



CHAMBERS OF  
BARBARA G. ZAMBELLI  
JUDGE

COUNTY COURT OF THE COUNTY OF WESTCHESTER  
RICHARD J. DARONCO  
WESTCHESTER COUNTY COURTHOUSE  
111 DR. MARTIN LUTHER KING, JR. BOULEVARD  
WHITE PLAINS, NEW YORK 10601

---

## FACSIMILE TRANSMITTAL

---

**DATE:** June 20, 2014 **No. Of Pages:** 19

**TO:** Stephen Barshov, Esq.  
Fax No.: (212) 421-1891

Robert A. Spolzino, Esq.  
Fax No.: (914) 323-7001

Christopher B. Fischer, Esq.  
Andrew P. Schriever, Esq.  
Troy D. Lipp, Esq.  
Fax No.: (914) 761-5372

**FROM:** Chambers of the Honorable Barbara G. Zambelli

**PHONE:** (914) 824-5439

**MATTER:** Matthew Kaplan and Aimee Linn v. Village of Pelham, Robert Yamuder, in his capacity as the Administrator of the Village of Pelham; and Extenet Systems  
Index No.: 13-3827

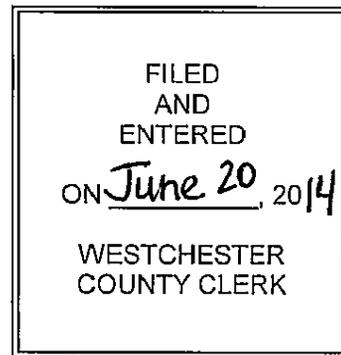
---

### COMMENTS:

Annexed please find a Decision and Order.

---

**\*\*NOTICE:** The information contained in the accompanying facsimile transmission is confidential and may also be legally privileged. It is intended to be viewed and used solely by the individual or entity named above. If you are not intended recipient of this facsimile or a representative of the intended recipient, you are hereby notified that any reading, dissemination, or copying of this facsimile or the information contained herein is strictly prohibited. If you have received this transmission in error, please contact sender at the above number.



SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

-----X  
 In the Matter of the Application of MATTHEW  
 KAPLAN and AIMEE LINN,

Petitioners,

DECISION & ORDER

For a Judgment Pursuant to Article 78  
 of the Civil Practice Law and Rules,

Index No. 13 / 3827

-against-

VILLAGE OF PELHAM, ROBERT YAMUDER, in  
 his capacity as the Administrator of the Village of  
 Pelham; and EXTENET SYSTEMS,

Respondents.

-----X  
 ZAMBELLI, A.J.S.C.

The following papers numbered 1-26 read on this on this petition for relief pursuant  
 to CPLR Article 78:

PAPERS NUMBERED

|   |       |
|---|-------|
| Notice of Verified Petition, Verified Petition, Barshov<br>Affirmation in Support with Exhibits A-I; Kaplan Affidavit<br>with Exhibits A-B;   | 1-6   |
| Binder Affirmation in Opposition with Exhibits 1-3; Angelini<br>Affidavit in Opposition with Exhibits 1-3, Memorandum of<br>Law in Opposition | 7-11  |
| Barshov Reply Affirmation with Exhibits A-E   | 12-13 |
| Exenet's Verified Answer, Binder Affirmation in Opposition<br>with Exhibits 1-3, Fisher Affirmation with Exhibits 1-6;                        |       |

|   |       |
|---|-------|
| Extenet's Memorandum of Law in Opposition to Petition                   | 14-19 |
| Village's Verified Answer & Memorandum of Law in Opposition to Petition | 20-21 |
| Certified Record of Proceedings with Exhibits 1-10                      | 22    |
| Village Memorandum of Law in Reply to Extenet's Memorandum              | 23    |
| Reply Affirmation of Steven Barshov with Exhibits A-F                   | 24-25 |
| Petitioner's Reply Memorandum   | 26    |

Upon the foregoing papers it is ordered that this application is disposed of as follows:

The petitioners Matthew Kaplan and Aimee Linn ("petitioners") reside at 203 Cliff Avenue, Pelham, New York. Petitioners commenced an Article 78 proceeding against the respondents Village of Pelham ("Village") and Robert Yamuder ("Yamuder"), the Village Administrator, seeking to 1) annul and vacate the September 19, 2013 Right of Way Agreement entered into between the Village and respondent ExteNet Systems, Inc. ("ExteNet"), 2) seeking to annul and vacate the determination of Yamuder which authorized the construction and installation of ExteNet's wireless telecommunications facilities in the Village, 3) seeking to enjoin the construction, installation and operation of the wireless telecommunications facilities in the Village unless and until ExteNet obtains a special use permit pursuant to Ch. 87 of the Village Code, and 4) ordering the Village and ExteNet to remove the three wireless telecommunications facilities that have been installed without a special permit. In conjunction with their Article 78 proceeding, petitioners submitted a proposed order to show cause requesting a temporary restraining order ("TRO") and a preliminary injunction "enjoining and restraining the Respondents from further constructing, installing and operating the distributed antenna system ("DAS") node and other wireless communications equipment at the utility monopole located at 156 East Second Street in

the Village of Pelham, New York; and at the two other locations specified in the Right-of-Way Agreement with the Village that was signed September 19, 2013" and "enjoining and restraining Respondents from installing, activating, or operating, any additional wireless telecommunications facilities in the Village of Pelham without a special use permit issued pursuant to Chapter 87 of the Pelham Village Code." After the parties were given an opportunity to brief the issue, by Decision and Order dated November 26, 2013, this Court (Zambelli, J.) denied the request for a TRO and a preliminary injunction in this matter, noting, inter alia, that the system had already been constructed prior to the filing of the petition.

Respondent ExteNet is a provider of telecommunications services which is organized under New York law as a "telephone corporation" and possesses a Certificate of Public Convenience and Necessity ("CPCN") issued by the New York State Public Service Commission ("PSC"). Beginning in approximately early 2011, ExteNet retained counsel (Jeffrey Binder) to assist it in obtaining "all necessary approvals" from the Village for the installation and construction of ExteNet proposed DAS network within the Village. ExteNet ultimately determined that its proposed system required the installation of three transmitting nodes, two which were capable of being deployed on existing utility poles and one which required the construction of a new utility pole, which ExteNet sought to construct in the Village right-of-way ("ROW") at 156 East Second Street, a location that is diagonally across from petitioners' home. After discussions with various Village officials, on April 11, 2013, ExteNet submitted an application for a special permit "[p]ursuant to Chapter 87" of the Village Code ("Code") (Certified Record of Proceedings, ("CR"), Exhibit 1). Chapter 87,

entitled as the "Wireless Telecommunications Facilities Siting Law for the Village of Pelham" (Code §87-2), requires a "special use permit" as "the means by which an applicant is allowed to construct and use wireless telecommunications facilities as granted or issued by the Village." (Code §87-4). The statutory scheme further provides that "[n]o wireless telecommunications facilities shall be installed or constructed until the application is reviewed and approved by the Village, and the special use permit has been issued." (Code §87-6(E)). Code §87-6 sets forth the application and other requirements for the issuance of the special permit. ExteNet's application included, inter alia, a full environmental assessment form ("EAF") submitted pursuant to the State Environmental Quality Review Act ("SEQRA") (Id.).

On June 18, 2013, the Village Board held its regular public meeting at which ExteNet's proposed DAS network was discussed. Mr. Binder attended on behalf of ExteNet, and according to the minutes of that proceeding, he represented that "ExteNet [was] prepared to proceed with any processes the Village would like them to go through in order to begin this work." (CR, Exhibit 2, p. 6). A trustee asked what would happen were the Village to deny ExteNet the right to install its equipment, to which Mr. Binder responded that "Federal law allows [telecommunications] companies to move ahead with the installation, however, ExteNet would prefer to work with the municipality." (Id.). The Board adjourned the matter, which was next heard at the Board meeting on September 3, 2013, where Mr. Binder appeared with an engineer from ExteNet. At this meeting, Mr. Binder indicated that ExteNet was "under a tight deadline" and was hoping to have the Board issuing a resolution approving its project at the next meeting (CR, Exhibit 3, p.12).

Regarding the proposed new utility pole, ExteNet was asked if the new pole was necessary and advised that due to pre-existing equipment on the existing pole, there was no room to add new equipment, thus the construction of the new pole was deemed necessary by ExteNet in order to provide the appropriate signal strength. It was also indicated that ExteNet was in negotiation with the Village of Pelham Manor on the same issue. The Mayor stated that he wanted to see more about what other municipalities were doing on these matters and thus proposed that the Board not vote on the issue until its September 17<sup>th</sup> meeting and after the Mayor had consulted with the Village Attorney (Id.).

At the Board meeting held on September 17, 2013, Yamuder advised that the Village had engaged in several meetings with ExteNet regarding the installation of the DAS network in three separate locations around the Village, that one of the Trustees and the Village Attorney had reviewed the "agreement", an apparent reference to a ROW Agreement, and suggested edits which had been accepted by ExteNet, although ExteNet indicated that there were no substantive edits (CR, Exhibit 4, pp. 8-9). A motion was then made to vote on a resolution approving the Agreement and authorizing the Mayor, Yamuder and the Village Attorney to execute it, which resolution was unanimously approved by all seven trustees (Id.). The Court notes that there is no indication in the record of proceedings that the application that ExteNet filed on April 11, 2013 was ever discussed by the Board, and there is also no indication that the application was ever the subject of a Board vote.

Thereafter, on September 19, 2013, Yamuder executed the ROW Agreement on behalf of the Village (CR, Exhibit 5). ExteNet obtained Village approvals from the Building

Department for electrical and mechanical permits to construct its DAS system on pre-existing monopoles at 156 Cliff Avenue and 355 Pelhamdale Avenue, and to construct a new monopole for the third system at 156 East Second Street (CR, Exhibit 6). Extenet then proceeded to construct its system, which construction was complete on or about October 31, 2013.

Petitioners bring this Article 78 proceeding seeking to annul and vacate the September 19, 2013 ROW Agreement entered into between the Village and ExteNet. Petitioners argue that Yamuder's authorization of the construction and installation of the DAS network was arbitrary and capricious and contrary to law. They submit that the ROW Agreement contained a provision requiring ExteNet to obtain all required governmental permits as a precondition to Yamuder's authorization. They note that while Chapter 87 of the Village Code requires that a special use permit be obtained for wireless communication facilities, Yamuder failed to require ExteNet to obtain one, thus rendering his authorization arbitrary and capricious. Petitioners also argue that the resolution by the Village Board approving the ROW Agreement was arbitrary and capricious because the Board failed to comply with SEQRA in making its determination, in that they submit that the Board failed to designate itself as a lead agency, failed to require the preparation of an EAF, failed to identify any potential environmental impacts arising from the approval of the ROW Agreement, failed to issue any determination of significance and failed to take a "hard look" at the potential adverse environmental impacts of approving the ROW Agreement.

The respondents Yamuder and the Village ("Village respondents") oppose the petition. The Village argues that the petitioners lack standing to challenge the Village's

actions, because petitioners have suffered no environmental injury as a result of the construction of the single telephone pole that was constructed diagonally across the street from petitioner's residence. It further argues that petitioner's claims are moot, given that the telephone pole with which they are concerned has already been erected. The Village respondents argue that in any event, the Village's actions did not require SEQRA review because there would be no meaningful impact on the human environment within the Village's authority to review and thus that the project was exempt from SEQRA. The Village also submits that Ch. 87 of the Village Code did not apply to the approval of the project at issue because certain provisions contained therein which require that telecommunications facilities be set back certain distances from the ROW would be irrational to apply to a project which was intended to be constructed in a ROW. The Village further submits that to apply Ch. 87 to ExteNet's project would run the risk of conflict with the federal Telecommunications Act of 1996 ("TCA"), as set forth at 47 U.S.C. §253, because given that Chapter 87 requires set backs from ROWs, these provisions would effectively entirely prohibit ExteNet's project from being constructed in the ROW, which would run afoul of that federal law. The Village contends that rather than take that course, the Board did not apply Chapter 87 to ExteNet's application, but "reviewed it in essentially the same manner as it would have if Chapter 87 were applied", as it considered the application at three public meetings over a course of four months, that petitioners did not appear at these meetings to object, that the Board considered the location, the height and appearance of the pole, and required ExteNet to demonstrate that there was no alternative

location that would provide the necessary service but was less visible, and that the Board determined that the service was needed and that there was no feasible alternative.

In its opposition to the petition, ExteNet argues that since it is a telephone corporation and public utility under New York law who possesses a CPCN, it has a right to construct and maintain utility infrastructure within municipal ROWs, subject only to the consent of the municipality. ExteNet argues that this "consent" is limited to the management of the ROW pursuant to the TCA, and in exercising the right to manage, municipalities may not exclude utilities from using the public ROW. ExteNet further argues that the Village's actions were taken in accordance with its limited municipal authority under state and federal law. ExteNet contends that Ch. 87 is entirely preempted by federal law because it is a comprehensive statute that address telecommunications facilities and their consistency with the Village's land use policies, which ExteNet submits exceeds the Village's authority, as it submits that the Village's right to manage the ROW is limited to safety considerations only. ExteNet further argues that the determination by Yamuder and the Building Official (who issued the electrical and mechanical permits to construct the facilities) to allow the project to proceed was necessarily based upon their implied determination that Ch. 87 did not apply to ExteNet's project, which determination ExteNet submits was rationally based and must be upheld by this Court. ExteNet submits that the determination was rational because Ch. 87 contains no provisions indicating that it specifically applies to structures for wireless services intended to be placed in ROWs, and in the absence of such legislation, the Village acted appropriately. ExteNet further argues

that applying Ch. 87 to its project would illegally discriminate among telecommunications companies in violation of federal law. ExteNet submits that as Ch. 87 applies by its terms only to telecommunications companies, it could never be applied evenhandedly to all entities which use the Village ROW, including other public utilities and telecommunications companies. ExteNet submits that, upon information and belief, neither ConEd nor Verizon's projects in the Village ROWs require review under Ch. 87, nor are they subject to ROW agreements. They also submit that many of Ch. 87's provisions would run afoul of the TCA because they afford the Village with unfettered discretion to deny applications.

As to SEQRA, ExteNet argues that the Board's determination to consent to ExteNet's use of its ROW is an act of a ministerial nature involving no exercise of discretion, and thus is exempt from SEQRA as a Type II action; they also argue that this action would also be exempt as Type II on the basis that it is an extension of "utility distribution facilities" as set forth at 6 N.Y.C.R.R. §617.5(c)(11). To the extent that the Board could be determined to have some discretion regarding ExteNet's project, ExteNet argues that any discretion the Board has is limited to managing the ROW and would not encompass environmental concerns, making SEQRA review unnecessary.

In reply, petitioners dispute that they lack standing or that this proceeding is moot. They also argue that the Board's failure to comply with SEQRA and Ch. 87 are pure questions of law which may be decided by the Court without deference to the Board's interpretation. Petitioners further argue that because the ROW Agreement was approved and building permits were issued without prior compliance with SEQRA, the approvals

should be annulled and vacated and the monopole with the DAS network should be ordered removed. Relatedly, they also dispute that ExteNet's project is exempt from SEQRA as a Type II action. In any event, they note that the record is devoid of any action by the Board which determined what type of action ExteNet's project was under SEQRA, which petitioners submit is a violation of SEQRA's mandatory procedures. Petitioners further argue that Ch. 87 and the Village's power to reasonably regulate and exercise its discretion regarding the siting of telecommunications facilities are not preempted by state or federal law, even when the projects are proposed for municipal ROWs. As to ExteNet's arguments that applying Ch. 87 to it would result in impermissible discrimination because such requirements would not apply to the other non-telecommunications utilities, such as Con Edison, who use the ROW for their projects, petitioners argue that such a claim is speculative and premature until such time that the Village actually applies Ch. 87 to ExteNet's project.

As an initial matter, petitioners have standing to bring this proceeding. In order to establish standing under SEQRA, petitioners must demonstrate both that they suffer an environmental injury that is in some way different from the public at large and that the alleged injury falls within the zone of interests to be protected or promoted by SEQRA (Matter of Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo, 112 A.D.3d 726, 727-728 (2d Dept. 2013)). Moreover, an injury in fact may be inferred from a demonstration of close proximity of petitioners' property to the proposed project (Id. at 728). Here, petitioners object to the construction and installation of the monopole and DAS equipment

which was constructed diagonally across the street and approximately 60 feet from petitioners' home (Kaplan Affirmation, ¶5). Petitioners allege that the monopole is visible from every room of their home which fronts the street (Id., ¶7). Petitioners object to the monopole on the grounds of aesthetics, community character and the historical value of their home and neighborhood (Id., ¶4-7). Such concerns are clearly within the zone of interests to be protected by SEQRA, which defines "environment" as "the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." (6 N.Y.C.R.R. §617.2(l)). Given the close proximity of petitioners' property to the project at issue and the fact that their alleged injury falls squarely within the ambit of SEQRA, petitioners have standing to bring this proceeding (Matter of Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo, supra; see also Matter of Ziemba v. City of Troy, 37 A.D.3d 68 (3d Dept. 2006) (holding that residents in the immediate vicinity of a project who will be visually impacted as a result thereof have standing under SEQRA)).

Nor is this proceeding moot. The Village argues that this proceeding is moot because the monopole has already been constructed and the DAS equipment has been attached to it and is operational. However, while the construction of an underlying project can render a challenge to it moot where a petitioner has made no effort to preserve its rights pending judicial review, where a petitioner acts promptly upon learning of a project,

the proceeding is not moot, especially where petitioner sought but did not obtain injunctive relief (see Matter of Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach, 98 N.Y.2d 165, 172 (2002); Matter of Watch Hill Homeowners Assn. v. Town Bd. of Town of Greenburgh, 226 A.D.2d 1031, 1032 (3d Dept. 1996), lv. denied, 88 N.Y.2d 811 (1996); Matter of Michalak v. Zoning Bd. of Appeals of the Town of Pomfret, 286 A.D.2d 906 (4<sup>th</sup> Dept. 2001)). Petitioners herein aver that they were unaware of the project until the monopole “replete with multiple protrusions and electronic equipment” was actually constructed and installed on September 26, 2013 (Kaplan Affidavit, ¶5). Petitioners aver that they immediately contacted Village officials regarding the circumstances of the monopole’s installation (Id., ¶8). On October 31, 2013, upon observing personnel from Con Edison at the pole and learning from them that the equipment would soon be operational, petitioners retained counsel, who commenced this proceeding on November 6, 2013 (Id., ¶21). Counsel sought injunctive relief, which as noted above, was denied by this Court. Accordingly, under the facts and circumstances of this case, the proceeding is not moot.

Turning to the merits of the proceeding, pursuant to the state’s Transportation Corporations Law, a telephone corporation such as ExteNet has the right to “erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways . . . provided that such corporation shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, or other body having like jurisdiction therein, the trustees of villages, or the town

superintendents of towns, permission to use the streets within such city, village or town for the purposes herein set forth.” (Transp. Corp. Law §27). Courts have interpreted the right granted by this section as “the right to exist as a corporation, while the privilege of using public streets is a right that must be granted at the local level.” (TC Systems Inc. v. Town of Colonie, 263 F.Supp.2d 471, 491 (N.D.N.Y. 2003), citing People's Cable Corp. v. City of Rochester, 70 Misc.2d 763, 767 (Sup. Ct. Monroe Co. 1972)). Localities retain the right to regulate and manage the ROW in terms of coordinating construction schedules and ensuring public safety, but are also permitted “to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles.” (Village of Carthage v. Cent. N.Y. Tel. & Tel. Co., 185 N.Y. 448, 452 (1906)). Indeed, the Court of Appeals clarified over a hundred years ago that “the right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate.” (Id.).

Under federal law, the Telecommunications Act of 1996 provides at, 47 U.S.C. §253(a), that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide and interstate or intrastate telecommunications service.” However, regarding state and local governmental authority, the statute further provides that “[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way . . . .” (47 U.S.C. §253(c)). In the section of the statute that addresses mobile services, the

preservation of local zoning authority is expressly addressed and provides that “nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities” (47 U.S.C. §332(c)(7)(A)), with the caveats that the local regulation shall not unreasonably discriminate among providers of functionally equivalent services (47 U.S.C. §332(c)(7)(B)(i)) nor may it prohibit or have the effect of prohibiting the provision of personal wireless services (47 U.S.C. §332(c)(7)(B)(ii)). Thus, neither state nor federal law grants a telecommunications provider “carte blanche authority to dictate the number and location” of its facilities (see Matter of Site Acquisitions, Inc. v. Town of New Scotland, 2 A.D.3d 1135, 1137 (3d Dept. 2003), quoting Sprint Spectrum v. Willoth, 996 F.Supp. 253, 257 (W.D.N.Y. 1998), aff’d 176 F.3d 630 (2d Cir. 1999)).

From the recitation of the above, it is clear that the Village maintains significantly more authority over its ROW than ExteNet contends and that the representation made to the Village that if it denied ExteNet the right to install its equipment, “Federal law” allowed ExteNet “to move ahead with the installation” was, at best, a gross misstatement of the law. The above case law also makes clear that, as indicated in the Court’s decision on the TRO, neither Ch. 87 nor SEQRA are pre-empted in their entirety by federal or state law in this matter. Indeed, while ExteNet disputes that “aesthetics” is a valid concern of municipal authorities when it comes to telecommunications equipment to be installed in a ROW, such zoning concerns have been held to be valid and not in conflict with the TCA, so long as

they do not have the effect of prohibiting wireless services (see Crown Castle NG East, Inc. v. Town of Greenburgh, 2013 WL 3357167 (S.D.N.Y. 2013) (No. 12 CV 6157 (CS)); aff'd, 552 Fed. App. 47 (2d Cir. 2014) (upholding that part of Town of Greenburgh's Antenna Law which required wireless provider who wished to construct a DAS system in the Town's ROW to obtain a special permit and demonstrate that its proposed facility "is the minimum height and aesthetic intrusion necessary to provide coverage", though the Court found that the record lacked sufficient evidence to support the Town's denial on this ground); see also Matter of Crown Comm. N.Y., Inc. v. Dept. of Transportation, 4 N.Y.3d 159, 164 (2005) (noting that environmental review under SEQRA was performed on telecommunications providers application to construct and operate telecommunications towers on state owned lands and ROWs)).

As to ExteNet's argument that Ch. 87 does not apply because it no where specifically states that it applies to wireless facilities to be constructed in the Village's ROW, this argument is devoid of merit. The plain language of the chapter makes clear that it applies anywhere in the Village, even on Village owned property and indeed, in addressing "location", the chapter evinces the Village's preference to have such facilities be constructed on Village property located in commercial areas (see generally Village of Pelham Code, Ch. 87; Code §87-7 (CR Exhibit 10)). The statutory language also makes clear that Ch. 87 shall apply unless it has been pre-empted by other law (Code §87-32). To the extent that Ch. 87 contains provisions that are determined to be pre-empted or would be non-sensical to apply to the application, such as requiring a certain set back

distance from the ROW for a project intended to be located in a ROW, they may be severed (see TCG New York, Inc. v. City of White Plains, 305 F.3d 6, 81 (2d Cir. 2002)). As to the contention that applying Ch. 87 to it would be discriminatory because, upon ExteNet's "information and belief" neither Con Edison nor Verizon have been required to go through that procedure, these claims are speculative because Ch. 87 was not applied to ExteNet and it has not been established that any there has been any discrimination against "providers of functionally equivalent services." (47 U.S.C. §332(c)(7)(B)(i)).

As to the argument that SEQRA does not apply because the Village's approval of ExteNet's application is a ministerial act involving no exercise of discretion, and thus that the action would be a Type II action which is exempt from further review under that statute, this argument is also unavailing. As an initial matter, SEQRA requires that an agency make an initial determination as to whether an action is subject to the statute (6 N.Y.C.R.R. §617.6(a)(1)(i); Matter of Hazan v. Howe, 214 A.D.2d 797, 799 (3d Dept. 1994)).<sup>1</sup> The statute further provides that no agency involved in an action may approve the action until it has complied with the provisions of SEQRA (6 N.Y.C.R.R. §617.3(a)). It is black letter law that strict compliance with SEQRA is required (Matter of Rivero v. Rockland Co. Solid

---

<sup>1</sup>ExteNet cites to Matter of Civic Ass'n of Utopia Estates, Inc. v. City of New York, 258 A.D.2d 650 (2d Dept. 1999) for the proposition that where an action is exempt from SEQRA as Type II, an agency need not make any specific declaration as to SEQRA's applicability. However, that case is distinguishable from the matter at bar. The Utopia Estates case involved the replacement of a sewer line which clearly fell under the Type II exemption for "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site" and the applicant demonstrated that such projects were routinely viewed as Type II actions. As the Supreme Court noted in its decision, there was "no substantial doubt" that the project was a Type II action, thus under the facts and circumstances of that case, no specific declaration as to type was required (175 Misc.2d 779,782 (Sup. Ct. Queens Co. 1998). Here, the facts are not so clear, and contrary to ExteNet's position, the Court finds as a matter of law that the Village approval of its project is not a ministerial act.

Waste Mgmt. Auth., 96 A.D.3d 764, 765 (2d Dept. 2012)). The record herein is entirely devoid of any determination or even discussion by the Board regarding whether ExteNet's application was deemed to be a Type II action. Moreover, the statutory and case law cited supra demonstrates that the Village's consent to the use of its ROW is a discretionary and not a ministerial act, given that the Village retains control over the placement, construction and modification of the facilities within the ROW (see also Matter of Benvenuto v. Village of Millerton, 10 Misc.3d 770, 772 (Sup. Ct. Dutchess Co. 2005) (holding that a grant of an easement to a private citizen to construct an access on a public ROW is not a ministerial act)). As to ExteNet's alternative or additional argument that the project is exempt from SEQRA as a Type II action because it involves the "extension of utility distribution facilities, including . . . telephone . . . connections to render service in approved subdivisions" (6 N.Y.C.R.R. §617.5(c)(11)), this argument is easily rejected, as this matter does not involve "service in approved subdivisions".

Given that neither Ch. 87 nor SEQRA are preempted in their entirety, ExteNet's application for a special permit, which included a full environmental assessment form ("EAF") submitted pursuant to SEQRA, should have been acted upon by the Village. The Village acted in error of law by issuing its resolution and authorizing Yamuder to enter into the ROW Agreement with ExteNet; it necessarily follows that the various building permits issued for the project were also issued in error of law. Accordingly, the Court grants the petition and annuls and vacates the September 17, 2013 resolution authorizing Yamuder to enter into the ROW Agreement with ExteNet, and annuls and vacates the ROW

Agreement itself and the construction permits which were issued thereunder, as all were issued in error of law. The Court remits this matter to Village to act upon ExteNet's Ch. 87 application and to apply SEQRA to it. However, as noted in the decision on the TRO, the Court takes no position as to whether all of the provisions of those statutes apply and would survive scrutiny under 47 U.S.C. §253(a) and Transportation Corporations Law §27 as that question is not properly before this Court given that ExteNet was not required by the Village to comply with Ch. 87 and SEQRA in any way. To this end, the Court notes that there is ample case law that is instructive and presumably the Village Attorney can advise the Village in that regard.

As to the petitioners' requested relief that the monopole and equipment be removed from the three locations, the Court holds that part of its petition in abeyance pending the Village's decision on ExteNet's application. It is noted that federal law requires that requests to authorize the installation of wireless communications equipment must be acted upon in a "reasonable period of time" (47 U.S.C. §332(c)(7)(B)(ii)) and the FCC has issued a "Shot Clock Order" which interprets such time period to be 150 days for review of siting applications for new facilities (24 F.C.C.R. 13994). Accordingly, the Court directs the Village to act on ExteNet's application within 150 days of the issuance of this Decision and Order. Should the application not be acted upon within that time frame or should ExteNet's application be denied, petitioners should notify the Court, which, upon notice to the parties, will direct the removal of the subject pole and equipment from the three locations in the Village.

This Decision and Judgment constitutes the Order of the Court.

Dated: White Plains, New York  
June 20, 2014

  
BARBARA G. ZAMBELLI  
A.J.S.C.

Sive, Paget & Riesel, P.C.  
Attorney for Petitioners  
460 Park Avenue  
New York, New York 10022-1906  
Attn: Stephen Barshov, Esq.

Wilson Elser Moskowitz Edelman & Dicker LLP  
Attorneys for Respondent Village of Pelham  
1133 Westchester Avenue  
White Plains, New York 10604  
Attn: Robert A. Spolzino, Esq.

Cuddy & Feder LLP  
Attorneys for Respondent ExteNet Systems, Inc.  
445 Hamilton Avenue - 14<sup>th</sup> Floor  
White Plains, New York 10601  
Attn: Christopher B. Fischer, Esq.  
Andrew P. Schriever, Esq.  
Troy D. Lipp, Esq.

Nancy Barry, Esq.  
Chief Clerk