the cell site was proposed to expand and fill gaps in the licensee's ***cellular*** geographic service area, since its customers' calls were often interrupted or disconnected due to the scarcity of antennas and interference from static.

The Children's Village site was classified in the E (Educational District) Zone under the Dobbs Ferry Zoning Code, in which a cell site was not a permitted use. During the hearings on the issuance of a use variance, several residents inquired about alternate sites and raised concerns about noise, reception interference and health risks.

Cellular One's experts testified that the cell site would have no effect on washing machines, ***telephones***, radios or televisions, that there would be no disruption of any other frequencies, and that there would be no effect of any of the transmissions on humans or animals or any other organisms. The reasons for selecting this site, due to its elevation and proximity to highways, were also placed in the record. Nevertheless, the Zoning Board denied the use variance.

Cellular One brought an Article 78 proceeding, alleging among other things, that the Zoning Board's actions were arbitrary and capricious and that it failed to apply the relevant standard of public necessity, applicable to a public utility in accordance with the Court of Appeals' decision in **Matter of Consolidated Edison Co. v. Hoffman.**[7]

The Supreme Court granted the petition finding that ***Cellular*** One was a public utility. The Second Department affirmed finding that the test for a use variance was that set forth in the **Consolidated Edison** case and that the board's determination was arbitrary and capricious.

In affirming the Second Department's decision, the Court of Appeals held that ***Cellular*** One had met its burden for the granting of a use variance, as a public utility. It held that ***Cellular*** One is a public utility since it sufficiently possesses the characteristics associated with such a use:

Characteristics of a public utility include (1) the essential nature of the services offered which must be taken into account when ***regulations*** seek to limit expansion of facilities which provide the services, (2) operat[ion] under a franchise, subject to some measure of public ***regulation***, and (3) logistic problems, such as the fact that [t]he product of the utility must be piped, wired or otherwise served to each user [,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery [citing **2 Anderson, American Law of Zoning**12.32, at 569].[8]

The Court then described the public utility standard established in **Consolidated Edison** with regard to the granting of a use variance:

[T]he utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities.[9]

The Court specifically determined that the **Consolidated Edison** standard applies to ***cellular telephone*** companies and:

permits those companies to construct structures necessary for their operation which are prohibited because of existing zoning laws and to provide the desired services to the surrounding community. Furthermore, the test we announced in that case, as well as the ***regulations*** of the FCC and the PSC, serve to guard against appellants' concerns about the potential proliferation of similar applications and the inability of ***local*** land use officials to exercise control to protect their communities.[10]

Legislation

Many municipalities in Westchester County have adopted ***moratoria*** or otherwise sought to implement legislation to control the installation of cell sites in their communities. In the Village of Tarrytown, two separate ***moratoria*** were adopted (one in September 1994 and another in October 1994) both of which were set aside by the Westchester County Supreme Court Justice Louis A. Barone. In affirming the Supreme Court's determination that the October ***moratorium*** was null and void, the Second Department stated:

Whether judged by the standards applicable to an exercise of the Village's general police power or its zoning authority, the ***moratorium*** cannot stand. [A] municipality may not invoke its police powers solely as a pretext to assuage strident community opposition (**Matter of Belle Harbor Realty v. Kerr,** 35 NY2d 507, 512).

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Although the ***moratorium*** on antennas purports to protect the health, safety, and welfare of Village residents, there is not a scintilla of evidence in the record indicating that the installation of ***cellular*** antennas in accordance with the plaintiff's proposed plan will be inimical to be well-being of the Village citizenry. Rather, the overwhelming and unrefuted medical and scientific evidence is to the contrary. The analytical and evaluative proof unequivocally established that the proposed antenna installation would generate only a minute fraction of the acceptable limit for radiofrequency emissions. This same evidence further demonstrated that the proposed plan, in conjunction with other cell sites, would not pose any health risk to Village residents, and that available studies indicated that no adverse health effects result from exposure to radiofrequency emissions which fall within the accepted standards.[11]

Although a municipal ordinance may be enacted pursuant to a municipality's regulatory or police power, substantive principles of due process require that the ordinance have a reasonable relation to a proper governmental purpose so as not to constitute an arbitrary exercise of governmental power.'[12]

In **People v. Scott,**[13] the Court of Appeals held that a police power ***regulation*** must bear a reasonable relationship to, some proportion to, the alleged public good advanced by the ***regulation***. Thus, a Village ordinance enacted under the police power must bear a reasonable connection to the public health, comfort, safety and welfare.[14]

Accordingly, in the case against the Village of Tarrytown, the constitutionality of [the Village of Tarrytown's ***local*** law] hinges on whether there is a reasonable nexus between the [Village's] objective and the means employed to implement that objective.[15]

In reviewing the adoption of the October ***moratorium*** the Second Department strongly disagreed with Tarrytown's assertion that the municipality could adopt legislation in response to a mere perception of health risks. Instead, the Second Department required a rational basis for the adoption of any such legislation.

The court rejected the Village's attempt to rely on **Criscuola v. Power Authority of the State of New York,**[16] which the Village argued supported the adoption of legislation which was aimed at addressing the public perception that ***cellular*** emissions are dangerous.

In **Criscuola,** the claimant in an eminent domain proceeding sought compensation in connection with the Power Authority's acquisition of a power line easement over the property. Specifically, the claimant sought an award for the decrease in the market value of his property due to cancerphobia - the public perception that proximity to power lines places one at a high risk for developing cancer.

The Court of Appeals held that proof regarding claimant's allegation of decreased property value should be received by the Court of Claims and that it was not necessary that cancerphobia be rational or supported by scientific evidence in order for the claimant to pursue his claim, since the value of property could be effected by unreasonable public perceptions. However, in this case, the Second Department emphatically held that the:

Criscuola decision has no bearing on the issue of whether a municipality may enact legislation restricting property rights based solely upon the public's unreasonable fear of health risks, an issue which, on the present record, must be resolved in favor of the plaintiff.[17]

Thereafter, in an unrelated litigation brought by ***Cellular*** One against the Town of Eastchester, the Westchester Supreme Court Justice Donald N. Silverman issued a preliminary injunction prohibiting Eastchester from enforcing its ***moratorium*** on the processing of applications for the installation of ***cellular*** antennas.

Scientific Data

The scientific literature regarding the effects of ***cellular*** radiotelephone emissions has concluded that unlike power line transmissions, the existing epidemiological and laboratory data fail to suggest any correlation between permissible levels of radiofrequency emissions and the occurrence of disease.

Recent reports in the news now indicate that despite cancerphobia regarding the effects of electromagnetic fields from power line transmissions on genetic materials, there also is no scientific evidence to support such concerns.

While the nature of the radiotelephone transmissions is distinctly different than emissions from electric power lines, the public apparently has had a difficult time separating these two issues.

The ***moratoria*** adopted by Tarrytown's board of trustees were determined to have been invalid exercises of its jurisdiction, since there is no scientific evidence suggesting any health or safety risk arising in connection with ***cellular*** radiotelephone emissions at the levels proposed for these cell sites. It is also interesting to note that the recently reported cases which have cited **Criscuola** have not resulted in any awards to claimants for diminished market value.[18]

The courts in **Rosenberg** and the **Tarrytown** case have recognized that no ***local*** jurisdiction may exercise control over the provision of ***cellular*** service in a manner which would interfere with the mandate of a public utility to provide such service. Whether by reason of limited ***local*** governmental powers, a lack of a rational governmental purpose or federal preemption, ***local*** municipalities are constrained in their efforts to control ***cellular telephone*** service providers from installing antennas.

Reasonable limitations on screening and aesthetic issues could be sustained, if carefully developed and properly applied. However, while certain areas of a community may be encouraged for the location of cell sites, if the public utility establishes a need for cell sites in other locations, then the prohibition against locating cell sites in such areas would not be sustainable.

1. **Land Mobile Serv.,** 46 F.C.C.2d 752, 756 (1974) (second report and order), **recon.,** 51 F.C.C.2d 945 (1975), **aff'd sub nom., National Ass'n of Regulatory Util. Comm'rs v. FCC,** 525 F.2d 630 (D.C. Cir. 1975), **cert. denied,** 425 U.S. 992 (1976).

2. 47 U.S.C. 151-613 (1988).

3. ***Cellular*** **Communications Sys.,** 86 F.C.C.2d 469, 474-82 (1981), **modified,** 89 F.C.C.2d 58, **petition for review dismissed sub nom., United States v. FCC,** No. 82-1526 (D.C. Cir. March 3, 1983).

4. 47 CFR 22.901.

5. 47 CFR 22.901(b).

6. 82 N.Y.2d 364, 604 N.Y.S.2d 895 (1993) (**Rosenberg**).

7. 43 N.Y.2d 598, 403 N.Y.S.2d 193 (1978) (**Consolidated Edison**).

8. **Rosenberg,** 604 N.Y.S.2d at 898.

9. **Consolidated Edison,** 403 N.Y.S.2d at 199.

10. **Rosenberg,** 604 N.Y.S.2d at 899.

11. ***Cellular*** **Tele. Co. v. Village of Tarrytown,** 624 N.Y.S.2d 170, 176 (2d Dept. 1995).

12. **Russell v. Town of Pittsford,** 94 A.D.2d 410, 464 N.Y.S.2d 906, 909 (4th Dept. 1983) (quoting **First Broadcasting Corp. v. City of) Syracuse,** 78 A.D.2d 490, 495, 435 N.Y.S.2d 194, 197 (4th Dept. 1981).

13. 26 NY2d 286, 309 N.Y.S.2d 919, 925 (1970).

14. **D'Angelo v. Cole,** 490 N.E.2d 819, 67 N.Y.2d 65, 499 N.Y.S.2d 900, 903 (1986). **See also Peconic Avenue Businessmen's Assoc.v. Town) of Brookhaven,** 98 A.D.2d 772, 469 N.Y.S.2d 483, 485 (2d Dept. 1983) (holding that a legislative enactment is arbitrary if there is no reasonable relation between the end sought and the means used to achieve that end); **Impress Promotions, Inc. v. City of Saratoga Springs,** 127 Misc. 2d 1029, 488 N.Y.S.2d 126, 127 (Saratoga Co. 1985) (holding that a police power ***regulation*** may not be unreasonable); **People v. Newton,** 97 Misc. 2d 658, 412 N.Y.S.2d 85, 87 (Nassau Co. 1978) (holding that a ***local*** prohibitory ordinance

was unconstitutional because it was arbitrary and discriminatory, and had no real or substantial relation to public health, safety or welfare).

15. **Russell,** 464 N.Y.S.2d a 909.

16. 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993).

17. **Id.**

18. **James v. Power Authority of State of New York,** 620 N.Y.S.2d 991 (2d Department, December 27, 1994) (Affirming denial of award for consequential damages for negative view,cancerphobia and noise pollution due to failure to establish diminished value in relation to comparable properties which are not adjacent to or near power lines); **DeMarco v. State of New York,** 621 N.Y.S.2d 883 (2d Department, January 9, 1995) (affirming Court of Claims rejection of appraisals of claimants experts which sought to value consequential damages for negative view or visual pollution in condemnation proceeding); and **Cottenaro v. Southtowns Industries, Inc.,** 1995 WL 119038 (4th Department, March 17, 1995) (Court recognized that diminution in property value could result from public fear of exposure to a potential health hazard and would constitute consequential damages in this contract claim against the installer of formaldehyde insulation in plaintiffs' home, except that the Statute of Limitations barred the claim which arose in 1977; Court also dismissed cancerphobia claim due to plaintiffs' failure to present any evidence of actual exposure to a disease causing agent).

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