Telecommunications: County's Denial of Tower Permit Based on Disguised RF Concerns Was Impermissible

T-Mobile Northeast LLC v. Loudon County Board of Supervisors, Nos. 12-2396 & 2397 (4th Cir. Apr. 3, 2014).

The Fourth Circuit has upheld a district court's invalidation of Loudon County, Virginia's denial of a permit to erect a cell tower where County Board of Supervisor transcripts revealed that a material reason for the denial was concern about RF exposure, in violation of the Telecommunications Act.

T-Mobile applied to construct two cell towers in Loudon County, Virginia and both applications were denied. The first was to be disguised as a bell tower on a church and the second as a silo on a farm.

T-Mobile challenged the denials, alleging that the silo tower denial was improperly based on purported radio frequency [RF] health effects – an impermissible reason under the Telecommunications Act of 1996 - and the church tower denial prevented the company from filling significant gaps in coverage, a mandated reason for allowing companies to build towers under the Telecommunications Act.

The district court held for T-Mobile on the silo tower and issued an injunction requiring the County to approve the tower, refusing to remand the case because it determined the County would use tangential reasons to deny the tower, while actually relying, impermissibly, on RF health effects. The court affirmed, however, the County's denial of the church tower because it found the decision was supported by substantial evidence. That denial did not prevent T-Mobile from filling coverage gaps, and, unlike the silo tower, was not based on alleged RF health effects.

HELD: The Fourth Circuit affirmed the district court on both holdings.

DISCUSSION: Starting with the silo tower, the County challenged the lower court's holding that it could not deny the permit based on RF health effects. It pointed out that 1) the statements in the record on RF health effects were the perspective of one County Board member and not the Board as a whole and 2) the Board also had permissible, valid reasons for denying the permit. The Circuit Court reviewed the record and agreed that the County Board had also cited aesthetic reasons and the "significant structural presence" of the silo as reasons for denying the permit, but that County Supervisor Miller had suggested the Board specifically included among its reasons the tower's "negative environmental impact." Supervisor Miller had prefaced these statements by noting he was making them "notwithstanding the prohibition . . . [i]n the Telecommunications Act . . ." Moreover, he had commented that local government bodies deny applications on this prohibited basis and merely cite permissible reasons. The Circuit Court also found that discussions of health impacts were "prevalent" among the whole Board, not just with Miller's lead. As a result the Circuit Court agreed with the lower court that remanding the case would contribute to the County's subterfuge because "while the Board would, on remand, omit its concerns over radiation when giving reasons for denial of the application, the radiation concerns would nonetheless persist as part of the decision making process."

T-Mobile challenged the district court's affirmation of the Board's denial of the church tower, contending that 1) the Board's decision was not supported by substantial evidence, 2) the decision prohibited T-Mobile from providing customers with service, and 3) the County had based its decision on environmental effects of RF emissions, as it had with the silo tower. As for the first issue, the Fourth Court noted that the record showed significant opposition from citizens about the proportion of the tower in reference to the surrounding environment, the property devaluation as a result of the tower and the unwanted noise the tower's generator would bring to the area. T-Mobile argued these were illegitimate reasons since the zoning already allowed the church to construct a bell tower with similar visual impacts. The Circuit Court rejected this argument pointing out that the fact that zoning allows for something does not mean citizens would not have legitimate complaints about putting in the allowed item – whether a bell tower or a cell tower. The court held these were legitimate reasons for denying the application.

The Circuit Court noted that when a local government denies a single tower at one site (in contrast to a situation where the local government has a general policy of rejecting facilities), the provider must prove "(1) that there is an "effective absence of coverage" in the area surrounding the proposed facility, and (2) that there is a "lack of reasonable alternative sites to provide coverage" or that "further reasonable efforts to gain approval for alternative facilities would be 'fruitless.'" Here, the second test was fatal to T-Mobile's argument: it failed to show there was a lack of appropriate alternate sites. Moreover, T-Mobile failed to show it would have been fruitless to try and obtain permission for towers in those sites – for example, using collocation (the preferred option under the comprehensive plan) and more numerous, but smaller, towers.

As for RF emission as a basis of this denial, the Court again sided with the County noting that, unlike, the silo tower, RF emission was mentioned in passing, and by the citizens speaking against the church tower, not the elected decision makers. Additionally, the Board's written order for the church tower never referenced RF emissions as an issue at this site, unlike the silo site. As a result, the church tower denial was upheld.

http://www.ca4.uscourts.gov/Opinions/Published/122396.P.pdf (last accessed April 17, 2014).

Zoning: Animal Cages in Home Are "Legally Constructed Accessory Building" For Enforcement Purposes Against Residential Exotic Animal Keeper

Salton v. Town of Mayfield Zoning Board of Appeals, 2014 NY Slip Op 02362 (N.Y. App. Div. Apr. 3, 2014)

A New York Appellate Division Court has upheld enforcement of a home business ordinance against a homeowner who was keeping large exotic animals including tigers and leopards in cages in his home and showing them to the public for a fee.

The plaintiff was allegedly running a business in his home by keeping exotic animals, including three tigers and two leopards, under state and federal licenses that required him to exhibit the