

TOWN OF WARWICK PLANNING BOARD
SPECIAL MEETING
September 3, 2014

Members present: Chairman, Benjamin Astorino
Roger Showalter, Vice-Chairman
Dennis McConnell, Beau Kennedy,
Christine Little, John MacDonald, Alternate
Laura Barca, HDR Engineering
J. Theodore Fink, Greenplan
John Bollenbach, Planning Board Attorney
Connie Sardo, Planning Board Secretary

The special meeting of the Town of Warwick Planning Board was held Wednesday, September 3, 2014 at the Town Hall, 132 Kings Highway, Warwick, New York. Chairman, Benjamin Astorino called the meeting to order at 7:30 p.m. with the Pledge of Allegiance.

Special Meeting:

NOTICE

A Special Meeting of the Town of Warwick Planning Board will be held September 3, 2014, at 7:30 pm at the Town Hall, 132 Kings Highway, Warwick, NY to discuss correspondence in regards to SEQR procedures, the Pine Island Board of Fire Commissioner's review of a proposed AT&T Telecommunications Tower, and any other business that may come before the Planning Board.

Mr. Astorino: I just want to reiterate to the public that is here. This is not a public hearing. This is a public meeting to discuss Planning Board issues of SEQR concerns due to the Pine Island Fire Department cell tower issue. With that being said, if you need to have a conversation, please take it outside so it doesn't disrupt our minutes. Thank you. As to the Board as we all know, the Pine Island Fire Department circulated for Lead Agency in October of 2013. On November 20, 2013, a letter was sent by our Planning Board to the Fire Department. Mr. McConnell will read the November 20, 2013 letter. Before we do that, let me introduce our professionals. We have Ted Fink from Greeplan, Inc., he is our SEQR Professional, Laura Barca from HDR, and she's our Planning Board Engineer, and John Bollenbach, Planning Board Attorney. Dennis will now read the November 20, 2013 letter that was sent from our Board to the Pine Island Fire Department. The letter is stated as follows:

Wednesday, November 20, 2013

Kenneth Gurda, Chairman
Pine Island Board of Fire Commissioners
PO Box 306, 675 County Highway 1
Pine Island, New York 10969

Re.: *Coordinated SEQR Review of Proposed AT&T Telecommunications Facility*

Dear Chairman Gurda and Fire Commissioners:

The Planning Board is in receipt of a letter and attachments from your counsel, Frank T. Simeone dated October 22, 2013, requesting that the Planning Board consent to the Board of Fire Commissioners acting as the State Environmental Quality Review Act (SEQR) Lead Agency for the review of a proposed 150 foot tall Wireless Telecommunications Facility at the Fire District's headquarters. The Planning Board does not intend to contest Lead Agency status, at this time, but we will need additional information from the Board before acquiescing Lead Agency status on this proposed facility.

The Planning Board notes that there have been no applications filed with the Town of Warwick for Site Plan or Special Use Permit approval on this proposed Wireless Telecommunications Facility. The site of the proposed Tower at 675 County Highway 1 is within the Town of Warwick's Local Hamlet Business (LB) Zoning District. In the LB District, Wireless Telecommunications Facilities are "prohibited unless the provider can demonstrate that adequate coverage cannot be provided by locating such facilities in zoning districts where the use is specially permitted" (see § 164-40M of the Town of Warwick Zoning Law). The Town of Warwick Planning Board has been authorized by the Town Board of the Town of Warwick with the review and approval of Site Plan and Special Use Permit approval for Wireless Telecommunications Facilities. However, the Full Environmental Assessment Form that was provided to the Planning Board does not identify the need for approval from the Town of Warwick Planning Board.

We have been advised by the New York State Association of Towns that fire districts do not have absolute immunity from local zoning and there is no express authority exempting fire districts from zoning. The information that we will need to consent to Lead Agency status is an analysis of the nine "Monroe" factors established by the New York State Court of Appeals, to determine if local zoning provisions should apply to the proposed facility. To assist you in documenting the Monroe factors, we have provided as an attachment to this letter a guidance document from the New York Department of State's Division of Local Government Services. Our understanding is that a public hearing should be held to elicit public input on the nine factors.

Once the Pine Island Fire District conducts its nine part Monroe test and provides documentation to the Planning Board, then the Planning Board will consider whether it will consent to the Pine Island Board of Fire Commissioners acting as Lead Agency under SEQR.

Finally, we note that the Environmental Assessment Form (EAF) provided as an attachment to your counsel's October 22, 2013 letter, was undated and unsigned by any party. The EAF document must be certified by a Fire District official. We also note that the State Regulations governing SEQR procedures, found in 6 NYCRR 617, require that a new EAF form be used for any SEQR reviews commencing on or after October 7, 2013. The EAF forwarded to the Planning Board was the outdated form.

For the Town of Warwick Planning Board,

Benjamin Astorino

On a motion by Ms. Little, seconded by Mr. Kennedy, and a vote of 5 for, and 0 against, and 0 absent, the Planning Board authorized this letter on November 20, 2013.

cc: Frank T. Simeone, Fire Commissioners Counsel
Michael Sweeton, Town Supervisor
John D. Bollenbach, Esq.

Attachments: DOS Legal Memo: Governmental Immunity from Zoning

DOS LEGAL MEMO Governmental Immunity from Zoning

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

Governmental Immunity from Zoning

Governments often undertake development activities within their own or other communities. For example, a municipality may be undertaking the construction of a new town garage, park, or community building. Likewise, local governments may find their community to be the site of a development action by another nearby municipality or another level of government, such as the county or the state. When this happens, questions are often asked about how zoning regulations affect these development activities. This paper is a guide for local government officials faced with these questions.

Certain acts of government may be exempt, or "immune," from zoning. Historically, New York courts have recognized that certain entities are entitled to absolute immunity from zoning regulations, including the federal government; state government; state urban development corporations; and public schools. These entities are not required to comply with local land use regulations. Other governmental entities, such as towns, villages, cities, counties and fire districts, are accorded only a limited immunity, and may be subject to local land use regulations. In making a determination as to whether the actions of governmental units with limited immunity are "exempt" from local zoning regulations, the New York Court of Appeals in the 1988 case of Matter of County of Monroe v City of Rochester 72 N.Y.2d 338, 533 N.Y.S.2d 702, established anew method for resolving inter-governmental land use disputes using the "balancing of public interests" analytic approach. Unless a statute exempts it, the encroaching governmental unit is presumed to be subject to the zoning regulations of the host community where the land is located. Working from that premise, a host community then considers several factors to determine whether

or not it is in the public interest to continue to subject the encroaching government to its land use regulations. The host community is to weigh the following nine factors:

1. the nature and scope of the instrumentality seeking immunity;
2. the encroaching government's legislative grant of authority;
3. the kind of function or land use involved;
4. the effect local land use regulation would have upon the enterprise concerned;
5. alternative locations for the facility in less restrictive zoning areas;
6. the impact upon legitimate local interests;
7. alternative methods of providing the proposed improvement;
8. the extent of the public interest to be served by the improvements; and
9. intergovernmental participation in the project development process and an opportunity to be heard.

A subsequent case indicated that a public hearing should be held to elicit public input on the nine factors. Neither the New York Court of Appeals nor the New York State statutes specify which board in the host municipality makes the determination of governmental immunity. This raises two questions – when in the development approval process is this determination made, and who makes it? The following are some alternative scenarios which may lead to a determination of governmental immunity.

A Municipality Developing Within its Own Jurisdiction

When a local government proposes to establish a facility or undertake an activity within its own geographic boundaries, the courts have held that it is subject to the County of Monroe “balancing of interests” test. In other words, the local government is presumed to be subject to its own regulations. Which board conducts the balancing analysis to determine whether this is in the public interest has been a matter of speculation. Some suggestions:

A municipal governing board may choose to bind some or all actions of its own municipality to the requirements of its zoning regulations by specifying so within the zoning law or ordinance. Where a municipality has done so, a zoning permit should be applied for. A referral to the planning board or zoning board for a special use permit or site plan review may be necessary as well. Any immunity challenge that the municipality wishes to make may be brought before the zoning board of appeals.

Where a local government has not bound itself to the requirements of its zoning regulations, the municipal governing board must protect the public interest by examining the nine factors as applied to the current project. It must determine

whether it is immune from the requirements of the zoning regulations, and whether a zoning permit is necessary. Even where a municipal governing board has declared an action immune from zoning, it may still wish to comply with the requirements of zoning, where practicable, and with public notice and hearing requirements.

A Municipality Developing Within Another Jurisdiction

In the absence of a statute to the contrary, where a municipality or other governmental unit proposes a project in another community, the two governments should assume that the action is subject to the host community's zoning requirements. The host community should apply the nine factors set forth in the *County of Monroe* case to determine the extent to which the host community's regulations will actually apply. Any disagreement between the parties should be resolved by the appeals process of the host community.

Where a municipality or other governmental unit undertakes development activities associated with a project without applying for a zoning permit, the host community will need to make a determination as to whether to initiate enforcement action against the developing municipality or governmental unit. Any disagreement between the parties should be resolved by the appeals process of the host community.

Unresolved Questions

Although the *County of Monroe* case was decided over ten years ago, several questions regarding the application of the test remain unanswered. First, the case dealt with site plan regulations which were adopted as part of the local zoning law. Whether the decision of the court would apply to the application of site plan regulations adopted independently of zoning, or for that matter to compliance with subdivision review or other land use regulations is has not been resolved.

Second, it is not clear which board in the host municipality weighs the nine factors and determines whether the governmental unit undertaking the development activity is immune from local land use regulations or not. Also ambiguous is when in the development process that decision is made.

Finally, where a governmental unit is absolutely immune from zoning or other land use regulations, it is unclear what deference that unit of government should give to the host government's regulations. The courts have not answered the question, "Should the immune governmental unit nevertheless try to comply with the host municipality's regulations?"

If you would like more information relating to local government powers and responsibilities, please contact the Department of State's Division of Local Government at (518)473-3355.

August 1999
Tug Hill Commission
Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3782
<http://tughill.org>

NYS Department of State
41 State Street
Albany, New York 12231
(518)473-3355
(800)367-8488
www.dos.state.ny.us

Mr. Astorino: Thank you, Dennis. With that being said, I will now ask Mr. Ted Fink to explain the SEQR process of this matter that has lead us up to this meeting.

Mr. Fink: One of the reasons that the Planning Board developed that letter was because of the Fire Commissioner's letter we received from them, dated October 22, 2013. It was addressed specifically to the Town of Warwick Planning Board as well as a number of other agencies. The agencies were not specifically identified in that letter as to whether or not as an Involved or Interested Agency. There is a big difference under SEQR. It is whether an Interested or an Involved Agency had received this letter. Interested Agencies have the same rights as any citizen would have in any sort of a SEQR proceeding. Whereas an Involved Agency is an agency for which a permit or some sort of an approval is required. It didn't say if the Town of Warwick Planning Board was an Interested or an Involved Agency. It just simply said that we are sending this letter out to all these different agencies, some are interested and some are involved. They didn't make any sort of an attempt to identify which were involved or which were interested. We received this letter. The letter says that they want to be Lead Agency. The Planning Board under jurisdiction granted to by the Town Board administers the Zoning Laws in the Town. Wire Telecommunication Facilities requires a Special Use Permit. Laura looked at it and said, "how come they didn't come to the Planning Board for an approval"? It gets a little murky here because of this Governmental immunity that is in existence with various agencies in NYS. To try and sort out as to whether or not a Government Agency is subject to a Local Zoning Regulation, those 9 Factors established in this Court of Appeals decision back in the 1980's are what are used in order to determine that. The advice that comes from the New York State Department of State says pretty clearly that unless a statute exempts the encroaching Governmental unit, and in this case it would be the Fire Commissioners, it is presumed to be subject to the Zoning Regulations of the host community as to where it is located. That is an important point that the Department of State raises. Unless a statute exempts it, the encroaching Governmental use unit is presumed to be subject to Zoning Regulations of a host community

where the land is located. In this case, in the LB zone they need to provide further information for the Board to say whether or not they qualify for the Governmental immunity for Zoning or not. We waited 10 months for them to provide the answers to these 9 Factors. We did not receive that. Then last week we found out that the Board of Commissioners went ahead and declared themselves Lead Agency before we got to make any sort of a determination as to whether or not we would contest Lead Agency. That is where we are at today. We have a situation where they didn't provide any of answers that we had asked them to provide to the Planning Board. In this case there are provisions within NYS Environmental Quality Review Act that allows for any agency that is either an involved or potentially involved agency to contest Lead Agency in a formal way. The way that it occurs, there is a formal application that is made to the Commissioner of the NYSDEC. There are 3 criteria that are used by the Commissioner in order to determine which agency is better suited to conduct the SEQR Review process. This Board has contested Lead Agency in other situations. This Board actually in the early 1990's contested Lead Agency on a project that required a permit from the NYSDEC and the Town of Warwick Planning Board. We actually contested to the DEC because they wanted to be Lead Agency on that project. The Planning Board had said no because we think we would be better capable of being Lead Agency. We actually won it. The Commissioner of Environmental Conservation awarded Lead Agency to the Town of Warwick Planning Board. With that sort of history in place, it is important to follow the procedures properly. We are locked in a situation where the Board is nearly left with a project within the Town that may or may not be subject to Zoning. We just don't know the answers to that yet. That is why we are here tonight. That is why we have another letter going to the Fire Commissioners to try and get clarification from them.

Mr. Astorino: Leading to that, that is why we have a Draft Resolution. All of the Board Members and Professionals have that.

Mr. McConnell: Mr. Chairman, could I make a point from my point of reference?

Mr. Astorino: Yes.

Mr. McConnell: If we had not responded at all back when we did it saying hold on we are not contesting at this point, but we would like more information. If we had not responded at all, at some period of time they could then presume that we have no argument with them being Lead Agency, but we do. We are not ready to give that up yet, but please provide us with the information. Is that correct?

Mr. Fink: Right. The key period of time is within 30 days. We acted within 30 days.

Mr. McConnell: Ok.

Mr. Fink: If we had gone outside the 30 days, we would have lost it.

Mr. McConnell: Ok.

Mr. Astorino: Ok. Do any Board Members or Professionals have any questions? We do have a Draft Letter/Resolution. We need to make a motion.

Mr. Bollenbach: It pretty much summarizes what we had already discussed.

Mr. Astorino: Exactly. Let's go through it.

Mr. McConnell makes a motion to send Letter/Resolution addressed to the Pine Island Fire District regarding Coordinated SEQR review of the proposed AT&T Telecommunications Facility.

Seconded by Ms. Little. The following Resolution was carried 5-Ayes.

September 3, 2014

Kenneth Gurda, Chairman
Pine Island Board of Fire Commissioners
PO Box 306, 675 County Highway 1
Pine Island, New York 10969

Re.: *Coordinated SEQR Review of*

Proposed AT&T Telecommunications Facility

Dear Chairman Gurda and Fire Commissioners:

The Planning Board has learned that the Pine Island Board of Fire Commissioners voted on August 21, 2014 to declare itself Lead Agency for conducting the State Environmental Quality Review Act (SEQR) review process for a proposed 150 foot tall Wireless Telecommunications Facility at the Fire District's headquarters. The Planning Board, in the attached lead agency coordinated review letter of response to the Fire Commissioners dated November 20, 2013, clearly requested additional information from the Fire Commissioners before acquiescing lead agency status on the proposed facility.

As stated in our previous letter to you, the Planning Board is authorized by the Town Board of the Town of Warwick to review Wireless Telecommunications Facilities throughout the Town. This authority is pursuant to the authority of New York State Town Law § 271 and Local Law No. 4 of 1994. In the Local Hamlet Business (LB) Zoning District where the Tower has been proposed, Wireless Telecommunications Facilities are "prohibited unless the provider can demonstrate that adequate coverage cannot be provided by locating such facilities in zoning districts where the use is specially permitted." In addition, the proposed Tower exceeds the maximum height that is permitted by the Town Zoning Law.

To date, the Planning Board's request for additional information has not been answered. Failure to answer the Planning Board's questions, contained in our letter of November 20, 2013, by the close of business on September 10, 2014 may result in the Planning Board contesting lead agency status. Please forward copies of revised plans to the Planning Board at this time so we are kept abreast of any changes that may have been proposed by AT&T.

Once lead agency status has been contested, then the decision as to which agency acts as lead agency will be made by the Commissioner of the New York State Department of Environmental Conservation (DEC). If the DEC Commissioner designates the Planning Board to act as lead agency, then the Planning Board is ready to assume lead agency status for the proposed Tower. The Planning Board has broad governmental powers for investigating the impacts of cell towers in the Town. Scores of site plan, special use permit, and subdivision applications are reviewed by the Warwick Planning Board under SEQR each year and we have reviewed and approved approximately ten Wireless Telecommunications Facility applications in the past 20 years. Since the proposed Tower appears to be inconsistent with the Town Zoning Law, the impacts of the Tower can be expected to be of townwide significance.

The Planning Board's further actions will be contingent upon a legally sufficient reply from the Board of Fire Commissioners.

For the Town of Warwick Planning Board,

Benjamin Astorino, Town of Warwick Planning Board Chairman

On a motion by Dennis McConnell , seconded by Christine Little , and a vote of 5 for, and 0 against, and 0 absent, the Planning Board authorized its Chairman to sign and then forward this letter to the Pine Island Board of Fire Commissioners on September 3, 2014.

cc: Frank T. Simeone, Fire Commissioners Counsel
Michael Sweeton, Town Supervisor
John D. Bollenbach, Esq.

Enclosure: Warwick Planning Board to Pine Island Board of Fire Commissioners letter of November 20, 2013

Mr. Bollenbach: Mr. Chairman, I suggest that we reserve a spot on our September 10, 2014 Work Session in the large meeting room for the Planning Board to discuss the status of the Pine Island Fire District responses.

Mr. Astorino: Connie, will you take care of that?

Connie Sardo: Yes. I will.

Correspondences:

1. Letters from Rachel Tetreault addressed to the Planning Board, dated 8/25/14 and 8/29/14 regarding the Pine Island Fire proposed cell tower.

Mr. Astorino: We received numerous correspondences. I will list them for the record. They have not all been put out to the Board yet. I am not going to read them at this point. These letters will be distributed to all of the Planning Board members. The correspondences are as follows:

1. Letter from Rachel Tetreault, dated 8/25/14.
2. Letter from Rachel Tetreault, dated 8/29/14.
3. Letter from Chris Meile, dated 9/3/14.
4. Letter from Allen Wierzbicki, Deputy Commissioner from OC Dep't of Emergency Services, dated 8/29/14.
5. Letter from Dara Breitkopf, dated 8/29/14.
6. Letter from Deb & Ed Carmody, dated 8/29/14.
7. Letter from Jenna Field, dated 8/29/14.
8. Letter from Kenneth C. Martin & Sheila Odonnell-Martin, dated 9/2/14.
9. Letter from Jeanette Shanahan, dated 9/2/14.

Mr. Astorino: Do any Board Members or Professionals have anything further?

Mr. McConnell: No.

Mr. Kennedy: No.

Mr. Showalter: No.

Mr. Bollenbach: No.

Mr. McConnell makes a motion to adjourn the Special Meeting of September 3, 2014.

Seconded by Ms. Little. Motion carried; 5-Ayes.