State of Vermont

Superior Court -- Environmental Division

ENTRY REGARDING MOTION

In re Verizon Wireless Barton Act 250 Permit, **Docket No. 6-1-09 Vtec**

Project: Verizon Wireless cell tower and antennas

Applicant: VT RSA Ltd. Partnership and Cellco Partnership, d/b/a Verizon Wireless
(Appeal from District #7 Environmental Commission determination)

Title: Motion to Exclude Evidence (Filing No. 9)

Filed: September 8, 2010

Filed By: Pamela A. Moreau, Co-Counsel for Attorneys for Appellee/Applicants Verizon Wireless

Response in Opposition filed on 10/08/10 by Appellant Michael Auger

Reply filed on 10/12/10 by Appellee Appellee/Applicants Verizon Wireless

_X_ Granted ___ Denied ___ Other

This matter is currently scheduled for a bench trial beginning on Wednesday, November 3, 2010; the parties have or are just about to complete their pre-trial discovery and exchange of pre-filed testimony. Appellee/Applicant Verizon Wireless ("Applicant") seeks by its most recent motion to exclude the anticipated testimony and other evidence to be offered by Appellant Michael Auger ("Appellant") concerning other possible sites for Applicant's proposed cellular transmission tower, antenna and related facilities, due to what Appellant believes will be the undue adverse impact of the proposed project, if it is constructed as Applicant proposes.

The sole issue remaining in this appeal is a determination of whether Applicant's proposed project conforms to Act 250 criterion 8 concerning aesthetics. As codified in 10 V.S.A. § 6086(a)(8), Act 250 criterion 8 directs that this Court determine whether the proposed project will have "an undue adverse effect on the scenic or natural beauty of the area, aesthetics" and other attributes not at issue in this appeal. Id.

Act 250 criterion 8 represents one of the perhaps most litigated legal issues in Vermont land use litigation. Most recently, this Court addressed the standards and legal precedent surrounding criterion 8 in a series of consolidated appeals concerning a proposed quarry. The parties here are referred to In re Rivers Development, LLC, No. 7-1-05 & 68-3-07 Vtec, Decision on the Merits at 49–53 (Vt. Envtl. Ct. March 25, 2010).

The parties here appear to agree on the general standards of criterion 8 and how a reviewing Court is to determine whether a proposed project is aesthetically "adverse" and, if so, whether the adversity created by the project is "undue." Applicant even concedes that, should this Court reach the second stage of what is commonly referred to as the "Quechee analysis",[1] a project proponent may receive approval for an adverse project, if found to have taken "generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings." Rivers Development, No. 7-1-05 & 68-3-07 Vtec, Decision on the Merits at 53.

[1] This standard takes its name from a former Vermont Environmental Board decision: See Re: Quechee Lakes Corp., Nos. 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law and Order (Vt. Envtl. Bd. Nov. 4, 1985).

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Appellants ask that we allow testimony and other evidence that would suggest that Applicant has failed to take "generally available mitigating steps," since there are alternate sites for Applicant's proposed tower and related facilities. This argument appears to have a rational foundation, particularly in light of Appellant's representations that the currently proposed site is one of significant aesthetic beauty.

However, we depart from Appellant's reasoning after we have failed to locate a single decision of this Court, the former Environmental Board, or our Supreme Court which has allowed a discussion of alternate locations within the context of a mitigation analysis. In fact, the very language concerning "generally available mitigation measures" speaks to actions that a project proponent could take to bring the proposed project into harmony with its surroundings. Id. We regard this language as referring to mitigation steps that could be taken at the site proposed for the project, not some alternate site; such mitigation measures could include screening, camouflaging of a cell tower, or lowering of its height without negating its operation.

We are further persuaded by the precedential case law that appears on point and suggests the granting of the pending motion in limine. Applicant would have us rely upon this Court's recent merits decision in In re Rinkers Inc., No 302-12-08 Vtec, Decision on the Merits (Vt. Envtl Ct. May 17, 2010)(Wright, J.), but we decline to do so, since that decision is subject to a pending motion to alter and period of appeal. Rather, we note that the Rinkers decision cites to twenty-six-year-old precedent that remains undisturbed and appears to speak directly to the issue before us:

> However, we do not find . . . in Act 250, authority to investigate alternative sites in respect to matters of aesthetics. The Legislature has, in specific instances, required us to evaluate alternatives (see 10 V.S.A. § 6086(a)(1)(F)—Shorelines, (8)(a)(iii)—necessary wildlife habitat and endangered species, (9)(B)(iii) and (9)(C)(iii)—primary agricultural, secondary agricultural and forest soils). The Legislature has not given us such discretion in respect to matters of aesthetics.
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> Therefore, our options are limited to imposing reasonable conditions . . . or denial of an application where undue adverse aesthetic impacts cannot be corrected by imposition of conditions . . . .

Re: Vermont Electric Power Company, Inc., No. 7C0565-EB, Findings of Fact, Concl. of Law, & Order, at 4–5 (Vt. Envtl. Bd. Dec. 12, 1984).

Thus, were we to adopt Appellant's argument that our mitigation analysis should include a consideration of alternate sites, we would need to ignore well established precedent to which we are directed to give weight (see 10 V.S.A. § 8504(m)) and to ignore the caution that doing so would require this Court to exceed its jurisdictional authority. This we decline to do. Therefore, we are compelled to **GRANT** Applicant's motion in limine and do hereby prohibit Appellant from presenting any testimony or other evidence premised upon an argument that an alternate site is more appropriate.

Thomas S. Durkin, Judge

October 15, 2010
Date

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Date copies sent to: 10/15/10 Clerk's Initials

Copies sent to:

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