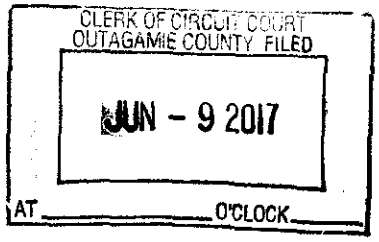
STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | OUTAGAMIE COUNTY



CENTRAL STATES TOWER III, LLC, PROFESSIONAL ASSOCIATES, INC., and VERIZON WIRELESS PERSONAL COMMUNICATIONS LP d/b/a VERIZONWIRELESS,

Petitioners/Plaintiffs,

vs.

Case No. 16 CV 696

CITY OF APPLETON,

Respondent/Defendant.

DECISION & ORDER

I.

Central States Tower III, LLC, Professional Associates, Inc., and Verizon Wireless Personal Communications LP (collectively "Plaintiffs") commenced this action for certiorari review or declaratory relief against a decision by the City of Appleton (Appleton) Common Council denying their application for a Special Use Permit for the construction of a mobile service support structure. Plaintiffs contend that Appleton's denial of the permit is contrary to Wis. Stat. § 66.0404 because (1) Appleton did not provide substantial evidence to support its denial and (2) the considerations relied upon by Appleton are not valid grounds to deny a permit.

II.

On April 12, 2016, Plaintiffs filed an application for a Special Use Permit to construct an 85-foot cell tower at 2718 Meade Street in Appleton. The City Plan Commission conducted an initial review of the application, including a public hearing on May 9, 2016. Several citizens spoke against the proposed location at the Plan Commission hearing. The Plan Commission

voted unanimously to approve the application. The Common Council considered the application on May 18, 2016, and referred it back to the Plan Commission after citizen opposition was expressed.

On June 6, 2016, the Plan Commission again approved the application. The Common Council took up the application for a second time on June 15, 2016. Again, citizens appeared to voice their opposition to the location of the cell tower. The public opposition was based on safety fears about the tower being so close to residential homes and probable reductions in property values of homes near the tower. The debate also focused on whether Wis. Stat. § 66.0404 prevented the Common Council from denying the permit. In the end, the Common Council voted to deny the application.

Plaintiffs requested the Common Council reconsider its denial, and the Common Council did so on July 6, 2016. The Common Council again debated whether or not it had the authority to deny the permit in light of § 66.0404. The City Attorney advised the council members against denying the permit because he did not believe they had grounds which would satisfy § 66.0404. Despite this advice, the Common Council again voted to deny the application. Plaintiffs then commenced this action under § 66.0404(2)(f) to challenge the denial of their application.

III.

Section 66.0404(2)(f) creates a cause of action to challenge the denial of a cell tower application. "A party who is aggrieved by the final decision of a political subdivision under par. (d)2. may bring an action in the circuit court of the county in which the proposed activity, which is the subject of the application, is to be located." Wis. Stat. § 66.0404(2)(f) (2015). Plaintiffs filed their Complaint on August 1, 2016. In response to Plaintiffs' Complaint, Appleton raises four arguments: (1) Appleton is immune from suit for its denial of the application; (2) § 66.0404

is facially unconstitutional for vagueness and overly burdensome; (3) placement of cell towers is a matter of local concern, and therefore § 66.0404 violates the Home Rule Amendment of Wisconsin's Constitution; and (4) if § 66.0404 is valid, Appleton's denial did satisfy § 66.0404 because it is supported by substantial evidence.

Immunity

Appleton argues that because it is a municipal corporation, its acts done in the exercise of a legislative, quasi-legislative, judicial, or quasi-judicial function are protected by governmental immunity under Article IV, § 27 of the Wisconsin Constitution and Wis. Stat. § 893.80.

Section 893.80(4) states:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Wis. Stat. § 893.80(4) (2015). This section has been interpreted to protect acts that are discretionary and involve judgment by a municipality. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 21, 253 Wis.2d 323. Appleton argues that because the decision whether to grant or deny Plaintiffs' application involved the exercise of discretion and judgment, its decision is entitled to governmental immunity.

As a matter of legislative interpretation, it makes no sense to find that the legislature would create a cause of action against a municipality under one statutory section while intending for the municipality to be immune under another section. *Cf.* §§ 66.0404(2)(f) & 893.80(4). In addition, as Plaintiffs argue a political corporation cannot be immune when its discretionary action violates an act of the legislature. *See* (Pls.' Reply Br. 13, Apr. 17, 2017.) Where a political corporation's act constituted a violation of a statute, the statute prevailed over the grant of

immunity in § 893.80(4). *Crawford v. Wittow*, 123 Wis.2d 174, 183-84 (1985). Plaintiffs also point out that an action for a declaratory judgment has consistently been found to not qualify as a "suit" subject to § 893.80. *See, e.g., Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 48, 235 Wis. 2d 409 (concluding "that although Wis. Stat. § 893.80(4) affords immunity to the Town and County for actions involving both money damages and injunctive relief based in tort, there is no immunity under § 893.80(4) for declaratory actions."). Thus, this action is not a suit to which § 893.80(4) applies, and Appleton is not immune.

Constitutionality of Wis. Stat. § 66.0404

Appleton's primary argument is that § 66.0404 is facially unconstitutional because it is vague and overly burdensome. Appleton's vagueness argument challenges the clarity of the "substantial evidence" requirement, and its burdensome argument focuses on the necessary research a municipality would have to undertake to establish safety concerns about the location of a cell tower and the need to complete such research within the 90-day deadline § 66.0404 imposes for municipalities to issue decisions on applications.

Statutes are presumptively constitutional. *Aicher* ex rel. *LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 18, 237 Wis.2d 99. "To overcome this strong presumption, the party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt." *Id.* at ¶ 19. "[W]herever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State* ex rel. *Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 46 (1973).

"The concept of vagueness is based on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Larson v. Burmaster*, 2006 WI App 142, ¶ 29, 295 Wis.2d 333. "[A] statute which either forbids or requires the doing of an

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Dog Fed'n of Wis., Inc. v. City of S. Milwaukee*, 178 Wis.2d 353, 359–60 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

A vagueness challenge to a statute is subject to a two-prong test. *Id.* The first prong of the vagueness test considers "whether the statute sufficiently warns persons 'wishing to obey the law that [their] ... conduct comes near the proscribed area.'" *Burmaster*, 2006 WI App 142, at ¶ 29 (quoting *State v. Pittman*, 174 Wis.2d 255, 276 (1993)). "The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards." *Id.*

Section 66.0404(2)(d)(4) requires a municipality denying a cell tower application to provide a written explanation setting forth substantial evidence supporting its decision. Appleton argues that this requirement is unconstitutionally vague because § 66.0404(2)(d)(4) fails to define "substantial evidence." Substantial evidence is a widely used legal standard. Courts regularly employ it in the administrative review context, and there is a large body of law available to assist municipalities in applying that standard. *See* (Pls.' Reply Br. 5 (describing the availability of case law applying the substantial evidence standard)). Appleton had no difficulty in finding a definition in case law, and it was able to apply that standard in its alternative argument that it in fact supported its decision with substantial evidence. (Def.'s Br. 5-6, Mar. 30, 2017.) In addition, § 66.0404(4) provides additional guidance by enumerating 24 bases upon which a municipality may not deny a permit. Because "substantial evidence" is a well defined and regularly applied standard, Appleton has not satisfied the two-part test for vagueness.

Appleton's second constitutional argument is that § 66.0404 is overly burdensome because it requires a municipality to independently investigate the safety and efficacy of a cell tower's proposed location in order to satisfy the substantial evidence requirement. Appleton argues that the cost and the need to fulfill this obligation in 90 days would be prohibitive for municipalities and denies them any real ability to ever deny a cell tower application. Plaintiffs do not address this argument.

Constitutional burdensome challenges usually involve an assessment of whether a statute makes exercising a fundamental right unduly burdensome. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 33 (1968) (finding an Ohio statute regarding listing of small political parties on the ballot overly burdensome on the right to vote). Appleton does not contend that its ability to deny cell tower permits rises to the level of a fundamental right nor does it provide actual evidence of what the cost of conducting its own investigation would be. Appleton simply states that conducting its own investigation would be too burdensome. Where a challenger made "little or no effort to demonstrate [the statute's] impracticability or that it [was] unusually burdensome," the U.S. Supreme Court refused to find that a statute was unduly burdensome—even where a fundamental right was involved. *Am. Party of Texas v. White*, 415 U.S. 767, 787 (1974). Appleton has not demonstrated that § 66.0404 is unduly burdensome.

Home Rule

Appleton also challenges § 66.0404 as a violation of the Home Rule Amendment of Wisconsin's Constitution. *See* Wis. Const. art. XI, § 3; Wis. Stat. § 62.11(5) (2015). Home rule is a principle under which municipalities "retain their ability to govern in the absence of state legislation." *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 29, 342 Wis.2d 444. The home rule amendment accomplishes two things: "(1) It makes a direct grant of

legislative power to municipalities; and (2) it limits the legislature in the exercise of its general grant of legislative power." *State* ex rel. *Michalek v. LeGrand*, 77 Wis. 2d 520, 526 (1977). The first purpose is accomplished by "expressly giving cities and villages the power 'to determine their local affairs and government.'" *Id.* (quoting *State* ex rel. *Ekern v. Milwaukee*, 190 Wis. 633, 638 (1926)). The second purpose is accomplished "by limiting the legislature in its enactments in the field of local affairs of cities and villages." *Id.* On issues of statewide concern, however, the legislature may prohibit municipalities from enacting ordinances or invalidate ordinances already enacted. *Adams*, 2012 WI 85, at ¶ 29.

The primary issue when determining whether a statute implicates home rule is whether the subject of the statute is of exclusive statewide concern, exclusive local concern, or a mix of state and local concerns. *Id.* at ¶ 30. Areas of statewide concern include "the law of domestic relations, of wills, of inheritance, of contracts, of crimes not essentially local (for example, larceny or forgery), and the organization of courts." *Id.* at ¶ 31, n. 16. By contrast, areas of local concern are "the laying out of parks, the building of recreation piers, the institution of public concerts," and control "over payments from the local purse." *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 515I (1952). An example of a mixed area is the livestock facility siting at issue in *Adams*, which mixed local concerns about the location of large livestock farms and the state's concern with providing a uniform permitting process. *See* 2012 WI 85, at ¶ 31.

Like the issue of livestock facility siting in *Adams*, here, the issue of cell tower siting falls into the "mixed bag" category. Section 66.0404 set forth a uniform procedure for permitting cell towers, but the issue also touches on local concerns. *See* § 66.0404(2) (setting forth how municipalities authorized to regulate cell tower siting). "When an issue falls into the 'mixed bag' category, political subdivisions may adopt ordinances which, while addressed to local issues,

concomitantly regulate matters of statewide concern." *Adams*, 2012 WI 85, at ¶ 32 (internal quotation omitted). Local municipalities' authority, however, "is limited to ordinances that complement rather than conflict with the state legislation." *Id.*

In determining whether a municipality's actions are preempted by the state legislation, courts consider the plain language of the statute and apply a four-part test:

> (1) whether the legislature has expressly withdrawn the power of political subdivisions to act; or
> (2) whether the political subdivision's actions logically conflict with the state legislation; or
> (3) whether the political subdivision's actions defeat the purpose of the state legislation; or
> (4) whether the political subdivision's actions are contrary to the spirit of the state legislation.

Id. at ¶¶ 32 & 35. Because this test is disjunctive, "if any one of the factors is met, the political subdivision's conflicting action is void." *Id.* at ¶ 32.

Looking at the plain language of § 66.0404(2), it is clear that the legislature has removed municipalities' power to regulate cell towers in an independent fashion. *See* § 66.0404(2) (h) ("A political subdivision may regulate the activities described under par. (a) only as provided in this section.") & (4) (prohibiting denial of a permit on the basis of 24 listed factors). Plaintiffs also point to the statement of Assemblyman John Nygren during the May 9, 2013 Joint Finance Committee meeting that § 66.0404 was designed to create "a consistent, statewide approval process." (Sewell Aff. ¶ 3, Apr. 13, 2017.) Municipalities maintain the right to enact zoning ordinances for cell towers, but any local ordinances are subject to the statute. § 66.0404(2)(a). As a result, the statute preempts any local authority maintained by municipalities. Appleton's denial of the permit will only be upheld if it is consistent with the terms of § 66.0404.

Certiorari Review of Denial

Section 66.0404(2)(d) provides municipalities 90 days to consider applications for cell tower permits or the application is deemed granted. In the event that the municipality denies an application for a permit, the denial must be made in writing and set forth substantial evidence which supports the decision. § 66.0404(2)(d)4. Contrary to Appleton's contention, the substantial evidence standard is well established in situations were the circuit court reviews a decision of an agency or municipality.

"Substantial evidence is evidence that is relevant, credible, probative and of quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs. v. Labor & Indus. Review Comm'n*, 175 Wis. 2d 537, 544 (Ct. App. 1993). Substantial evidence for purposes of administrative review does not require a finding based on a preponderance of the evidence, but only that reasonable minds could arrive at the same conclusion as the agency or political subdivision. *Holy Name Sch. of Congregation of the Holy Name of Jesus of Kimberly v. Dep't of Indus., Labor & Human Relations*, 109 Wis. 2d 381, 386 (Ct. App. 1982). Plaintiffs contend that that § 66.0404(2)(f) entitles them to a de novo review of Appleton's denial of their application, and Appleton does not challenge the use of that standard of review.

Turning to Appleton's written notice of its decision to deny the application sent on July 6, 2016, it is clear that Appleton did not meet its burden of setting forth substantial evidence supporting its decision. The letter of July 6, 2016, simply states that the application was denied and provides the vote of each alderperson. It says nothing about the safety and property value grounds on which Appleton now relies. It is dubious whether the Common Council discussed safety and property values to a sufficient extent for the transcripts to provide additional support for Appleton's position, but regardless, the statute requires that the grounds for the denial be set

forth in writing. Appleton failed to include its grounds for denying the application in the letter to Plaintiffs' counsel, and the Court cannot find that Appleton met its burden under these circumstances.

ORDER

Plaintiffs' Petition for a Declaratory Judgment is GRANTED.

Dated this 9th day of ~~May~~ June 2017.

BY THE COURT:

The Honorable Nancy J. Krueger

Circuit Court Judge, Branch II