

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PENNSYLVANIA CELLULAR	:	No. 00-01,764
TELEPHONE CORPORATION d/b/a	:	
AT&T WIRELESS,	:	
	:	
Appellant	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
	:	
THE ZONING HEARING BOARD OF	:	
WOODWARD TOWNSHIP,	:	
LYCOMING COUNTY, PENNSYLVANIA,	:	
Appellee	:	Appeal

OPINION AND ORDER

This opinion is written in response to the Appeal filed by Pennsylvania Cellular Telephone Corporation d/b/a AT & T Wireless to the Woodward Township Zoning Hearing Board decision of September 27, 2000 denying Pennsylvania Cellular’s request for a special exception.¹ Pennsylvania Cellular is seeking approval of a proposed 180 foot high communications tower on property owed by Raymond Williams in Woodward Township. Mr. Williams owns a large tract of farmland located on Yeager Road. Mr. Williams has a home on the tract of land and the remaining portion of his land is used for farming or agricultural purposes. Mr. Williams has leased to Pennsylvania Cellular a 100,000 square foot parcel on his land, which is not actually farmed, for construction of the cellular tower.

The cellular tower is needed by Pennsylvania Cellular to allow them to

¹The Zoning Hearing Board’s decision was a 2-1 decision to deny the special exception, with one member of the Board dissenting.

provide seamless and continuous telephone service to its customers in this area.

Pennsylvania Cellular determined the tower to be necessary because it had received customer complaints of dropped or disconnected service in the area between Williamsport and Jersey Shore along Route 220. N.T., p. 70.

Pennsylvania cellular proposes to construct a 180 foot monopole and to erect a twelve (12) foot by twenty (20) foot prefabricated concrete equipment building to house the equipment which will operate the cellular communication antennas attached to the tower. The design of the tower is a monopole which resembles a flagpole which is not latticed. N.T., pp. 37, 40-50. The compound containing the tower and equipment building would be surrounded by an eight (8) foot high chain link fence with basked wire for security. (N.T., p. 49.

Public hearings were held before the Woodward Township Zoning Hearing Board on September 13 and 17, 2000. The Court has been provided with the transcript of the record of these proceedings and has taken no further testimony. The matter was appealed, briefed and argued before the Court by counsel for Pennsylvania Cellular, Eric J. Schock, Esquire. Although the Zoning Board provided the record in this matter to the Court by their Solicitor Richard Gahr, Esquire, the Board did not provide a brief or appear in Court to argue the matter. The record does contain the Zoning Hearing Board's Findings of Fact and Conclusions of Law. Counsel for Woodland Township, George Orwig, Esquire appeared for the argument on the appeal, but Mr. Orwig reported that the Woodward Township supervisors were not taking position on this matter. Thus, they did not brief or argue the matter. At the public hearings on September 13 and 27, 2000,

Attorney Thomas Marshall, Esquire appeared for a group of Woodward Township residents who were objecting to the proposed special exception, but neither Attorney Marshall nor the objecting residents intervened in Pennsylvania Cellular's appeal and they did not appear before the Court to argue or brief their position.² At the hearing before the Zoning Hearing Board, Raymond Williams, the landowner who was leasing the land to Pennsylvania Cellular to build the communication tower, produced an exhibit 2, which was a Petition in favor of granting the special exception signed by himself and three of his neighbors who live near the location of the tower. Likewise, the Court also notes that Attorney Marshall, on behalf of objectors to the special exception, submitted a petition signed by thirty-one (31) individuals who were opposed to the proposed special exception for the communication tower because they believed the tower would decrease their property value and would not be consistent with the surrounding residential development. This petition was marked as Objectors' Exhibit 1.

The record shows that the area where the communications tower would be built is in an Agricultural Zoning District which district specifically includes as a special exception use, "communication transmitting or receiving facilities." At the hearing before the Woodward Township Zoning Hearing Board the parties stipulated that the character of the neighborhood is residential, consisting of single dwelling family homes that have been

²First, the Court held a preliminary conference in this case on January 3, 2001, and set up a briefing schedule for the argument regarding this matter. A copy of the Court's Order dated January 3, 2001 and the Notice of the argument date was sent to Attorney Marshall to be sure he was aware of this matter, but the objectors did not intervene or file a brief in this matter. The only argument and brief was submitted by Pennsylvania Cellular.

classified as “upscale.” There are no commercial uses. All utilities are underground and there are no structures greater than the 30-35 feet high home of Dr. Steven Eck who is one of the objectors to Pennsylvania Cellular’s proposed tower. There are no chain link fences in the area. The development served by Sunset Drive is primarily residential except for the subject property of Raymond Williams whose large tract of property is used for farming or agricultural purposes. The objectors feel that the proposed communications tower would interfere in the preferred site view from their homes and would decrease the value of their property. See Woodward Township Zoning Hearing Board Findings of Fact. No. 13.

The Woodward Township Zoning Ordinance specifically permits communication transmitting or receiving facilities as a special exception use. The Woodward Township Zoning Ordinance, Section 1201(D), requires that in reviewing requests for special exceptions, the Zoning Board shall take into account the comments received from the Township Planning Commission and that the Board take into account the following requirements:

1. That the use is so designed, located and proposed to be operated that the public health, safety, welfare and convenience will be protected;
2. That the use will not cause substantial injury to the value of other property in the neighborhood where it is to be located;
3. That the use will be compatible with adjoining development and the proposed character of the zoning district where it is to be located;
4. That adequate landscaping and screening is provided as required herein;
5. That adequate off-street parking and loading is provided and

ingress and egress is designed to cause minimum interference with traffic on abutting streets; and,

6. That the use conforms with all applicable regulations governing the district where located, except as may otherwise be determined for large-scale developments.

In approving a Special Exception, the Zoning Hearing Board may attach whatever reasonable conditions and safeguards it deems necessary in order to insure that the proposed development is consistent with the purposes of this Ordinance.

The Woodward Township Zoning Hearing Board denied the special exception request in this case as did the Woodward Township Planning Commission by finding that the proposed special exception violated Clause 2 of the Ordinance in that the use would cause substantial injury to the value of other property in the neighborhood, by virtue of the view of the proposed tower. See Zoning Board's Conclusion of Law 4B at p. 9 of the Board's decision. The Zoning Board also found that Clause 3 of the Ordinance was violated by the proposed special exception, because the proposed use was not compatible with the adjoining development as a significant part of the adjoining development is residential. See Zoning Board Conclusion of Law, 4C, at p. 9.³ After a discussion of relevant Pennsylvania Appellate authority, the Board reached the following conclusion:

7. Based on the above, the Zoning Hearing Board concludes that the erection of a 180' monopole telecommunication tower in a cornfield that would be visible to at least five or six homes in the vicinity; would obstruct their views which are valuable

³The Zoning Board also found inadequate landscaping had been provided, although the Board acknowledged the applicant, Pennsylvania Cellular, offered to work out this problem with the township. See Zoning Board Conclusion of Law, 4D at p. 9.

and worth protecting and would diminish the value of their property, causing more of an impact than would ordinarily be expected from a “typical” communications tower of this type and height. This is an upscale neighborhood that has lovely vistas and the residents made the decision to live there based, in part, on the view.

It is recognized that in some neighborhoods, especially those that do not have views described by the Objectors, a communications tower would not have as much impact as it does in this neighborhood.

In the Court’s review of the complete record of this matter and applicable appellate case authority, the Court feels constrained to overturn the decision of the Woodward Township Zoning Hearing Board. It is clear by virtue of the Woodward Township Zoning Ordinance, Section 402 pertaining to designated agricultural districts such as is involved in this case, that “communication transmitting or receiving facilities” are a permitted special exception use. A special exception is not an exception to a zoning ordinance, but rather, is a use which is expressly permitted by the Ordinance, absent a showing of a detrimental effect on the community. Manor Health Care v. Zoning Hearing Board, 590 A.2d 65, 67 (Pa. Cmwlth. 1991). In the case of Zoning Hearing Board v. Konyk, 5 Pa. Cmwlth. 446 (1975), which discussed a special exception for a gasoline service station in a business zoning district, the Pennsylvania Commonwealth Court noted the following pertinent language:

The legislature in providing for Special Exceptions in zoning ordinance has determined that the impact of such a use of property does not, of itself, adversely affect the public interest to any material extent in normal circumstances, so that a Special Exception should not be denied unless it is proved that the impact upon the public interest is greater than that which might be expected in normal circumstance.... The

burden is on the township and the protecting neighbors, if there are any, to prove by evidence that the impact of the requested use in the normal operation would be injurious to the public health, safety and welfare.

5 Pa. Cmwlth. at 470-471.

The Commonwealth Court in the Konyk case then went on to note that the concerns to the gasoline service station expressed by the objectors and the township, ie. the traffic hazzard created by the service station and the service station would not be in keeping with the character of the neighborhood, were no more than the normal consequences usually found in the border - transition areas between business and residential zones. 5 Id. at

472. The Konyk Court concluded:

The Township did not restrict service stations from business areas bordering on residential zones. In failing to do so, in the exercise of its legislative function, it effectively determined that the consequences are presumptively insufficient to deny a Special Exception.

The Woodward Township Zoning Hearing Board accepted this legal proposition for they noted in their Conclusion of Law No. 6 in discussing Appellate Court rulings that the objectors must not only show a high probability that the proposed use would cause an adverse impact, but also, that the proposed use would create an adverse impact not normally generated by the type of use proposed. (Emphases added). Conclusion of Law 6, p. 11. It is difficult to find evidence in the record before us that shows that the proposed tower would create adverse condition not normally associated with a communication tower. There is no evidence in the record unique to this tower that shows why it will have an adverse impact beyond that of any transmitting or receiving tower which is permitted by

the Ordinance as a special exception use. See also Arch Bishop O'Hara's Appeal, 389 Pa. 35 (1957) where the Pennsylvania Supreme Court denied a Zoning Board's refusal to permit the construction of a Catholic school in a residential zone which contained a special exception permitting erection of a building for education purposes. The Supreme Court noted:

There is nothing in the contemplated use of this site of land by appellant which would depreciate or change the character of this neighborhood any more than would the establishment of any other school, church or philanthropic institution in the district. The conclusion reached in the court below in this respect would exclude any school from the district, a conclusion contrary to the language of the ordinance. No property owner is misled in this respect for every person purchasing a home site or a home in this district does so with notice contained in the ordinance that some day a school, a church or a philanthropic institution might be erected in the neighborhood.

389 Pa. at 55. (Emphasis added).

Likewise, in this case, it is difficult to imagine how the proposed communication tower would depreciate or change the character of the neighborhood any more than any other communication tower which is a permitted use by special exception in the Woodward Township Zoning Ordinance.⁴

While the Board cites to the correct legal standard, they do not seem to follow it. In their Conclusion of law No. 7, the Board concludes that the tower would be visible "to at least five or six homes in the vicinity." The Board then notes that the tower

⁴See N.T. 67, testimony of Jason Frolic, a civil engineering consultant for Pennsylvania Cellular, who testified that the tower in question was similar to other communication towers; and N.T. 123, testimony of realtor Connie Barger on behalf of objectors, that there was nothing unusual about this particular tower that would adversely affect property values.

would “obstruct their views which are valuable and worth protecting and would diminish the value of their property causing more of an impact than would ordinarily be expected from a typical communication tower of this type and height. This is an upscale neighborhood that has lovely vistas and the residents made the decision to have them based, in part, on the view.” It is clear that this conclusion of law is not based on anything unique or particular to the Pennsylvania Cellular tower, but rather, is based on the surrounding upscale homes and the owners’ expectations of pure vistas or views. Therefore, the Board seems to be basing its decision on the uniqueness of the homes affected by the challenged communication tower. The problem with this approach is that the Board, in not focusing on the communication tower, but rather the particular upscale area in which it would be placed, is in actuality rewriting the zoning ordinance. The zoning ordinance permits communication towers in this agricultural district as a special exception or use. The Board in focusing on the district and not the unique aspects of this particular tower is basically finding that communication towers are not compatible with the zoning district. If the board feels this is the case they should amend the zoning ordinance in the future and exclude communication towers as a permitted special exception. However, the Court is obliged to interpret the ordinance as written.

Further, the case law the Court has reviewed would not support the Board’s inferential findings that the objectors have met their burden of proof that there is a high degree of probability that the proposed use will substantially affect the health and safety of the community. The Court does not believe the evidence presented shows a high probability that the proposed use would create an adverse impact not normally generated

by the type of use proposed, but rather, an adverse impact would be created in this district by any communications tower. Again, the Court cannot change what is already permitted as a special exception use without appropriately amending the ordinance.

In the case of Soble Construction Co. v. Zoning Board, 16 Pa. Cmwlth. 599 (1974), the Pennsylvania Commonwealth Court considered an appeal by a company seeking to build a development of multi-family dwellings. The case involved a residential zoning district with primarily single family detached dwellings. However, the ordinance permitted, as a special exception, developments for multi-family dwellings. The applicant for the development filed for a special exception to approve development of multi-family dwellings with a total of 238 units. At the public hearing a number of residents objected to the submitted use claiming, among other things, that the planned units were not compatible with the adjoining developments and that the proposed plan would cause substantial injury to the value of other property in the neighborhood. The lower Court (Monroe County) upheld the Zoning Board's refusal to grant a special use permit. The Pennsylvania Commonwealth Court reversed the lower Court and the Zoning Board. The Commonwealth Court held that the zoning ordinance, in providing for the special exception, had determined that the impact of the multi-family property use does not, of itself, adversely affect the public interest to any material extent in normal circumstance. The Court then indicated that the burden of proving that the impact of the requested use in its normal operation would be injurious to the public health, safety and welfare would be on the township or protesting neighbors. The Commonwealth Court then stated:

Neither aesthetic reasons nor the conservation of property

values nor the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners, within the meaning of the enabling act or under the Constitution of Pennsylvania.

Id. At 607.

The Commonwealth Court then discussed the burden of proof on the township and/or objectors and concluded:

The protestants cannot sustain that burden by merely introducing evidence to the effect that property values in the neighborhood may decrease.

Id.

The Court thinks at best the objectors in the instant case have proven that the communication tower may diminish property values of approximately 5 or 6 home. (See Zoning Board's Conclusion of Law 7). There was not evidence presented to a high degree of probability that the proposed use would affect the safety, health and welfare of the community.

In conclusion, the Court is not trying to be critical of the Woodward Township Zoning Board in overturning their result. In studying the transcript of the hearings held by the Zoning Board Members, the Court recognizes that the Board worked diligently in hearing many hours of testimony. Likewise, the Court is not attempting to be critical of the objectors. In fact, the Court sympathizes with their desire to maintain the purity of their vistas and views. The reality, however, is that the zoning ordinance as presently written permits the use in question as a special use exception. The result as authorized by the Zoning Board would in essence change what has been permitted by the Woodward

Township Zoning Ordinance.

One final issue, not heretofore discussed concerns landscaping and screening. In Conclusion of Law 4B, the Zoning Board notes adequate landscaping and screening has not been provided, although the applicant offered to work with the township. The Zoning Board is far better and able to determine what landscaping and screening would be most appropriate. Thus, the Court will remand the matter to the Woodward Township Zoning Board to address this concern. See Butler v. Derr Flooring Company, 285 A.2d 538 (Pa. Cmwlth 1971).

Accordingly, the following is entered:

ORDER

AND NOW, this _____ day of July 2001, for the reasons stated in the forgoing Opinion, the Court GRANTS the Appeal of Pennsylvania Cellular Telephone Corporation.

The matter is remanded back to the Zoning Hearing Board of Woodward Township to address issues of landscaping and screening.⁵

By The Court,

Kenneth D. Brown, J.

cc: Erich J. Schock, Esquire
Richard Gahr, Esquire
George Orwig, Esquire
Thomas Marshall, Esquire
Work File
Gary Weber, Esquire, (Lycoming Reporter)

⁵The Court would suggest, as mentioned in the Pennsylvania Cellular's brief, that wooden fencing be used as opposed to chainlink fencing around the tower. This would seem to be more in character with the surrounding area.