

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**THE TOWNSHIP OF NORTHAMPTON**

55 Township Road  
Richboro, PA 18954

**Plaintiff,**

**v.**

**ATC OUTDOOR DAS, LLC**

116 Huntington Avenue, 11<sup>th</sup> Floor  
Boston, MA 02116

**Defendants.**

Civil Action No. \_\_\_\_\_

**THE TOWNSHIP OF NORTHAMPTON'S BRIEF IN SUPPORT OF PETITION  
FOR PRELIMINARY INJUNCTION AGAINST ATC OUTDOOR DAS, LLC**

**I. FACTS**

The Township of Northampton ("Township") is a Pennsylvania Township of the Second Class, located in Bucks County Pennsylvania and within the Eastern District of Pennsylvania. The Township maintains its offices at 55 Township Road, Richboro, Pennsylvania 18954. Defendant, ATC Outdoor DAS, LLC ("ATC"), is a Delaware limited liability company which is registered to do business in the Commonwealth of Pennsylvania, maintaining its principal place of business at 116 Huntington Avenue, 11<sup>th</sup> Floor, Boston, Massachusetts, 02116.

Township has filed a Complaint seeking declaratory and injunctive relief to prevent ATC from constructing and/or installing telecommunications facilities including, but not limited to "nodes" (consisting of a wireless antenna and related telecommunications equipment), varying in height from twenty-five (25) feet to forty (40) or more feet, "hub sites" (connecting nodes to

each other and to a small building), thirty (39) miles of fiber optic cable (approximately thirty miles above ground and nine miles underground), as well as installations on thirty-six (36) existing utility poles and twenty (20) new poles. The gravamen of Plaintiff's Complaint is that ATC has failed to comply with the Township's Telecommunications Facilities Ordinance and Zoning Ordinance with respect to the construction and installation of the telecommunications equipment, as required under the Federal Telecommunications Act of 1996. 47 U.S.C. §332(c)(7)(A).

## II. ARGUMENT

Under Federal law, the Township is entitled to injunctive relief if it demonstrates (1) a reasonable probability of success on the merits and (2) that it will be irreparably harmed if an injunction is not granted to restore the status quo. *Vector Security, Inc. v. Stewart*, 88 F.Supp. 2d. 395 (E.D.Pa. 2000). The Township has met this standard and a preliminary injunction should be granted.

### A. **THE TOWNSHIP IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM**

After initial meetings and disclosures between ATC and Township, at which time ATC disclosed its intent to install a DAS system, consisting of the above referred telecommunications infrastructure components, to the Township, by letter dated July 25, 2011, Michael T. Solomon, Director of Planning and Zoning for the Township, advised ATC that, among other deficiencies, "the proposed work identified previously (the installation and construction of ATC's telecommunications facilities) is not related to a permitted use pursuant to §§ 140-58.5, 140-10, 140-13.1, 140-13.3, 140-14, 140-15, 140-16, 140-17, 140-20, 140-21, 140-21.1, 140-23, 140-35,

140-28, 140-36 and 140-36.1 of the Northampton Township Zoning Ordinance”. Mr. Solomon also advised ATC that it had a right to appeal to the Township Zoning Hearing Board.

The above referenced sections are all derived from the Township Zoning Ordinance, as is section § 140-58.5, which is entitled “Telecommunications Facilities Ordinance”. This ordinance has since been recodified as § 27-1123 of the Zoning Code, with the latter requiring that no telecommunications tower be located within three hundred (300) feet of a lot in a residential use or a residential district boundary.

ATC filed an appeal from Mr. Solomon’s letter and said appeal was limited solely to a challenge of a prior determination of the zoning officer, dated June 29, 2011, to wit: that the installation of the proposed hub site at 10 Commerce Drive within the Township required approval by the Township as a land development plan, as defined under the Pennsylvania Municipalities Planning Code and the Northampton Township Zoning Ordinance and Subdivision and Land Development Ordinance. ATC’s appeal to the ZHB (which was dated July 28, 2011) did not address any of the issues raised by Mr. Solomon’s July 25, 2011, letter. On or about October 24, 2011, the Township Zoning Hearing Board granted ATC’s appeal for approval for the site at the above referenced location, ruling that the land development approval was not required. Since that time, ATC has not sought any relief from the Northampton Township Zoning Hearing Board as required by the Zoning Ordinance and the Telecommunications Facilities Ordinance.

ATC instead filed an action in mandamus, declaratory judgment and injunctive relief in the Court of Common Pleas of Bucks County, seeking only a determination that ATC was exempt from the requirements of the Township’s Right of Way Ordinance. Judge Bateman of that Court ruled that ATC was exempt from the Township’s Right of Way Ordinance. Following

the issuance of that Order, the Township and ATC entered into a settlement agreement, which once again was limited to issues concerning the Right of Way Ordinance and made no mention of, or determination regarding, the Zoning Ordinance.

Indeed the Township was unaware that the proposed DAS system installation, upon which the settlement was premised, was, in fact, in direct violation of the Township's Zoning Ordinance at the time of the settlement. The permit application submitted by ATC for installation of the DAS system contained information which detailed the type of equipment to be installed generally, and a generic list of property addresses at which ATC was proposing to install equipment. However, the application did not contain any information which specifically detailed the nature of the equipment proposed to be installed at any specific location within the Township. In other words, ATC did not disclose its intent to install new telecommunications facilities or towers within specific residential communities as a part of its initial permit application, and the Township was unaware that the DAS system was in violation of the Township Zoning Ordinance until installation commenced.

For that reason, the Township issued a "Stop Work Order," directing that ATC cease and desist from all construction work. Since that time, ATC filed a Petition for Contempt in Bucks County, but once again, the Petition is related only to issues raised in its underlying Complaint, to wit: the Right of Way Ordinance issues.

The Township has now filed the instant Complaint in this Court, seeking the Declaratory and Injunctive Relief set forth therein, which essentially asks that this Court order that ATC comply with the requirements of the Township Zoning Ordinance and the Telecommunications Ordinance, thereby standing in the same shoes as any other entity or person desiring to construct anything within the Township. The Township's Telecommunications Facilities Ordinance and

the Township's actions with respect to ATC pursuant to the Ordinance fall squarely within the Township's legal authority under federal and state law.

With respect to federal law, the Ordinance is fully consistent with the Telecommunications Act of 1996. While a major purpose of the Act was to promote competition in the telecommunications industry, the Act also expressly recognizes and preserves the fundamental zoning authority of municipalities. Section 332(c)(7) of the Act is entitled "Preservation of Local Zoning Authority." Subsection (A), entitled "General Authority", states as follows:

Except as provided in this paragraph, nothing in this Act 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). In the Act, the term "personal wireless services" is defined as "commercial mobile services, unlicensed services and common carrier wireless exchange services." 47 U.S.C. §332(c)(7)(C)(i). The term "personal wireless service facilities" is defined as "facilities for the provision of personal wireless services." 47 U.S.C. §332(c)(7)(C)(ii).

ATC's DAS system consists of facilities for the provision of commercial mobile services. These facilities are, therefore, personal wireless service facilities subject to the zoning authority of the Township. The Township has legal authority over the placement, construction and modification of such facilities pursuant to its Telecommunications Facilities Ordinance and the Federal Telecommunications Act.

This issue was squarely addressed by the United States District Court for the Eastern District of California in *NewPath Networks, LLC v. City of Davis*, 2010 U.S. Dist. LEXIS 40043 (decided March 18, 2010). In *NewPath*, the District Court considered a factual history which is

strikingly similar to the matter at bar and rejected arguments that NewPath's proposed DAS System was exempt from regulation under the local zoning ordinance, and denied a preliminary injunction to permit installation of the system over the stop work orders issued by the City of Davis.

It is therefore respectfully submitted that the Township is likely to be successful on the merits of its Complaint, and that it is entitled to injunctive relief to prevent any further irreparable harm to the Township and to its residents.

**B. A PRELIMINARY INJUNCTION WILL PREVENT IRREPARABLE HARM**

A Preliminary Injunction should be issued if greater injury will result from its denial than from its issuance. *Credit Alliance Corp. v Philadelphia Minit-Man*, 301 A. 2d 816 (Pa. 1973). In the instant case, it is abundantly clear substantial harm will result to the Township and its residents if ATC is permitted to construct its telecommunications system without regard to the requirements of the duly enacted Township Zoning Ordinance, including the Telecommunication Facilities Ordinance. Once the system is in place, there is no likelihood that the Township will be able to enforce its own rules and regulations, and its residents will suffer harm to their health, safety and welfare as a result. There is no harm to ATC by merely requiring it to do what it should have done in the first instance, that being to file the necessary applications to the Zoning Hearing Board so that that governmental body may have the hearings and make the decisions that the Municipalities Planning Code and the Northampton Township Zoning Ordinance have entrusted with them. It is only in this fashion that the residents of the Township may be protected and irreparable harm be avoided.

**C. THE PRELIMINARY INJUNCTION WILL RESTORE THE STATUS QUO**

The issuance of this Injunction will operate to maintain affairs between the parties as they existed prior to the dispute between them, and will compel ATC, as the wrongdoer, to give it the status it appropriated before any action could have been commenced against it. *West Penn Specialty MSO, Inc. v Nolan*, 737 A.2d 295 (Pa. Super. 1999); *Albee Homes, Inc. v Caddie Homes, Inc.*, 207 A. 2d 768 (Pa. 1965). If this Honorable Court were to issue this injunction, order would be restored to the zoning process in Northampton Township, and the Zoning Hearing Board, in the exercise of its quasi-judicial function, would be able to sort through the myriad issues imposed by the placement of these telecommunications facilities, and will then make an orderly determination under the appropriate rules as to its location, giving due regard to the rights of all of the parties. As the situation stands now, only ATC has been able to make that decision, apparently without regard to the health, safety and welfare of the Township and its residents. The status quo needs to be restored so that all parties can make their intention and needs known in the correct forum.

### III. CONCLUSION

It is therefore respectfully submitted that this Petition for Preliminary Injunction be granted and the proposed Order attached hereto be issued by this Honorable Court.

Respectfully submitted,



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