

**Metro PCS N.Y., LLC v Incorporated Vil. of
Southampton**

2013 NY Slip Op 32913(U)

October 25, 2013

Supreme Court, Suffolk County

Docket Number: 26595/2013

Judge: Paul J. Baisley

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MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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METRO PCS NEW YORK, LLC and FIRST
PRESBYTERIAN CHURCH OF SOUTHAMPTON,

Petitioners-Plaintiffs,

For an Order and Judgment under Article 30 & 78 of
the New York State Civil Practice Law and Rules,

-against-

THE INCORPORATED VILLAGE OF
SOUTHAMPTON, THE INCORPORATED VILLAGE
OF SOUTHAMPTON BOARD OF TRUSTEES, THE
INCORPORATED VILLAGE OF SOUTHAMPTON
CLERK/ADMINISTRATOR, THE INCORPORATED
VILLAGE OF SOUTHAMPTON BUILDING
DEPARTMENT AND THE INCORPORATED
VILLAGE OF SOUTHAMPTON BOARD OF
HISTORIC PRESERVATION & ARCHITECTURAL
REVIEW,

Respondents-Defendants.

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I.A.S. PART 36

By: Baisley, J.S.C.

Dated: October 25, 2013

INDEX NO.: 26595/12
MOT. NO.: 001 CDISPSUBJ

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In this hybrid CPLR article 78 proceeding and plenary action for declaratory relief petitioners/plaintiffs seek, among other things, a judgment annulling the decision of respondent/defendant Incorporated Village of Southampton Board of Historic Preservation & Architectural Review (the "Board") dated July 25, 2012 and filed on July 30, 2012 which denied their application for a certificate of appropriateness. Petitioners/plaintiffs also seek a judgment directing that the Board issue a certificate of appropriateness and directing that respondent/defendant Incorporated Village of Southampton Building Department (the "Building Department") issue a building permit.

Petitioners/plaintiffs desire to construct, operate and maintain a public utility wireless communication facility on property located at 2 South Main Street, Southampton, New York which is owned by petitioner/plaintiff First Presbyterian Church of Southampton (the "Church") and is improved by, among other things, a church building that has an approximately 70-foot-high steeple.

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Petitioner/plaintiff MetroPCS New York, LLC (“MetroPCS”), a lessee of the property owner, is licensed by the Federal Communications Commission to construct, maintain and operate wireless telecommunications systems in the New York area and seeks to provide reliable wireless telephone service within the geographic boundaries of the Incorporated Village of Southampton (the “Village”).

MetroPCS applied on July 26, 2011 to the Building Department for a building permit for the project. Prior thereto, on March 22, 2011, MetroPCS applied to the Board for a certificate of appropriateness pursuant to Village Code §65-4 describing the nature of the proposed work as reconstruction or alteration to install wireless antennas within the church’s bell tower.

After four public hearings, the application was dismissed by the Board at its February 13, 2012 meeting based on procedural issues, without prejudice to renewal. MetroPCS submitted an alternate design to the New York State Office of Parks, Recreation and Historic Preservation (NYSHPO) on March 19, 2012 which reduced the number of antennas from eight to four and lowered the height of the antennas ten feet to minimize any potential impact to the Church building, the Village’s historic district and its surroundings, which was purportedly found by NYSHPO to have no adverse effect.

MetroPCS resubmitted its application to the Board on May 8, 2012 based on the alternate design. Petitioners/plaintiffs claim that less than one percent of the exterior sheathing of the church will be removed. They explain that the exterior sheathing of the church steeple in the area around the clock faces will be temporarily replaced, during the lease term, with radio frequency transparent fiberglass reinforced polymer (RFP) identically matching the exterior sheathing based on size, thickness, and texture to be painted white to match the current sheathing material.¹

At the next hearing before the Board on June 27, 2012, MetroPCS submitted a sample of painted RFP material to enable the Board to compare it to the existing facade. Members of the Church testified in support of the application, some neighbors testified against it, and Ken Wedholm of Stealth Concealment Solutions testified in support, providing photographs of other similar projects, such as the East Hampton Presbyterian Church, where historic structures were used to house a wireless communication facility and the same material was used to camouflage the wireless antenna. The hearing was adjourned to July 11, 2012 for a final hearing at which Ken Wedholm testified again and MetroPCS submitted its “Findings of Fact and Conclusions of Law.” At the hearing, the Board voted to deny the application and subsequently rendered its decision dated July 25, 2012, which was filed with the Village Clerk on July 30, 2012.

The Board explained in its decision that the Church was selected as the site for the proposed communication facility for the apparent reason that line of sight locations between antennas maximizes transmission clarity, range and efficiency thereby rendering the placement of antennas on structures as

¹ Counsel for petitioners/plaintiffs described the RFP material at the August 22, 2011 public hearing as styrofoam with a fiberglass sheath.

high as possible desirable so as to avoid topographical interference.² The Board also described the historical significance of the Church as a religious organization declared to be the first organized Presbyterian church in colonial America and the owner of the subject property located in the center of the Village in the Southampton Village Historic District, listed in the New York State and National Register of Historic Places, and designated as a local landmark. It recited hearing testimony that the church building or sanctuary was constructed in 1843 and expanded in 1895 and that the west end of the church building has a steeple

topped with corner parapets approximately seven feet above the roof of the steeple connected by wooded crenellations rising approximately one-third of the height of the parapets. Below the roof is a section containing on each of the four sides a clock face operated from a central gear, and below the section displaying the clock is a third identifiable section containing pairs of horizontal louvers. The gable roof of the sanctuary itself runs east and west parallel to Meeting House Lane. A large thee [sic] story annex building is connected to the sanctuary at the southeast corner, and this is connected in the south to a three story educational wing. Except for the stained double entry front doors facing South Main Street, the siding, trim and fenestrations of the sanctuary, steeple and attached buildings are painted white.

The Board indicated that hearing testimony from individuals that included its historic consultant, Mr. Studenroth, revealed that the sanctuary's architecture is Gothic or Neo-gothic design and consistently characterized the sanctuary portion of the building and the steeple as an iconic symbol of the Village. Hearing testimony further revealed that MetroPCS and Church officials had entered into an arrangement whereby MetroPCS has a lease or contingently may lease from the Church space within the steeple for the installation of transmission equipment and additional space in the first level of the sanctuary for the placement of electronic equipment required to operate the facility.

The Board noted that due to the landmark status of the church building and steeple and their location within the Village's historic district, approval of the Board of a certificate of appropriateness was a condition precedent to the issuance of a building permit for the installation of the proposed facilities. The Board indicated that the second application submitted on May 8, 2012 was dissimilar to the first inasmuch as it proposed to install the antennas in the area below the steeple roof next to the four clock faces rather than within the parapets above the steeple roof. It explained that:

² When asked by the Board at the August 22, 2011 public hearing why this particular site was selected, counsel for petitioners/plaintiffs responded that it fit within MetroPCS' existing communications system, an existing structure was required in the Village rather than building an unsightly new one, the height of the steeple was ideal, and there was a willing landlord with the ability to hide the antennas from view from the street level. When questioned further by the Board about the current existence of other wireless carriers' antennas installed in the Village Hall and the availability of said site, counsel responded that there may not be enough room to accommodate another carrier there because the antennas cannot interfere with each other. At the September 26, 2011 public hearing, counsel reiterated that the church was the only location in the Village with a landlord willing to lease space pursuant to MetroPCS' agreement and meeting the requirements for height, clearance, network coverage and equipment space.

The specific proposal of this application is to remove the exterior sheathing from the four sides of the steeple surrounding the respective clock faces and replace the wood boards with the RFP material which will be milled to the specifications of the boards being replaced and paint the RFP material the same color as the rest of the steeple, white. In addition, the applicant proposes to remove the sheathing with a high degree of care to minimizing [sic] any damage during the removal process and store the boards in labeled crates within the church for restoration of the boards on the steeple in the same order as removed when the lease term expires.

The Board also noted that the purpose or reason for the alteration was not restoration, rehabilitation or for general maintenance of the existing sheathing or structure but rather was for a voluntary or elective alteration to the church exterior. It distinguished this application from instances where historic material in need of maintenance, repair or replacement can no longer be obtained and a synthetic or non-historic material represents either a viable or the sole available replacement. Based on the purpose or reason for the alteration, “a voluntary elective alteration to the church exterior,” the Board found that the proposal was not “appropriate” to the property as the term is contextually used in Village Code §65-5(C)(1). In addition, the Board disagreed that the area affected by the project represented a small percentage of the size of the building as viewed in the context of one large interconnected structure of buildings. Instead, it found that the appropriate basis for measuring the impact or scale of the application was limited to the steeple itself, the architectural centerpiece of the sanctuary, and that the central focus of the steeple was the clock. The Board in considering the scale of the proposed project under Village Code §65-5(C)(2) explained,

From the perspective of an observer on the ground, the clock area is one-third of the architectural presence of the steeple. Defining the area of the project in terms of square feet of sheathing to be replaced, as the applicant advocates, does not provide a realistic comparison of the scale of the project based upon the visual impact the clock area makes in relation to the steeple itself, and the Board determines the scale of the proposal is large and characteristically significant in relation to the section of the church in which it is located.

Next, the Board expressed significant reservations concerning the ability of MetroPCS or the Church to guarantee that at the end of the lease term, the original sheathing would be properly restored. Their reservations arose from MetroPCS having declined to provide relevant lease text sections followed by the discovery that the lease could potentially be renewed for 25 or 30 years,³ approximately one-fifth of the time that the steeple has existed, with the concern that once the application was granted, neither the Board nor any other Village agency or representative, such as the Building Inspector, would have jurisdiction to monitor the storage, preservation and then restoration of the historic materials during the lease duration. The Board determined that an approval of the application for an indefinite period of time

³ Wayne Bruyn, a former president of the Board of Trustees of the Church, stated at the September 26, 2011 public hearing that the lease has a specific term that is renewable at the option of MetroPCS for a certain period of time.

could not reasonably be temporary as MetroPCS asserted and that the approval would, instead, be more in the nature of a permanent grant.

The Board also expressed its concern that MetroPCS had not shown how the restoration of the Church building, as close as possible to its present condition at the end of the lease thereby preserving the historic material and character of the building, would be monitored and accomplished over a period of 20 or 30 or more years of successive administrations of the Church, changes in the corporate structure of MetroPCS, and administrative changes of the Village. It determined that it was unrealistic to consider that the removal, care, storage and restoration of the existing sheathing could be “successfully monitored, enforced or achieved over such a long period of time.” The Board added that MetroPCS had submitted no legal authority that it was within the jurisdiction of the Board pursuant to the Village Code “to accept such contingent procedures extending so far into the future as a condition for granting an approval.” The Board found that “[a]bsent express jurisdiction to accept such a proposal and written and enforceable agreements with all responsible parties as to the satisfactory future performance of the contingencies, the Board deems it unreasonable to accept such a proposal [as] a basis for favorable consideration of the application.”

The Board concluded that “...the practical reality is that the request is not for the temporary installation of non-historic material, but for substitution of the historic material with a synthetic material on a permanent basis. The RFP is a synthetic material, and in the opinion of the Board its substitution for the original sheathing, which in this context is irreplaceable as the original sheathing, does not comply with the principle of compatibility, or the spirit and intent of historic preservation under Village Code Section 65-5 C(3).”

The Board also concluded that the proposed project did not comply with the relevant sections, item nos. 2 and 9, of the Secretary of the Interior’s “Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings,” which the Board was required to consider pursuant to Village Code §65-5(C)(6). It noted that the voluntary replacement of the original sheathing with synthetic RFP material was avoidable, and that the installation for an unlimited time, in effect permanently, deprived the building of historic wood material contrary to the purpose and intent of the Secretary of the Interior’s guidelines.

Petitioners/plaintiffs commenced this hybrid CPLR Article 78 proceeding and action for declaratory relief on August 28, 2012. By their petition/complaint they argue that the denial of their application by the Board violates their rights under the Telecommunications Act of 1996, Federal and New York State case law, and CPLR Articles 30 and 78. They allege a first cause of action to annul the Board’s determination on the grounds that it was arbitrary and capricious, without sound basis and reason, and arrived at without regard to the facts; a second cause of action to annul the Board’s determination on the ground that it was not supported by substantial evidence contained in the record; and a third cause of action seeking a declaration that respondents/defendants failed to recognize MetroPCS as a public utility under New York State Law and afford MetroPCS deferential treatment under the Village Code. They also allege a fourth cause of action seeking a declaration that the

determination constitutes an invalid prohibition against the provision of wireless services within the Village in violation of the Telecommunications Act of 1996; a fifth cause of action for a declaration that in denying the application, the Board unconstitutionally usurped powers and acted in an ultra vires manner; or, in the alternative, a sixth cause of action for a declaration that the Village Code is unduly vague, overly broad and unconstitutional.

Under the Village Code, the Board "...is charged with the duty of maintaining the desirable character of the municipality and of disapproving the construction, reconstruction and alterations of buildings that are designed without consideration of the harmonious relation of the new or altered building to such buildings as already exist and the environs in which they are set" (Village Code §116-33 [A]). "The Board is [further] charged with the duty of exercising sound judgment and of rejecting plans which, in its opinion, are not of harmonious character because of proposed style, materials, mass, line, color, detail or placement upon the property or in reaction to the spaces between buildings or the natural character of landscape or because the plans do not provide for the location and design of structures and open spaces so as to create a balanced and harmonious composition as a whole and in relation to its several parts and features to each other" (Village Code §116-33[B]). Every application for a building permit for the construction of any building or structure must be referred to the Board for architectural review (Village Code §116-32[B]). "No building permit shall be issued by the Building Inspector on any application which has been referred to the Board unless the Board shall have granted architectural approval for the building or structure" (Village Code §116-32[F]). The Board may require changes in plans as a condition of their approval (Village Code §116-32[G]).

Village Code §65-4 entitled "Certificate of appropriateness required" provides that

No person shall carry out any exterior alteration, restoration, construction, reconstruction, demolition or moving of a structure, land, trees or plantings upon property designated a landmark or property within a historic district, nor shall any person make any material change in the appearance of such a property, to the extent that it is visible from a public street, other rights-of-way or park and which shall affect the appearance and cohesiveness of the historic district, without first obtaining a certificate of appropriateness from the Board of Architectural Review and Historic Preservation.

Pursuant to Village Code §65-5 entitled "Criteria for approval of certificate of appropriateness"

...

B. The Board's decision to approve or to disapprove shall be based upon the following principles:

- (1) Features or properties which make significant contribution to the character of a landmark or a historic district shall be altered as little as possible;
- (2) Any alteration of an existing feature or property shall be compatible with its historic character, as well as with the character of nearby properties; ...

C. In applying the principle of compatibility, the Board shall consider the following factors:

- (1) The general design, character and appropriateness to the property of the proposed alteration or new construction.
- (2) The scale of the proposed alteration or new construction in relation to the property itself, surrounding properties and the neighborhood.
- (3) Texture, materials and color and their relation to similar features of other properties in the neighborhood. ...
- (6) The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings.

The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings includes the following:

2. The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided....
9. New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

In an Article 78 proceeding to review the administrative determination of a local administrative board, such as an architectural review board, judicial review is limited to determining whether action taken by the board is supported by substantial evidence and is not illegal, arbitrary, or an abuse of discretion (*see Stroh v Gross*, 269 AD2d 384, 702 NYS2d 874 [2000] citing *Matter of Johnson v Village of Westhampton Beach*, 244 AD2d 335, 663 NYS2d 663 [1997]; *Matter of DGM Partners-Rye v Board of Architectural Review of the City of Rye*, 148 AD2d 608, 539 NYS2d 74 [1989]). The disposition of this proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (*Matter of Fanelli v New York City Conciliation and Appeals Bd.*, 90 AD2d 756, 455 NYS2d 814 [1982] *affd* 58 NY2d 952, 460 NYS2d 534).

The Court initially notes that in considering whether to grant a certificate of appropriateness under Village Code §65-4, the Board is required to determine whether the proposed work will “affect the appearance and cohesiveness of the historic district.” There is nothing in Village Code §65 that mandates or limits alterations or construction solely for the purpose of restoration, rehabilitation, and general maintenance or upkeep and expressly prohibits a voluntary or elective alteration. The reason for the alteration is not a listed criteria for the Board's decision to approve or disapprove an alteration pursuant to Village Code §65-5(B). The Board's determination of appropriateness under Village Code §65-5(C)(1) relates to the alteration's “compatibility” with the steeple's or Church's “historic character”

and the “character” of nearby properties pursuant to Village Code §65-5(B)(2), again pertaining to appearance and cohesiveness and not the exigency of the condition of the property. Thus, the Board’s finding that the subject proposal is not “appropriate,” and therefore not “compatible with [the steeple’s] historic character” and “the character of nearby properties” merely because it is a voluntary or elective alteration of the Church exterior rather than an alteration necessitated by decay or disrepair is an erroneous application of Village Code §§65-5(B)(2) and (C)(1). Notably, item no. 9 of the Secretary of the Interior’s Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings allows exterior alterations, whether elective or not, provided that “[t]he new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.”

In addition, the Board was incorrect in determining that “the appropriate basis for measuring the impact of the application is correctly limited to the steeple itself” when considering the “scale of the proposed alteration ... in relation to the property itself” under Village Code §65-5(C)(2). Based on a reading of Village Code §65-4, the steeple is “a structure,” ... “upon property designated a landmark or property within a historic district” and the subject property consists of all the buildings and structures of the Church connected to the steeple at said location designated as a landmark and within the historic district.

However, the Board’s finding that alteration involving the removal of historic wooden sheathing and its replacement with synthetic RFP material, particularly within the context of an indeterminate lease term, does not meet the standards of criteria under Village Code §§65-5(B)(1),(2) as well as Village Code §§65-5(C)(3), (6) was not arbitrary or capricious and had a sound basis in law and fact. Such finding constituted a sufficient basis to reject the subject application for a certificate of appropriateness. The Board demonstrated that it was constrained by criteria in the Historic and Landmark Preservation law of the Village Code as well as the Secretary of the Interior’s guidelines to ensure that permanent removal of historic wood materials was avoided and that the alteration with RFP material was compatible in texture, color and weathering⁴ to the adjacent wood from which the historic character of the steeple is derived, which the Board could not do based on the evidence and testimony presented to it. Therefore, the request by petitioners/plaintiffs for judgment on their first cause of action annulling the Board’s determination as arbitrary and capricious, without sound basis and reason, and arrived at without regard to the facts, and on their second cause of action that the determination was not supported by substantial evidence contained in the record is denied. Petitioners/plaintiffs’ further request for a judgment directing that the Board issue a certificate of appropriateness and directing that the Building Department issue a building permit is also denied.

⁴ Ken Wedholm of Stealth Technology stated at the June 27, 2012 public hearing that the small amount of existing wood that will remain around the RFP material around the clock faces will weather but that the RFP material will not, and that perhaps in 10 years there may be a discernable difference and may require repainting. At the July 11, 2012 public hearing, Mr. Wedholm stated that the RFP material would be painted with paint specifically made for said material and then would be painted with paint recently used on the rest of the church and assured that thereafter there would be no discernable difference between the paint products in appearance and that the church would continue to be upgraded and maintained.

By their third cause of action, petitioners/plaintiffs seek a declaration that respondents/defendants failed to recognize MetroPCS as a public utility under New York State Law and afford MetroPCS a deferential standard of review as a wireless carrier under the Village Code such that it was required to show only that the proposed wireless communication facilities are a public necessity and that there are compelling reasons making it more feasible to site the facility at the proposed location rather than use an alternate location. In addition, by their fourth cause of action petitioners/plaintiffs seek a declaration that the determination constitutes an invalid prohibition against the provision of wireless services within the Village in violation of the Telecommunications Act of 1996, as codified at 47 USC §332(c)(7)(B)(i)(II). Petitioners/plaintiffs argue that the Board's interpretation of the Village Code had the effect of prohibiting the installation of wireless communications facilities as there are no determinate circumstances in which it would permit such an installation in the Church's steeple. In addition, they argue that the Board violated the Telecommunications Act of 1996 by denying the least intrusive telecommunications facility needed so as to remedy the coverage gap inasmuch as the proposed facility is entirely concealed within the steeple and there will be no perceptible impact to the surrounding area.

47 USC §332 (c)(7)(B) entitled "Limitations" provides

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

...

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

...

(iii) 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.

MetroPCS is a public utility entitled to the application of the "public necessity" test in zoning matters relating to the placement, construction, and modification of personal wireless service facilities (see *Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 371, 604 NYS2d 895 [1993]; *Matter of Site Acquisitions v Town of New Scotland*, 2 AD3d 1135, 770 NYS2d 157 [3d Dept 2003]; see also *Matter of Independent Wireless One Corp. v City of Syracuse*, 12 AD3d 1085, 1086, 784 NYS2d 473 [4th Dept 2004], *lv denied* 4 NY3d 710, 797 NYS2d 817 [2005]). Thus, MetroPCS "need only establish that there are gaps in service, that the location of the proposed facility will remedy those gaps and that the facility presents a minimal intrusion on the community" (see *Matter of Site Acquisitions v Town of New Scotland*, 2 AD3d 1135, 1137, 770 NYS2d 157; see also *Matter of Independent Wireless One Corp. v City of Syracuse*, 12 AD3d 1085, 1086, 784 NYS2d 473). However, it has been held that a telecommunications provider does not have "carte blanche authority to dictate the number and location" of its facilities (see *Sprint Spectrum v Willoth*, 996 F Supp 253, 257 [1998], *affd* 176 F 3d 630 [1999]; see also *Matter of Consolidated Edison v Hoffman*, 43 NY2d 598, 610, 403 NYS2d 193 [1978]; *Matter*

of *Site Acquisitions v Town of New Scotland*, 2 AD3d 1135, 1137, 770 NYS2d 157; see also 47 USC § 332 [c][7][A]), and when weighing the extent of intrusion of a proposed facility, the municipality may consider, among other things, the aesthetic impact of a facility (see *Sprint Spectrum v Willoth*, 176 F3d 630, 645-646 [1999]; *Matter of SiteTech Group v Board of Zoning Appeals of Town of Brookhaven*, 140 F Supp 2d 255, 261 [ED NY 2001]; *Matter of Site Acquisitions v Town of New Scotland*, 2 AD3d 1135, 1137, 770 NYS2d 157).

Under the instant circumstances, the Board demonstrated in its determination that the aesthetic impact would be great inasmuch as the proposed project involves the removal of historic materials that do not require replacement, contrary to federal and local guidelines for preservation, for the indeterminate period of the lease term with no assurance of their being properly preserved and then successfully restored at the end of the lease term (see generally *Omnipoint Communications, Inc. v City of White Plains*, 430 F3d 529 [2d Cir 2005]). The Court notes that this case is distinguishable from a similar case involving the proposed installation of six wireless panel antennas behind radio frequency transparent louvers within the steeple of an existing church building that is over 100 years old which case was recently decided by the United States District Court, Eastern District New York, in that the instant matter involves the proscribed removal of historic materials from a historic church for a potentially indefinite period of time to accommodate the construction of a wireless communication facility (compare *New York SMSA Ltd. Partnership v Town of Oyster Bay*, US Dist Ct, ED NY, 11 CV 3077, Brodie, J., Aug. 16, 2013). In addition, MetroPCS failed to show that the church site was more feasible than other options, instead presenting the agreement with the Church as a completed deal and dismissing alternate sites such as the Village Hall, currently containing the antennas of other wireless carriers, as probably being unfeasible (see *Omnipoint Communications, Inc. v City of White Plains*, 430 F3d 529; compare *New York SMSA Ltd. Partnership v Village of Floral Park Bd. of Trustees*, 812 F Supp 2d 143 [ED NY 2011]).

As a fifth cause of action, petitioners/plaintiffs seek a declaration that in denying the application, the Board unconstitutionally usurped powers and acted in an ultra vires manner in that the determination was based on documents dehors the record and criteria not contained in the Village Code and on baseless assertions and false assumptions; or, in the alternative, as their sixth cause of action, they seek a declaration that the Village Code is unduly vague, overly broad and unconstitutional. The Court finds that the Board properly based its determination on the applicable criteria within the Village Code and the documents and hearing testimony within the record.

Accordingly, the petition/pleading is dismissed in its entirety. The Court declares that the Board did recognize MetroPCS as a public utility under New York State Law and afforded MetroPCS a deferential standard of review as a wireless carrier under the Village Code, that the Board's determination did not constitute an invalid prohibition against the provision of wireless services within the Village in violation of the Telecommunications Act of 1996, and that the determination denying petitioners/plaintiffs' application was based on an application of criteria within the Village Code and supported by substantial evidence in the record.

Submit judgment on the petitioners'/plaintiffs' claims for Article 78 relief.

PAUL J. BAISLEY, JR.
J.S.C.