19-P-1164 Appeals Court

CELLCO PARTNERSHIP[1] vs. CITY OF PEABODY & another.[2]

No. 19-P-1164.

Suffolk. April 6, 2020. - September 24, 2020.

Present: Wolohojian, Maldonado, & Ditkoff, JJ.

Land Court. Telecommunications Act. Telecommunications, Personal wireless service facility. Zoning, Telecommunications facility, Special permit, Issuance of permit, Public utilities. Public Utilities, Telecommunications.

Civil action commenced in the Land Court Department on September 23, 2014.

The case was heard by Jennifer S.D. Roberts, J., on a motion for summary judgment.

The case was submitted on briefs.
Scott H. Harris & Andrew R. Hamilton for the plaintiff.
Dana Alan Curhan for the defendants.

[1] Doing business as Verizon Wireless.

[2] City council of Peabody.

DITKOFF, J. Cellco Partnership, doing business as Verizon Wireless (Verizon), sought a special permit from the city council of Peabody (city council) to construct a facility at 161 Lynn Street to provide personal wireless service to its customers. The proposed facility would have filled gaps in Verizon's coverage network. The city council denied Verizon's special permit application, and, on Verizon's appeal, a judge of the Land Court granted summary judgment to Verizon and ordered the city council to grant the permit. Concluding that Verizon met its high burden of showing, as a matter of law, that the proposed facility is the only feasible option for filling the gaps in the coverage network and thus the denial of Verizon's special permit application constituted an effective prohibition on personal wireless services in violation of the Federal Telecommunications Act (TCA), we affirm.

1. Background. a. The TCA. To provide context for our discussion of the undisputed facts, we first provide a brief background on the TCA. Congress enacted the TCA to make "substantial changes to Federal regulation of telecommunications in recognition of, and to facilitate the spread of, new technologies nationwide." Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 479 (1999). "The new emphasis on competition is reflected in the many provisions of the TCA that seek to accelerate private sector deployment of new

telecommunications technologies," including personal wireless services. Id. For example, because there is often "local resistance" to having necessary equipment placed within a community, the TCA includes provisions that "impose[] procedural and substantive obligations on local zoning authorities." Id. at 480.

The TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Accordingly, the TCA preempts to some extent State and local authority with respect to zoning and land use issues pertaining to personal wireless service facilities. See Roberts, 429 Mass. at 482.

b. Proposed facility. Verizon is a licensed provider of personal wireless services and, pursuant to Federal regulations, must provide substantial service in its license area. See 47 C.F.R. § 27.14. Verizon accomplishes that by deploying a network of antennae installed in locations where buildings and topographical features do not obstruct the radio frequency signals. Caused in part by the distances and topographies between existing antennae, Verizon has significant coverage gaps in Peabody.

When trying to fill coverage gaps, Verizon follows a systematic procedure to locate sites for additional antennae. To begin, Verizon uses computer modeling software to define a ring that will have a high probability of meeting Verizon's coverage and capacity objectives. After defining that ring, Verizon searches therein for an existing building, tower, or other structure of sufficient height on which it may install an antenna. If no such structure is found, Verizon then searches for a raw land site where it may build a personal wireless service facility. Following this procedure, Verizon concluded that the property at 161 Lynn Street was the only feasible option that would have filled the coverage gaps at issue. Verizon also considered, but rejected, a utility pole owned by NSTAR and a church steeple, both of which the parties admit were not feasible options.[3]

On June 18, 2014, Verizon submitted a special permit application to install, operate, and maintain a personal wireless service facility at 161 Lynn Street. As described by Verizon, the facility would have "consist[ed] of three (3) panel antennae and remote radio heads flush mounted to a sixty foot (60') monopole constructed on the [p]roperty," plus an equipment

[3] Neither the utility pole nor the church steeple would have filled the coverage gaps.

shed.[4] On August 28, 2014, the city council voted to deny Verizon's special permit application. Verizon then filed an appeal from that decision in the Land Court pursuant to G. L. c. 40A, § 17.[5]

c. Alternative options. Shortly after Verizon filed its appeal in the Land Court, the parties discussed two other options: (1) having Verizon install a number of small cell antennae on utility poles that were owned by Peabody Municipal Light Plant (PMLP) and (2) building a personal wireless service facility at 38 Coolidge Avenue.[6] PMLP, a municipal utility separate from the defendants, rejected the first proposal, and the city council denied Verizon's special permit application to

[4] A ten-foot high stockade fence would have surrounded the perimeter of the proposed facility, and additional equipment such as a generator and a utility pole would have been located inside.

[5] Verizon initially asserted claims under both G. L. c. 40A, § 17, and the TCA, which includes a private right of action. See 47 U.S.C. § 332(c)(7)(B)(v). Although the latter claims were dismissed for lack of subject matter jurisdiction in the Land Court, the motion judge considered the requirements of the TCA in deciding Verizon's appeal under G. L. c. 40A, § 17. Neither party claims any error in this approach, as the Land Court has jurisdiction to review the city council's denial of the special permit, and the city council was bound to adhere to the TCA in deciding that issue.

[6] Verizon's case was stayed in the Land Court while the parties discussed the second of those options.

build a personal wireless service facility at 38 Coolidge Avenue.[7]

Undeterred, the parties continued to discuss other options.[8] First, the defendants informed Verizon that PMLP planned to construct a municipal-wide distributed antenna system (DAS) that would have obviated the need for Verizon's proposed facility, but the DAS option failed to materialize.[9] Second, the defendants asked Verizon to reconsider their earlier proposal to install small cell antennae on PMLP utility poles, but Verizon and PMLP were unable to reach an agreement. Third, Verizon submitted petitions to install its own utility poles to be used for small cell antennae, but the city council denied those petitions. The city council reasoned that a new Federal regulation required PMLP to make its utility poles available to

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[7] Verizon also filed an appeal from the decision denying its special permit application as to the 38 Coolidge Avenue site. Although the parties requested that the Land Court consolidate the two cases, that request was denied, and an order instead issued stating that "[t]he [Land] [C]ourt will . . . coordinate the two cases." The only special permit application before us is the one regarding the 161 Lynn Street site.

[8] Verizon's case in the Land Court was not stayed during the parties' further discussions.

[9] The city council described a DAS as a system of small antennae that are installed throughout a community and operated by a single entity that sublets capacity on the system to multiple wireless communication providers. A DAS thus eliminates the need for each particular wireless communication provider to have its own antennae.

Verizon under presumptively fair terms and conditions and that Verizon, therefore, did not need its own utility poles.[10] Thus, fourth, Verizon again tried to negotiate with PMLP over the use of its utility poles. On November 9, 2018, after Verizon and PMLP were again unable to reach an agreement, Verizon submitted the motion for summary judgment that underlies this appeal.[11] A judge of the Land Court declared that the denial of Verizon's special permit application constituted an effective prohibition on personal wireless services in violation of the TCA because, as a matter of law, no other feasible option would have filled the coverage gaps. This appeal followed.

2. Discussion. a. Standard of review. Review of an appeal under G. L. c. 40A, § 17, "involves a 'peculiar' combination of de novo and deferential analyses." Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 381 (2009), quoting Pendergast v.

[10] It is not certain whether the regulation has that effect and, in any event, the regulation is the subject of legal challenges. See, e.g., ExteNet Sys., Inc. v. Pelham, 377 F. Supp. 3d 217 (S.D.N.Y. 2019). There is no indication in the record that PMLP intends to interpret the regulation in the manner suggested by the city council or to comply with it during the pendency of legal challenges to its validity.

[11] Verizon had submitted a prior motion for summary judgment while the parties were discussing PMLP's plans to construct a DAS. Because of the state of those discussions at that time, that motion for summary judgment was denied and is not before us.

Board of Appeals of Barnstable, 331 Mass. 555, 558 (1954). We owe "deference to the interpretation of a zoning by-law by local officials only when that interpretation is reasonable," but we owe no such deference to the interpretation of a statute by local officials. Pelullo v. Croft, 86 Mass. App. Ct. 908, 909-910 (2014). Moreover, in the context of this appeal, where Verizon's case was decided on a motion for summary judgment, we review de novo whether there were genuine issues of material fact. See, e.g., Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 376 (2019).

Typically, we do not scrutinize decisions of local officials in light of events that occurred after those decisions were made. See Boston Edison Co. v. Boston Redev. Auth., 374 Mass. 37, 74 n.28 (1977). Contrary to this normal practice, the parties understandably ask us -- as they asked the motion judge in the Land Court -- to consider events that occurred during the four and one-half years following the denial of Verizon's special permit application.[12] As the parties have agreed to this

[12] The record contains an affidavit from a city council member stating that the litigation over the 161 Lynn Street site was "joined with the special permit application for the [38] Coolidge Avenue . . . site and its administrative record, and the consequent litigation generated thereby." As we noted above, the two cases were not consolidated, and the record contains no other indication that the administrative record for the 38 Coolidge Avenue site was made part of this case. See note 7, supra. Moreover, the parties' discussions of other

procedure, our analysis takes those events into consideration. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1629 (2019). Otherwise, the matter would have to be remanded to the city council for further consideration of the intervening events. We agree with the parties that this would not serve a useful purpose where the legal question we are asked to resolve is not one that is "within the authority of the [city council]," to which we would owe deference, but instead turns on the requirements of the TCA. Wendy's Old Fashioned Hamburgers of N.Y., Inc., 454 Mass. at 381.[13]

b. Feasibility of an alternative option. As noted above, the TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

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options continued even after the denial of Verizon's special permit application as to the 38 Coolidge Avenue site.

[13] Our approach of taking the intervening events into consideration also serves the TCA's stated goal of expediting resolutions of these sorts of disputes. The TCA's private right of action instructs courts to "hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action . . . by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis"). See Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 41-42 (1st Cir. 2014). Although this case does not involve a claim brought pursuant the TCA, but instead an appeal brought pursuant to G. L. c. 40A, § 17, we think the same principles apply. See note 5, supra.

thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). "When a carrier claims an individual denial is an effective prohibition, virtually all circuits require courts to (1) find a 'significant gap' in coverage exists in an area and (2) consider whether alternatives to the carrier's proposed solution to that gap mean that there is no effective prohibition." Omnipoint Holdings, Inc. v. Cranston, 586 F.3d 38, 48 (1st Cir. 2009) (Cranston).[14] The carrier bears the burden of proving that "it 'investigated thoroughly the possibility of other viable alternatives' before concluding no other feasible plan was available." Id. at 52, quoting VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 834-835 (7th Cir. 2003). This is a heavy burden that requires showing "from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Amherst, N.H. v. Omnipoint Communications Enters., 173 F.3d 9, 14 (1st Cir. 1999). The carrier's burden is high, but there are also "limits on [a city council's] ability to insist that [a] carrier[] keep searching regardless

[14] The defendants do not dispute that the first prong of this test was satisfied.

of prior efforts to find locations or costs and resources spent." Cranston, supra.

The defendants' arguments regarding the feasibility of an alternative option pertain to the DAS option; the defendants do not contend that any of the other options that the parties discussed were feasible. With respect to the DAS option, PMLP tried to reach an agreement with a neutral host that would have constructed and managed the DAS. According to the PMLP general manager and as attested to by him in an affidavit (PMLP affidavit), when PMLP was unable to reach an agreement with a neutral host, PMLP "communicated to [Verizon] that it would offer to serve as the host and allow [Verizon] to design its own system to be financed at less than [Verizon's] estimated cost as a tenant under both the [neutral host] model [that had been proposed] for Peabody and for the operating Wellesley system."[15]

The defendants rely solely on the PMLP affidavit to argue that there were genuine issues of material fact as to the economic feasibility of the DAS option. We are not persuaded. The PMLP affidavit does not even suggest that specific terms of a proposal were ever presented. Indeed, the defendants agree that Verizon requested a price proposal seven times over the course of September and October 2018, and PMLP failed to offer

[15] The town of Wellesley created a DAS that, apparently, Verizon uses.

any price proposal. Similarly, the defendants provide no reason to believe that any pricing terms would be economically feasible. The affidavit instead discusses Verizon's estimated cost in comparison to Verizon's costs under (1) a hypothetical neutral host DAS that failed to materialize and (2) a DAS in a different town.[16] These cost comparisons amounted to no more than unsupported, conclusory statements that were insufficient to defeat a motion for summary judgment. See Borella v. Renfro, 96 Mass. App. Ct. 617, 622 (2019).

Moreover, there were additional reasons why the DAS option was not feasible. See Cranston, 586 F.3d at 52 (cost is but one factor in determining feasibility of alternative option). As stated by the PMLP general manager in an e-mail, "We could not reach an agreement with Verizon . . . on who would provide communication services to the new antenna[e], pole rental fees, and the resolution of safety concerns." The defendants do not argue that there are any genuine issues of material fact with respect to the additional reasons why the DAS was not feasible. The defendants do not contend, for example, that Verizon and PMLP would have been able to resolve other issues unrelated to

[16] As noted by Verizon in its brief, these comparisons required more context to be helpful. We do not know if Verizon's costs under the hypothetical neutral host DAS would have been prohibitively expensive. Nor do we know anything about the Wellesley DAS and whether Verizon's costs under that DAS should be similar to its costs under a Peabody DAS.

the economic feasibility of the DAS or that the parties' inability to do so was the result of an unreasonable bargaining position taken by Verizon. Simply put, "this case does not turn on[] a claim by a carrier that economic infeasibility alone makes an alternative site unavailable." Id. at 53.

In reaching our conclusion, we are also mindful of Verizon's diligent attempts, over the course of four and one-half years, to find another feasible option. Verizon considered multiple locations, such as an NSTAR utility pole, a church steeple, and the 38 Coolidge Avenue site, and also explored other options, such as small cell antennae and a DAS. It even considered some of those options multiple times. In contrast, when the United States Court of Appeals for the First Circuit has concluded that there were other feasible options, the carrier either "did not present serious alternatives to the town," Amherst, N.H., 173 F.3d at 15, or did not explain why its proposal was the only feasible one, Second Generation Props., L.P. v. Pelham, 313 F.3d 620, 635 (1st Cir. 2002). See Cranston, 586 F.3d at 52 ("When we have held the carrier has not met its burden, the evidence has been essentially undisputed that the carrier had other alternatives"). That is simply not the case here, and we think the limit has been reached on Verizon's obligation to "keep searching regardless of prior efforts to find locations or costs and resources spent." Id.

Judgment affirmed.