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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4174-12T4

NEW YORK SMSA LIMITED
PARTNERSHIP, d/b/a
VERIZON WIRELESS,

Plaintiff-Appellant,

v.

BOARD OF ADJUSTMENT OF THE
BOROUGH OF BERNARDSVILLE,

Defendant-Respondent,

and

CITIZENS FOR PRESERVING
HISTORIC BERNARDSVILLE,
INC.,

Defendant/Intervenor-
Respondent.

Argued December 9, 2014 – Decided April 8, 2015

Before Judges Reisner, Koblitz and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0286-12.

Richard L. Schneider argued the cause for appellant (Vogel, Chait, Collins & Schneider, attorneys; Mr. Schneider, of

counsel and on the brief; David H. Soloway, on the brief).

John T. Lynch argued the cause for respondent Board of Adjustment of the Borough of Bernardsville.

Robert F. Simon argued the cause for respondent Citizens For Preserving Historic Bernardsville, Inc. (Herold Law, P.A., attorneys; Mr. Simon, of counsel and on the brief; Anand Dash, on the brief).

PER CURIAM

In this case, the Bernardsville Board of Adjustment (Board) denied plaintiff's application for (d) variances to permit installation of a 130-150 foot monopole in a residential neighborhood where cell towers and other commercial uses were prohibited and where the maximum allowed building height was 35 feet.[1] See N.J.S.A. 40:55D-70(d). The Board found that the proposed construction would be contrary to the local zoning ordinance and the zoning master plan relating to this residential area; the monopole would have a significant negative impact on neighborhood property values and on the character of the neighborhood; the proposed cell tower would only cover a small, sparsely populated area and a few lightly-traveled country roads; and there appeared to be other available

[1] Because the proposed use would be located on an under-size lot with an existing residence on it, the applicant also needed variances for intensifying the use of an under-size lot and placing a second principal use on the lot.

technologies and/or potential sites which would have a less severe impact on the local zoning.

The Law Division judge found that the Board's resolution was supported by the evidence and was not arbitrary and capricious. Having reviewed the record de novo in light of the applicable legal standards, we affirm the April 5, 2013 order from which plaintiff appeals.

I

The underlying facts are discussed at length in the Board's resolution and the Law Division judge's written opinion. We highlight here only what is most important to our decision.

First, on this record, there was ample evidence from which the Board could conclude that constructing a 130-150 foot monopole, purportedly "stealthed" (disguised) as a giant evergreen tree with plastic branches, would have a significant negative visual impact on the surrounding residential neighborhood. The proposed monopole would be from fifty to seventy feet higher than the surrounding trees, almost all of which were deciduous. As one of the objectors' experts cogently put it, the fake tree would not be fooling anyone. Further, the surrounding neighborhood was a park-like mountainous region, prized locally for its unspoiled natural beauty, and had been

zoned for ten-acre residential development, rather than smaller lot sizes, in order to preserve its valued natural qualities.

The applicant might have met this elephant-in-the-room problem head-on with evidence that the magnitude of the service gap was such that the need for the monopole outweighed the detriment to the local zoning. Instead, the applicant presented a less-than-credible case on important issues, and then appeared to take the untenable fall-back position that any gap in service, no matter how minor, would justify virtually any amount of damage to local zoning values.

A few examples will suffice. The applicant presented a planning expert who had conducted several "balloon" tests, designed to demonstrate where and to what extent a 130-150 foot monopole would be visible in the surrounding neighborhood. A balloon test is a typical element of the case presented by a cell phone tower applicant. The expert floats a large red balloon over the area where the monopole is to be constructed, takes photographs, and then superimposes a monopole in the photos. The Board found that in this case the expert's photo exhibit included skewed camera angles resulting in an unrealistic portrayal of the project's visual impact on the surrounding neighborhood.

Both sides presented expert testimony on whether construction of a monopole in this area would have a negative impact on property values. The objectors' real estate appraiser opined that it would significantly depress property values, and would make houses in a proposed upscale development across the road from the monopole "almost unsal[e]able." This expert compared sale prices of homes in another area where there was an existing 400-foot monopole, with the sale prices of similar homes that did not have a view of such a monopole. Of course, that example involved a much higher monopole than the one the applicant proposed.

However, the applicant's expert, who opined that the monopole would not affect property values, presented testimony that the Board reasonably found was less persuasive than the objector's expert. On his first appearance before the Board, plaintiff's expert testified about homes in a general area where there was a monopole, but admitted that the monopole was not visible from any of the homes in the study. The Board candidly advised the applicant's counsel that they viewed the expert's opinion as worthless for that reason, and gave the applicant a chance for a do-over.

When the same expert testified on another day, he this time had chosen to study homes in an area next to a fire house that

had a monopole disguised as a tall flag pole. This monopole had no branches or visible antennas. Rather, the equipment was entirely hidden within the pole, and it looked like an ordinary, if very tall, flag pole next to a fire house in a residential area. In addition, there was an existing, non-cell-related lattice tower at the fire house site. The expert used the comparable sales method but some of the sales were as long as thirteen years apart.

Additionally, the applicant presented no evidence as to the population of the area in terms of the number of households or residents served or the number without reliable cell phone service. The record would support a fair conclusion that the "gap" area was a portion of a rather sparsely populated neighborhood, in which many residents had the ability to use, and did use, commercially available booster equipment to obtain satisfactory cell phone service using the signals provided by existing cell phone installations. In fact some of the neighborhood residents who used other cell phone providers, testified that those providers had given them the devices.

The applicant claimed that, apart from residential service, its chief concern was making cell phone service available to vehicles traveling the local roads. Yet, its expert on that issue had conducted no traffic studies and relied

instead on information from the Department of Transportation website, which the Board could reasonably have concluded was unreliable and yielded exaggerated numbers of vehicles. The expert himself admitted that the numbers were probably wrong.

The Board hired its own radio frequency expert, Ross Sorci, to render an opinion about the existence of a service gap and the applicant's proposed solution, the reasonableness of the applicant's search for other potential locations, and the viability of other, less intrusive technologies. Sorci initially confirmed that a service gap existed, although he declined to characterize its relative significance. He opined that the proposed location was suitable in the sense that a 130-150 foot cell tower placed there would cover the gap, that the applicant had made a reasonable search for other potential cell tower locations, and that certain alternate technologies would not work in this area. The objectors then presented testimony from an expert, Henry Menkes, who opined that a newer and much less conspicuous technology could work in this area. The Board recalled Sorci as a witness, and he testified that the new approach could be technologically viable. The applicant's radio frequency expert was also re-called and testified that the new technology would not work in the area. Ultimately, the Board credited Menkes' testimony.

In addition to expert testimony, the Board heard testimony from dozens of local residents and a representative of the local Environmental Commission, all opposing the project. Many of the residents testified that they had no trouble with cell phone reception in their homes. All of the witnesses who addressed the issue testified that any loss of reception while driving on the local back roads was minor and temporary, lasting at most a few seconds.

The owner of the property next to the proposed tower, and the owner of the proposed multi-million-dollar housing development across the street[2], both testified that potential buyers had lost interest after learning that a cell tower might be built in this location. In other words, they testified to the project's concrete, as opposed to theoretical, harm to local landowners. The Board also noted, based on the members' familiarity with the local area, that the housing development appeared to have stalled after the applicant applied to build the cell tower.

[2] The developers were planning to build seven or eight houses on very large lots. According to one of the developers, the cell tower would be directly in the line of sight from the development's exit and entrance road and from each of the proposed houses. He described in detail the many years and millions of dollars he and his partners had spent obtaining permits and preparing the land for development, and the anticipated difficulty they would have in selling the houses if the tower were built.

Finally, although the applicant represented that the county emergency services agency had expressed interest in co-locating an antenna on the cell tower once it was built, the applicant did not introduce any legally competent evidence concerning the need for that antenna. No one from the emergency services agency testified at the Board hearings.

II

Our review of the trial court's decision in this case is de novo, applying the same legal standards as the trial judge. Charlie Brown of Chatham, Inc. v. Bd. of Adj. of Chatham, 202 N.J. Super. 312, 321 (App. Div. 1985). The decision of a municipal zoning board is entitled to substantial deference. Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965). Judicial review is limited to determining whether the board's decision was arbitrary, unreasonable, or capricious. Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adj., 343 N.J. Super. 177, 198 (App. Div. 2001). We owe deference to the board's particular knowledge of local conditions and may not substitute our judgment for that of the board. Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 385 (1990). Because variances should be granted sparingly and with great caution, courts must "give greater deference to a variance denial than to a grant." Nynex Mobile Commc'ns Co. v. Hazlet Twp. Zoning Bd.

of Adj., 276 N.J. Super. 598, 609 (App. Div. 1994).

An applicant seeking a use variance under N.J.S.A. 40:55D-70(d) must satisfy the positive and negative criteria set forth in the statute. Generally, "the positive criteria require that an applicant establish 'special reasons' for granting the variance," by showing that "the use promotes the general welfare and the proposed site is particularly suitable for the proposed use." Smart SMR of New York, Inc. v. Borough of Fairlawn Bd. of Adj., 152 N.J. 309, 323 (1998) (citations and internal quotations omitted); see New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 160 N.J. 1, 6 (1999).

All applicants, even those proposing an inherently beneficial use of the property, must also satisfy the negative criteria:

> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.
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> [N.J.S.A. 40:55D-70(d) (emphasis added).]

While the Court has not recognized cell phone towers as an inherently beneficial use, they occupy something of a hybrid

status by virtue of the federal policy favoring the provision of reliable cell phone service.

> Generally speaking, use variance applications require identifying and weighing the negative and positive criteria under N.J.S.A. 40:55D-70d. The positive criteria test whether a proposed use promotes the general welfare and is particularly suited for the site. With telecommunications towers, an FCC license generally establishes that the use promotes the general welfare.
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> [New Brunswick Cellular, supra, 160 N.J. at 14 (citing Smart, supra, 152 N.J. at 336).]

Where, as here, a cell phone provider has an FCC license to provide service in a particular area, the license satisfies the "general welfare" element of the test. Ibid. However the applicant must also show "the suitability of the site and [satisfy] the negative criteria." Ibid. "To demonstrate that a site is particularly suited for a telecommunications facility, the applicant initially must show the need for the facility at that location." Ibid. For example, in New Brunswick Cellular, the Court noted that the applicant "proved through competent expert testimony that its existing capacity to serve the public in the area was inadequate. The expert also established that the proposed site would redress that lack of capacity." Ibid.

Once the applicant satisfies the positive criteria, the court will use the same balancing test it applies to inherently

beneficial uses, to determine whether the application satisfies the negative criteria:

> [W]e will weigh, as we would with an inherently beneficial use, "the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good."
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> [Smart, supra, 152 N.J. at 332 (quoting Sica v. Bd. of Adj. of Wall, 127 N.J. 152, 166 (1992)).]

In New Brunswick Cellular, the Court summarized the considerations, in language equally applicable to this case:

> To satisfy the negative criteria, an applicant must show that the use will not substantially impair the purpose and intent of the zoning ordinance, or constitute a substantial detriment to the public good. . . . Under the Telecommunications Act of 1996, (Telecommunications Act), Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 U.S.C.A., 18 U.S.C.A., and 47 U.S.C.A.), municipalities may not prohibit telecommunications facilities. 47 U.S.C.A. § 332. . . . Assuming that the need for telecommunications facilities can be established, the question is where should they be located. In making that observation, we do not suggest that every site is suitable or that every facility is necessary. . . .
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> . . . [T]he monopole will not generate noise or traffic and will not impose any burden on city services, such as sewers or water. An abiding concern with telecommunications facilities, however, is their height. The aesthetic impact of a 90-foot monopole in an industrial zone, however, will be minimal.

> In another case, a comparable structure in a residential zone could impose a more substantial adverse impact.
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> [New Brunswick Cellular, supra, 160 N.J. at 15-16 (citations omitted).]

In this case, the Board found that any gaps in service were minor, occurring in a relatively small portion of a sparsely populated ten-acre-zoned residential neighborhood whose occupants had not complained about poor cell phone service, and along lightly traveled country roads. The opponents of the application also presented expert real estate testimony concerning the detrimental impact that the monopole would have on local property values in this residential neighborhood, and concerning the detrimental effect the prospect of a monopole was already causing to a particular real estate development project located across the road from the site. The Board found that the applicant's real estate expert and its "balloon test" expert were not credible, and found the objectors' evidence more persuasive.

Further, the Board was presented with an application that posed significant harm to the local zoning plan by placing a 130-150 foot monopole in a residential neighborhood, in an area the Township had specifically sought to protect due to its spectacular natural beauty.

In summary, the Board found that the applicant had not proven that there was more than a minimal gap in coverage, or that the monopole was particularly suited for placement in this location, and the objectors had proven that the proposed monopole would have a significant detrimental effect on the surrounding residential neighborhood.

We agree with plaintiff that it did not have to prove the existence of a "significant" gap in service in order to satisfy the positive criteria. That standard applies to complaints alleging a violation of the federal Telecommunications Act (TCA). See Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-kus, 197 F.3d 64, 75-76 (3d Cir. 1999).

> No case interpreting and applying New Jersey's MLUL has required a wireless communications carrier to prove the existence of a significant gap in coverage in order to satisfy the positive criteria of N.J.S.A. 40:55D-70(d). Although the existence of a coverage gap, i.e. a need for additional service, has been deemed relevant to an analysis of the positive criteria, see, e.g. New Brunswick Cellular, [supra,] 160 N.J. at 14, New Jersey courts have not applied the rigorous standard developed by federal courts addressing alleged significant gaps in coverage under the TCA. Thus, the question of a significant coverage gap only arises when the carrier claims that the denial of its application constitutes an effective prohibition of wireless communications services in violation of the TCA, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

> [New York SMSA, L.P. v. Bd. of Adj. of Weehawken, 370 N.J. Super. 319, 336 (App. Div. 2004).]

Nor does the applicant have to prove that it used the least intrusive means to address the gap in coverage. That standard applies to complaints under the TCA. See New York SMSA Ltd. v. Twp. of Mendham Zoning Bd. of Adj., 366 N.J. Super. 141, 149-50 (App. Div.), aff'd. o.b., 181 N.J. 387 (2004); Ocean Cnty. Cellular Tel. Co. v. Twp. of Lakewood Bd. of Adj., 352 N.J. Super. 514, 528-29 and n.4 (App. Div.), certif. denied, 175 N.J. 75 (2002). However, in conducting the Sica balancing test applicable to the negative criteria, a board is entitled to consider the extent of the need for an additional cell tower – that is, the gap in service – balanced against the extent of the harm that will be caused by locating the cell tower in an area where its presence contravenes the local zoning ordinance. Otherwise, a board could not meaningfully weigh the positive and negative criteria against each other, and a cell phone provider could wreak havoc on local zoning in order to cover an additional area the size of a postage stamp.

Clearly, in evaluating the negative criteria, the Board may properly consider the impact of placing a monopole in a residential neighborhood. The observation we made in New York

SMSA L.P. v. Bd. of Adj. of Bernards Twp., 324 N.J. Super. 149 (App. Div. 1999), is equally applicable here:

> One could hardly dispute the finding that the monopole would be an intrusive presence in the general neighborhood and on the nearby residences. That effect cannot be adequately mitigated by screening or landscaping, nor would the tower be attached to, or replace in some way an existing use which might mitigate its adverse effect.
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> [Id. at 164.]

"Proof of an adverse effect on adjacent properties and on the municipal land use plan . . . generally will require qualified expert testimony." Smart, supra, 152 N.J. at 336. In this case, the objectors presented expert testimony, which the Board found credible. The Board did not credit the testimony of plaintiff's real estate expert. On this record, we cannot fault the Board's decision. As we concluded in a prior case involving the proposed placement of a cell phone tower in the middle of a residential neighborhood: "[T]he record supported the Board's conclusion that [the] existence of such a tower would change the character of the area, adversely affect real estate prices, and impair the intent of the zoning scheme." Northeast Towers, Inc. v. Zoning Bd. of Adj. of W. Paterson, 327 N.J. Super. 476, 499 (App. Div. 2000).

Balancing the relatively minimal additional benefit to cell phone coverage in a relatively small geographic area,

against the significant harm to the residential neighborhood and the local zoning plan, the Board concluded that plaintiffs had not satisfied the Sica test. The Board also considered that plaintiff had not fairly considered alternate technology that might obviate the need to place a cell tower at this location. Absent factors not present here, it is not our role to second-guess the Board's fact finding and its evaluation of witness credibility. We conclude that the Board's decision was supported by substantial credible evidence. On this record, the applicant did not prove its entitlement to the (d) variances it sought.[3]

Affirmed.

[3] To the extent not specifically addressed plaintiff's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).