

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
VERIZON WIRELESS OF THE EAST LP d/b/a
Verizon Wireless and TARPON TOWERS II, LLC,

Plaintiff,

-against-

TOWN OF WAPPINGER, TOWN OF WAPPINGER
PLANNING BOARD, and TOWN OF WAPPINGER
ZONING BOARD OF APPEALS,

Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
EXPEDITED REVIEW PURSUANT
TO 47 U.S.C. § 332(c)(7)(B)(v)**

Docket No.: 7:20-cv-8600

-----X
Plaintiffs Verizon Wireless of the East LP d/b/a Verizon Wireless (“Verizon”) and Tarpon Towers II, LLC (“Tarpon”), as and for their Complaint against Defendants Town of Wappinger (“Wappinger” or the “Town”), Town of Wappinger Planning Board (“Planning Board”), and Town of Wappinger Zoning Board of Appeals (“ZBA” and collectively with other Defendants, the “Town”), allege as follows:

Facts Common to All Claims for Relief
Nature of the Action

1. Plaintiffs bring this action for declaratory and injunctive relief under Section 332 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 and correspondent federal regulations and orders. That federal law generally prevents and preempts state and local governments from action or inaction that prohibits or has the effective of prohibiting the provision of personal wireless services. Among other things, it is unlawful under Section 332 for a municipality to fail to act on or fail to approve applications to install infrastructure to support wireless services within a certain time period or absent a recognized justification. Here, the Town violated that federal law through its continuing and unjustifiable failure to act on Plaintiff’s application to install a wireless communications facility—a 150 foot tall monopole on an

approximately 48 acre horse farm—to address what the Town’s own wireless consultant confirmed is an area of deficient wireless service for residents and visitors in the Town and neighboring Fishkill.

2. The Town’s failure to act, and the Planning Board’s unlawful and pretextual invocation of state law to delay action, occurred more than 270-days after Tarpon’s application was complete and the Planning Board had received and reviewed a full visual report with photos and photo simulations from vantage points it had pre-approved and in some cases selected.

3. The Town’s actions were contrary to not just federal law, but also local and state law, and were based on solely generalized—and unsupported—“Not In My Back Yard” (NIMBY) opposition from a group of small, but vocal, residents.

4. The Town’s decision to succumb to generalized NIMBY opposition rather than act based on its obligations under federal law, or even follow its own local code and New York’s State Environmental Quality Review Act (SEQRA), is not unique in the context of wireless facilities applications and the Telecommunication Act (“TCA”) lawsuits that can follow. Yet, the Town’s actions were particularly unjustifiable here.

5. Tarpon first met with Town representatives in August 2019 for a pre-application meeting after securing a ground lease option with a property owner and Verizon as the “anchor” tower tenant. There, Tarpon and the Town discussed the need for the tower (the “Facility”) and the permits, variances, and authorizations Tarpon would need to apply for. The Town advised Tarpon that rather than submitting a full visual study in its initial application, it was preferable that Tarpon submit an application and include a map with proposed locations for photos to be included in the visual study which it could discuss with the Planning Board prior to preparing and submitting the study required in the Town’s Code.

6. Per the Town's instructions, in October 2019, Tarpon applied to the Planning Board and ZBA for the various permits and variances it needed to install the Facility. Tarpon's submission included a detailed radiofrequency (RF) engineering report from Verizon explaining the need for the new Facility to improve service in the Castle Point area of the Town and the northwest portion of Fishkill. The submission also included a site selection analysis addressing the various locations that Tarpon and Verizon had identified and evaluated and the basis for selecting the final proposed site. The submission contained a full SEQRA environmental assessment form with a visual addendum. And the submission provided a map of proposed photo locations for the visual study with several of the locations provided by Town staff as part of the pre-application meeting and process.

7. Following a Planning Board meeting in November 2019, at which the Planning Board approved (a) the timing and public notice for the balloon float and (b) the photo locations Tarpon should include in its visual analysis report, Tarpon conducted the balloon float and in December submitted the visual study.

8. Through the course of the next several months, Tarpon addressed comments on its submission from the Town Planner, Engineer, and Fire Prevention Bureau. Tarpon obtained authorizations for the Facility from various federal and state agencies, including the Federal Aviation Administration, the New York Department of State Coastal Commission, and the State Historical Preservation Office, which determined that the Facility would have no visual impact on any historic properties. The Town's RF consultant also concluded that Tarpon's proposed tower was the "best solution" to address the agreed upon coverage deficiencies in the Castle Point area of the community.

9. Per the Planning Board's request, Tarpon submitted renderings of various design

options for the Facility, revised site plans addressing comments from the Planning Board and the Town's professionals, and a stormwater management plan. Tarpon also appeared at multiple Planning Board meetings and participated in various work sessions with the Town's professionals and agreed to a tolling agreement whereby it extended the Town's time to act on the application under the FCC's "shot clock" by 45-days.

10. Starting in May 2020, local NIMBY opposition became more vocal. The opposition was based primarily on generalized aesthetic objections, health and safety concerns regarding RF exposure, and conclusory assertions regarding diminution of property values.

11. In supplemental filings in late May and early July 2020, Tarpon responded to the public comments and filings of the opposition by, inter alia, submitting reports regarding the lack of diminution of property values from wireless facility installations and addressing structural safety of towers. Tarpon also submitted revised zoning drawings and provided a storm water report per the Town Engineer's request and agreed to another 45-day extension of the shot clock.

12. Satisfied with Tarpon's application, the SEQRA Full EAF as originally filed and updated and the way in which it and Verizon had addressed the comments of the Town's professionals and the public, the Planning Board passed a unanimous resolution on July 6, 2020 directing the Town Planner to draft a SEQRA negative declaration (i.e. a finding of no significant environmental impact) with the intention that the Planning Board would review and confirm the written negative declaration at a continued public hearing in two weeks.

13. Between the July 6, 2020 and July 20, 2020 public hearings, Tarpon submitted a noise study verifying that the Facility equipment at grade would emit only very low decibel levels of sound and the Town Planner drafted and circulated the negative declaration, which would clear the way for approval of the Facility. No other materials were added to the administrative record.

14. However, at the July 20, 2020 continued hearing the Planning Board did not act on the negative declaration it had unanimously directed the Town Planner to draft two weeks prior. Instead, for the first time, the Planning Board claimed to take issue with the scope and completeness of Tarpon's visual study—the same study the Planning Board scoped, approved, and had been in possession of for seven months.

15. Then, in a comment letter, dated July 24, 2020, the Planning Board asserted that it had determined that the visual study was “defective” and did not accurately reflect the potential visual impact of the Facility. The Planning Board requested that Tarpon submit additional photos depicting how the Facility will look from areas immediately adjacent to the property. Additionally, though the Planning Board received Tarpon's site selection analysis in early October 2019 and had never taken issue with its thoroughness or requested that Tarpon evaluate any additional sites or re-evaluate any previously considered sites, the Planning Board also requested that Tarpon evaluate two new sites and re-evaluate a site it had previously considered.

16. The Planning Board also requested that Tarpon provide a real estate valuation report specific to the unique nature of the neighborhood. The Planning Board did not identify or cite a single local code provision or any other basis in law to support its assertions that Tarpon's submissions were somehow defective, or that additional information could be required.

17. Nevertheless, at significant cost, Tarpon completed additional visual scopes of work, which included photos from over fifty vantage points and 360-degree drone fly footage. Tarpon also engaged a certified real estate appraiser to conduct a site-specific market study.

18. On August 18, 2020, Tarpon submitted (a) the additional visual study, (b) the site-specific market study, (c) an additional real estate appraisal study conducted in the nearby town of East Fishkill finding no diminution of property values following the installation of a wireless

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.