

Court of Appeals Upholds Denial of Cell Tower Permit

Julia K. Potter, Attorney, Boardman & Clark LLP



In a recent case, *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, the Wisconsin Court of Appeals upheld a municipality's decision to deny a permit to Eco-Site, LLC, a wireless infrastructure provider seeking permission to construct a cell tower on private, rural land. In doing so, the court clarified the scope of the limits placed on municipal regulatory authority by Wis. Stat. § 66.0404, which prohibits a municipality from denying a cell tower permit "based solely on aesthetic concerns."

Eco-Site sought a permit from the Town of Cedarburg to construct a 120-foot metal monopole cell tower, along with a supporting 5,600 square foot structure, on a horse farm located in the Town's A-1 agricultural zoning district (but surrounded by residential uses). Under the Town's ordinances, the permit could not be granted unless certain conditions were met, including that the tower be "[c]ompatible with adjacent land" – i.e., that "[t]he uses, values and enjoyment of other Town property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation" of the cell tower. After much discussion, the Town Board denied Eco-Site's permit application on a number of grounds, including failure to meet the ordinance's compatibility requirement.

Eco-Site sued the Town, making two primary arguments: (1) that the Town's determination that the tower was incompatible with adjacent land was a misapplication of its own ordinances; and (2) that the Town's decision was based

solely on aesthetic concerns in violation of Wis. Stat. § 66.0404(4)(g). Both arguments failed.

The court held that the Town's conclusion that the proposed tower would be incompatible with neighboring land uses was reasonable, noting that the Town had placed the property and adjacent land in agricultural and residential districts in an effort to keep the area rustic, rural, and populated and that "[t]his intended use and lifestyle are clearly at odds with, and would be thwarted by, the introduction of a 120-foot tall telecommunications tower with its substantial related structure and fencing." In addition, the court concluded that the neighboring homeowners' concerns about the negative effect the cell tower would have on their property values fairly related to the residents' "uses, values and enjoyment" of their property and therefore to the compatibility factor set out in the ordinance.

Eco-Site also argued that that the Town's denial of its permit application on the basis of incompatibility, lost property values, and the effect on the public health, safety, and general welfare amounted to a denial based solely on aesthetics in contravention of Wis. Stat. § 66.0404. Eco-Site pointed to numerous comments during the discussion of each ordinance factor that related to the visual impact of the tower. The court acknowledged that the Town Board made comments regarding aesthetics, but concluded that Wis. Stat. § 66.0404(4)(g) only prohibits a denial of a cell tower siting permit if that denial is based "solely" on aesthetic concerns. Because the Board's decision that the tower did

not meet the ordinance's incompatibility standard was also based on the impact of the tower on the uses and lifestyle for which the neighborhood was zoned and the economic impact on neighboring property values, it was not a denial based "solely" on aesthetic concerns.

This decision is an important one for municipalities looking to exercise their right to regulate the siting of cell towers within municipal limits. Municipalities should carefully consider the standards set out in local ordinances for the granting of cell tower permits to ensure that they incorporate factors that are not purely aesthetic (e.g., effect on property values and impact on the uses and enjoyment of nearby property), and should be sure to carefully document that the basis for denial of a permit includes non-aesthetic factors.

Licensing and Regulation 402

About the Author:

Julia K. Potter is an attorney at Boardman & Clark LLP, where her practice focuses on land use, real estate, right-of-way regulation, and general municipal law. She received her law degree, summa cum laude, from the University of Michigan Law School and her B.A. from Brown University. Julia was named an "Up and Coming Lawyer" by the Wisconsin Law Journal in 2018.

Boardman & Clark LLP is a Madison law firm that provides a full range of legal services to Wisconsin municipalities. Contact Julia at JPotter@boardmanclark.com