CITIZEN OPPOSITION TO CELL TOWER LEASE IN CITY PARK

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As illustrated by the case described herein, diversion of limited public park resources to other beneficial public uses and infrastructure projects can give rise to litigation prompted by local citizens who oppose loss of their parkland. In the case of *Vertical Bridge Development, LLC v. Brawley City Council*, 2023 U.S. Dist. LEXIS 91363 (3/24/2023), Plaintiff Vertical Bridge challenged the Defendant City of Brawley decision to deny permission to construct a telecommunications cell tower in a city-owned park.

FACTS OF THE CASE

Vertical Bridge constructs, operates, and manages telecommunication infrastructure across the United States. A wireless communications provider commissioned Vertical Bridge to construct a cell tower in the City of Brawley, California ("City"). In August 2020, a Site Acquisition Specialist for Vertical Bridge contacted Brawley City Manager and Brawley Development Services Director to propose three city-owned parks as possible site locations for Vertical Bridge's cell tower. Over the next several months, they discussed the site proposals and negotiated a lease agreement.

On March 16, 2021, the Brawley City Council ("City Council") authorized the City to enter into a lease agreement with Vertical Bridge concerning Wiest Field Park. On April 1, 2021, the City executed an "Option and Lease Agreement" (hereinafter, "Agreement") providing Vertical Bridge the exclusive option to lease approximately 1,296 square feet (36' x 36') of Wiest Field Park for placement of Vertical Bridge's communications facilities.

Wiest Field Park is a city-owned recreational park and sports complex. Vertical Bridge's proposed communications facilities would be adjacent to the park's existing baseball field and batting cages and comprise a 110-foot monopole tower with antennas on top inside an 8-foot high, 36' x 36' chain link equipment enclosure.

The Agreement contained a provision authorizing Vertical Bridge the right to enter the park to apply for "Government Approvals," including any license or permit necessary for Vertical Bridge's use of the leased space. The provision also authorized Vertical Bridge to apply for such approvals on behalf of the City, and the City agreed "to reasonably cooperate with such applications." Based on its communications with City staff, Vertical Bridge understood the project would undergo an administrative approval process.

In the summer of 2021, Brawley residents began to express opposition to the proposed cell tower project and demanded the City hold a public hearing on Vertical Bridge's conditional use permit (CUP) application. Rather than go through the administrative approval process, the City directed Vertical Bridge to submit a CUP application to the Planning Commission.

On August 11, 2021, the Planning Commission held a public hearing on Vertical Bridge's CUP application. Vertical Bridge presented its application, and community members presented their comments and evidence. The Planning Commission denied the CUP application.

Vertical Bridge appealed the Planning Commission's denial to the City Council, and the City Council held a hearing on the appeal on October 5, 2021. After hearing comments and considering evidence presented by Vertical Bridge and community members, the City Council voted 5-0 to deny the CUP application.

Within the next day, the City Council issued a written denial of the application, including the following findings:

> (1) there is a lack of evidence showing a gap in service making a tower necessary in the area; (2) a nearby armory would be a suitable alternative site that would eliminate the impact on the baseball activities at the park; (3) arguments concerning potential radio frequency dangers were not considered; (4) the proposed tower would be approximately twice as tall as existing light standards and would have a significant negative visual impact, and (5) the proposal is not compatible with the existing use of the park as it will significantly reduce the available practice space for baseball and football activities.

On December 31, 2021, Plaintiff filed a Complaint in federal district court alleging a lack of substantial evidence for a denial under the federal TCA (Telecommunications Act) and discrimination between providers of equivalent services in violation of the TCA.

TCA SUBSTANTIAL EVIDENCE?

As cited by the court, the TCA required "any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Moreover, the court noted any party plaintiff “seeking to overturn the local government's decision” under the TCA had “the burden of showing the decision was not supported by substantial evidence":

> Substantial evidence implies less than a preponderance, but more than a scintilla of evidence. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In conducting its TCA review, the federal district court further acknowledged the role of the federal judiciary was “deferential, such that courts may neither engage in their own fact-finding nor supplant the Town Board's reasonable determinations." In so doing, the court recognized it was required to “take applicable state and local regulations as they find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations.”

Accordingly, the court would only find the City's decision invalid if the City failed to comply with applicable state and local regulations without necessarily considering applicable TCA federal standards.

LEASE AGREEMENT

Plaintiff had argued "the City cannot reconsider its decision as a landlord to lease a portion of Wiest Field Park for the cell tower by denying the CUP application for the project as a zoning authority." The federal district court, however, noted "nothing in the Agreement states that the City's decision to lease the park waives or displaces otherwise applicable municipal procedures for approving or denying a request to construct a cell tower thereon." On the contrary, the court found "the Agreement indicates that Vertical Bridge would need to obtain government approvals, including a use permit, and could apply for such on behalf of the City, and the City agreed to reasonably cooperate with such applications."

LOCAL REGULATION AUTHORIZATION

The issue before the federal district court was, therefore, whether "the City Council's decision to deny Vertical Bridge's CUP application was authorized by applicable local regulations." As cited by the court, the applicable local regulations were "the relevant statutes are set forth in the Brawley Code of Ordinances ("Code") at Chapter 8C Communications Facilities and Chapter 27, Brawling Zoning Ordinance." In pertinent part, the federal district court cited Section 8C.5.2 of the Code which provided the following:

> all wireless communication facilities require a conditional use permit (CUP). To obtain a conditional use permit, a hearing is required before either the planning director or the planning commission.

Citing Section 27.274 of the Code, "Basis for Approval or Denial of a Conditional Use Permit," the court further noted the planning director or planning commission could approve a CUP application if the permit satisfied the following conditions:

> [The permit] will not jeopardize, adversely affect, endanger, or otherwise constitute a menace to the public health, safety, or general welfare, or be materially detrimental to the property of other persons located in the vicinity of such use.

In making this determination, the court found the planning director or planning commission was required to consider the "nature, condition and development of adjacent uses, buildings and structures." Accordingly, the Code would prohibit approval of a CUP where the proposed use "will adversely affect or be materially detrimental to said uses, buildings or structures." Code § 27.274.1.b.

Prior to the approval of a CUP for a proposed communication facility, Sections 8C.6.1.b.iii and 8C.2.b.iii of the Code mandated the planning director or planning commission to make a finding

that "the facility blends in with its existing environment and will not have significant adverse visual impacts."

CITY ZONING COMPLICANCE

The federal district court acknowledged “the City gave Vertical Bridge the exclusive option to lease the park for its proposed project.” That being said, the court, however, noted “the City did not by that same agreement agree to forego the City’s zoning regulations.” Further, the court found the record in this case indicated “Vertical Bridge's CUP application was originally intended to undergo administrative review by the Planning Director.” Before Vertical Bridge submitted its application, the court noted Brawley residents had “began to voice their opposition to the proposed tower site and demanded a public hearing.”

As characterized by the court, the record indicated “the City complied with its zoning regulations requiring a public hearing on the CUP application and providing for an appeal to the City Council”:

> Upon consideration of Vertical Bridge's and community members' presentation of comments and evidence, the City Council denied the CUP application and made necessary findings under the regulations - namely, that the proposed use "would have a negative visual impact" and "not compatible with existing use of the park."

In the opinion of the court, these findings were grounded in “Section 27.274.1.b's mandate to consider whether the use will adversely affect or be materially detrimental to adjacent uses" and “Section 8C.2.b.iii's mandate that the cell tower will not have significant adverse visual impacts."

Having found the CUP application “grounded in applicable local regulations,” the next issue before the federal district court was “whether there was a reasonable amount of evidence for its denial of the CUP.”

LEGITIMATE LOCAL CONCERNS

As described by the federal district court, the Code required consideration of “the project's impact on aesthetics and adjacent uses.” Further, the court found such considerations have been held to be "legitimate concerns for a locality." In the opinion of the federal district court, “A review of the administrative record reveals there was substantial evidence to support the City Council's decision”:

> First, the record contains evidence for the City's finding that 110-foot cell tower and 36-feet-by-36-feet chain link enclosure would be approximately twice as tall as existing ballpark lights and would have a negative visual impact on Wiest Field Park.

Further, “in concluding that the project would have a negative visual impact on the park,” the federal district court found the City Council considered and relied on community members' objections to the tower and its equipment enclosure”:

> Residents voiced concerns that the tower would become a prominent industrial feature in the park and take away from its relaxing and recreational character. Indeed, photographs of the proposed site depict that the tower and its enclosure would encroach on a grassy area near an existing baseball field and batting cages.

Moreover, the court noted “residents expressed how the project would be a visual eyesore standing almost twice as tall as the light posts nearby." In particular, the court found residents had described the project as "inconsistent with the character of the recreational complex" and a "hideous structure in one of the nicer areas of our town."

In the opinion of the court, the record indicated “the residents' aesthetic objections” were “specific to the tower being placed in a recreational park and sports complex frequented by families and their kids, not simply an objection to the aesthetics of cell towers generally.”

The federal district court held the Town Board was “entitled to make an aesthetic judgment as long as the judgment is grounded in the specifics of the case” and the Town’s judgment “did not evince merely an aesthetic opposition to cell-phone towers in general." In this particular instance, the court found the Town Board could reasonably find this cell tower project “should be in an industrial or a commercial area, not on a kid's park." Moreover, the court noted Code Section 27.274 contained “a broad mandate for the City to consider the public's general welfare.” According to the court, "the concept of the public welfare is broad and inclusive."

In determining whether “the tower would be consistent with the public's general welfare,” the federal district court further held “the City Council was within its authority under Code Section 27.274 to “weigh the benefit of merely improving the existing coverage against the negative aesthetic impact the tower would cause.” In this particular instance, the court also found the City Council had noted “a lack of data supplied by the proposed carrier to demonstrate that there is an actual gap in service making a tower in this area necessary."

Having found "more than a scintilla of evidence" of “the kind a reasonable mind might accept as adequate to support a conclusion,” the federal district court concluded “Defendants' denial of the CUP application under Code Section 8C.2.b.iii” had “adequate support in the record.”

Further, in the opinion of the court, “the City Council's finding that the proposed use is not compatible with the existing use of the park" was also supported by sufficient evidence”:

> The City Council heard and received letters from residents informing them of how the proposed cell tower and enclosure would affect the park's adjacent uses - to wit, the nearby sports facilities, including the baseball field and batting cages.

ADJACENT USES

Plaintiff had also argued the evidence before the City Council did not meet the Code's definition of "adjacent." The federal district court disagreed. As cited by the court, the Code's definition of "adjacent" included "two or more objects that lie near or close to each other." Code Section 27.31.

In this case, the court noted: “Photographs of the proposed site show that the cell tower would lie near or close to the sports complex's baseball field, batting cages, pitching mound, and bleachers” which would “qualify as adjacent uses under the Code Section 27.31.”

Accordingly, the court found the record contained “ample support that the 110-foot cell tower and its equipment enclosure would be contrary to the public's general welfare and materially detrimental to adjacent uses because it would significantly reduce the available practice space for baseball and football activities.” As described by the court, one of the youth sport coaches had explained the following to the City Council:

> (1) there are very limited spaces in Brawley for youth baseball and football activities; (2) the tower would take away space players use to warm-up and practice; and (3) would eliminate an area where younger kids play while their older siblings are practicing or playing games.

Based upon this evidence, the federal district court concluded “the Defendants' denial of the CUP application under Code § 27.274.1.b finds adequate support in the record.” In so doing, the court noted Code Section 27.274.1.b required “a finding that the proposed use will not adversely affect or be materially detrimental to the adjacent uses."

PRETEXT FOR APPLICATION DENIAL?

Plaintiff had also argued: "Defendants' reasons for denial are pretext for their capitulation to the NIMBY [“Not in My Back Yard”] ire of citizens. According to Plaintiff, pretext was “most evident from the fact that the City cooperated with Vertical Bridge to choose the location for the Proposed Tower and approved the Lease Agreement." The federal district court rejected this argument.

In the opinion of the court, “the City's business decision to give Vertical Bridge an option to lease a portion of Wiest Field Park” was “separate and distinct from the zoning and land use decision it made, in its capacity as a regulator.” Accordingly, the court held: “Nothing in the Agreement bypassed necessary zoning procedures or prevented the Planning Commission or City Council from exercising their zoning adjudication role.”

In the opinion of the federal district court, “Defendants' decision was authorized by and grounded in the Code, consistent with the Code, and the residents' opposition were specific to the cell tower's placement at Wiest Field Park”:

> Because Defendants' decision was authorized by applicable local regulations and supported by a reasonable amount of evidence, the Court finds the substantial evidence standard met, and thus upholds Defendants' decision to deny Vertical Bridge's CUP application.

Accordingly, the federal district court granted “Defendants' motion for summary judgment on the substantial evidence claim.”

UNREASONABLE DISCRIMINATION?

Vertical Bridge had also claimed “Defendants violated the TCA because they unreasonably discriminated between Vertical Bridge and other tower developers in the City.” As cited by the federal district court, the TCA provided, in pertinent part, as follows:

> the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I),

As characterized by the court, this provision "explicitly contemplates that some discrimination among providers of functionally equivalent services is allowed”:

> Any discrimination need only be reasonable. To establish unreasonable discrimination, a provider "must show that they have been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement or cumulative impact as the facilities in question."

To support of the claim of unreasonable discrimination, Plaintiff had argued “Defendants have approved towers at much taller heights in locations that do not have adequate screening for the tower, and close to residential areas.” In particular, Plaintiff had referenced another "180-foot tower immediately adjacent to residential properties" that the City had previously approved as proof of discrimination. The federal district court rejected this argument.

In the opinion of the court, Plaintiff had not satisfied “the standard required to show discrimination under the TCA.” Specifically, the court found Plaintiff had not presented evidence to establish the following requirement:

> [Plaintiff’s] identified towers are "similarly situated" to the cell tower in question in terms of its "structure, placement or cumulative impact" on Wiest Field Park - a recreational park and sports complex daily frequented by the community's youth for sports activities on a nearly year-round basis.

The court acknowledged Plaintiff had presented evidence of an arguably “similarly situated” cell tower which stood “far above the height of the adjacent residential structures and is immediately adjacent to a park used as a playground." The federal district court, however, noted the placement of Plaintiff's supposedly “similarly situated” tower was “located across the street from and does not take up any space in the park playground.” Since this cell tower did not “encroach on or reduce park space available for the community's use,” the federal district court did “not find it similarly situated in terms of structure or cumulative impact to the tower in question.”

Citing precedent case law from the United States Court of Appeals for the Ninth Circuit, the federal district court acknowledged, "it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact."

Moreover, unlike the proposed cell tower denied here, the federal district noted "none of the existing cell towers Vertical Bridge identified were located on public property, in public parks or recreational facilities, or in a sports complex used daily by the City's youth." On the contrary, the court found each of Plaintiff's identified towers were located on either commercial or industrial properties.

Accordingly, the federal district court concluded Plaintiff had "not shown that the other cell towers on which it relies are 'similarly situated' for purposes of a TCA discrimination claim." The court, therefore, granted Defendants' motion for summary judgment on TCA discrimination claim.

CONCLUSION

Having found substantial evidence and a lack of discrimination in denying Plaintiff Vertical Bridge's conditional use permit, the federal district court granted summary judgment to the Defendant City of Brawley, effectively dismissing the alleged violation of the Telecommunications Act without trial proceedings.

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SEE ALSO:

PARK PURPOSE CHALLENGE TO WIRELESS COMMUNICATION FACILITY
https://www.nrpa.org/parks-recreation-magazine/2018/june/park-purpose-challenge-to-wireless-communications-facility/

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