

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FRANK and JUDI PICCOLELLA.,	:	NO. 07 – 02,383
Appellants	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
ZONING HEARING BOARD OF	:	
LYCOMING COUNTY,	:	
Appellee	:	Zoning Appeal
	:	
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,	:	
Intervenor	:	

OPINION AND ORDER

Before the Court is a zoning appeal filed by Frank and Judi Piccolella (hereinafter “Piccolella”) on October 25, 2007, seeking to overturn a decision issued by the Lycoming County Zoning Hearing Board (hereinafter “the Board”) on October 24, 2007, which granted an application for special exception filed by Cellco Partnership (hereinafter “Cellco”). By Notice of Intervention filed November 2, 2007, Cellco intervened in the appeal. At a conference on January 4, 2008, the parties agreed to proceed on the record below and after the filing of a certified record and briefs, argument was heard April 2, 2008.

Cellco filed an Application for Special Exception with the Board on May 17, 2007, seeking permission to construct a cellular communication tower on property leased from Jackson Corners Sportsmen, Inc. in Jackson Township.¹ Hearings on the application were held on June 27, 2007, and September 26, 2007. By decision issued October 24, 2007, the Board granted the application, with conditions, finding the proposed construction consistent with the requirements of the Lycoming County Zoning Ordinance and also finding no undue adverse impact on neighboring properties.

In an appeal from a decision of the Zoning Hearing Board where no additional evidence is taken by the Court, the Court is limited to determining whether the Board abused its

¹ The property is in a Resource Protection Zone and cellular phone towers are permitted therein by special exception. See Lycoming County Zoning Ordinance Section 3120.

discretion or committed an error of law. Limley v. Zoning Hearing Board of Port Vue Borough, 625 A.2d 54 (Pa. 1993). An abuse of the board's discretion may be found only where its findings are not supported by substantial evidence. Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637 (Pa. 1983). As fact finder, the board is the ultimate judge of credibility, Martin Media v. Hempfield Twp. Zoning Hearing Board, 671 A.2d 1211 (Pa. Commw. 1996), and a board's interpretation of its own zoning ordinance is entitled to great weight and deference from a reviewing court. Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55 (Pa. Commw. 1999).

In the instant appeal, Piccolella contends that the proposed tower conflicts with the County Comprehensive Plan's objective of scenic preservation, that it will adversely affect the area from which it can be seen, and that co-location is possible. Each of these contentions will be addressed seriatim.

The applicant for a special exception has the burden of proving compliance with the objective requirements of the zoning ordinance. Township of Birmingham v. Chadds Ford Tavern, Inc., 572 A.2d 855 (Pa. Commw. 1990). Once that burden is met, the burden shifts to any objector to prove noncompliance with general policy standards of the ordinance. Yarnall v. Allen, 444 A.2d 1335 (Pa. Commw. 1982). In the instant case, cellular communication towers are further regulated under Section 3240Q of the Ordinance, and the Court finds the Board's conclusion, that Cellco met its burden of showing compliance with the objective requirements of the Ordinance, is supported by substantial evidence. Specifically, evidence was presented to show that the tower is required to support adequate cellular phone coverage in the area and that co-location is not possible, that the tower design is safe and that its operation will not interfere with the nearby residential area, and that the necessary road construction and site development will have no adverse impact on the area. The Court finds no abuse of the Board's discretion in basing its decision on such evidence. Further, Piccolella's argument, that the proposed tower conflicts with the scenic preservation objective of the County's Comprehensive Plan, does not prove noncompliance with general policy standards of the Ordinance. The Commonwealth Court has held that comprehensive plans are simply general guides and that uses permitted by special exception in a particular zoning district will prevail over any general recommendation

made through a comprehensive plan, even where the comprehensive plan is incorporated into the ordinance. In re: Appeal of Realen Valley Forge Greenes Associates, 799 A.2d 938 (Pa. Commw. 2002), *reversed on other grounds*, 838 A.2d 718 (Pa. 2003); *see also* Schatz v. New Britain Township Zoning Hearing Board, 596 A.2d 294 (Pa. Commw. 1991).

The second objection, that the tower will “adversely affect the area from which it can be seen”, is also not grounds upon which to find an abuse of discretion, as the Commonwealth Court has held that a concern for the aesthetics alone cannot support a determination that a community would be adversely affected by the granting of a special exception. Heck v. The Zoning Hearing Board for Harveys Lake Borough, 397 A.2d 15 (Pa. Commw. 1979); Westinghouse Electric Corp. v. Council of Township of Hampton, 686 A.2d 905 (Pa. Commw. 1996). The Board credited evidence by the Lycoming County Zoning Administrator that the proposed tower will not adversely affect the neighborhood² and as Piccollela’s argument is based solely on the aesthetics involved, it cannot be sustained.

Finally, with respect to the third argument, that co-location is possible, the Court notes the evidence of record does not support such a contention. Rather, the evidence of record supports the Board’s conclusion that co-location is not possible. Further, the Board has attached to the grant of a special exception the condition that Cellco provide proof to the Zoning Administrator that co-location is not possible, thus, in effect, making “double-sure” that this requirement of the Ordinance³ is met.

In conclusion, as the Court finds the Board’s decision supported by substantial evidence and thus finds no abuse of the Board’s discretion, the decision to grant Cellco’s application for a special exception will be affirmed.

² Exhibit ZA-1.

³ Specifically, one of the attached conditions is that Cellco “provide proof of compliance to the Zoning Administrator with requirements of Section 3240(q) of the Ordinance”, and that section requires, at subsection 2(c), that the applicant “show evidence of having exhausted co-location options with existing communication towers and existing buildings or other structures to place any antenna. ...”

ORDER

AND NOW, this 17th day of April 2008, for the foregoing reasons, the appeal filed by Frank and Judi Piccolella is hereby DENIED and the decision of the Lycoming County Zoning Hearing Board is hereby AFFIRMED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Frank Piccolella, 573 Roaring Branch Road, Liberty, PA 16930
Karl K. Baldys, Esq.
Richard Williams, Esq.
Hourigan, Kluger & Quinn, 600 Third Avenue, Kingston, PA 18704
Gary Weber, Esq.
Hon. Dudley Anderson