IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GABRIEL N. PRESTON and JEAN PRESTON,	)	
Appellants/Plaintiffs,	)	
v.	)	C.A. No. 00A-02-006-JRJ
THE BOARD OF ADJUSTMENT OF NEW CASTLE COUNTY and AT&T WIRELESS PCS OF PHILADELPHIA, LLC,	)	
Appellees/Defendants.	)	

Submitted: December 18, 2001
Decided: January 23, 2002
Amended: January 28, 2002

A M E N D E D M E M O R A N D U M O P I N I O N

On Plaintiffs' Petition for a Writ of Certiorari
from a Decision of the Board of Adjustment of New Castle County.
Decision **AFFIRMED**.

Gabriel N. Preston and Jean Preston, Plaintiffs, Pro Se.

John E. Tracy, Esquire, New Castle County Law Department, 87 Reads Way, New Castle, Delaware, Attorney for Apellee/Defendant The Board of Adjustment of New Castle County.

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JURDEN, Judge

This is the Court's decision on a petition for a writ of certiorari filed by Gabriel and Jean Preston ("the Prestons"), seeking to overturn a decision of the Board of Adjustment of New Castle County ("the Board"), granting a Special Use Permit to AT&T Wireless PCS of Philadelphia, LLC ("AT&T"). Having reviewed the record below, as well as the parties' written submissions, the Court concludes that the Board's decision must be **AFFIRMED**.

POSTURE

On December 16, 1999, the Board of Adjustment held a public hearing on an application filed by AT&T for a Special Use Permit to construct a telecommunications tower. The Prestons, whose property abuts the proposed site, attended the hearing and argued against the construction of the tower. In January 2000, the Board issued a decision granting the application for the permit. The Prestons filed with the Superior Court a petition for a writ of certiorari, which the Court allowed but ultimately dismissed for failure to join AT&T, an indispensable party. The Prestons appealed the dismissal to the Delaware Supreme Court, which found that AT&T had constructively intervened and remanded the case to this Court.[1] A hearing was held in Superior Court in August 2001 to determine the scope of the issues on remand. Briefing is now complete, and the issues are ripe for decision.

FACTS

[1] *Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787 (Del. 2001).

In November 1999, AT&T submitted an application to the Board seeking a Special Use Permit to install a 133-foot high monopole cellular communications tower on a commercially zoned site known as 142 Owensby Drive, Wilmington, Delaware. The permit was required under the County's Unified Development Code ("the UDC") because the proposed tower would be within 500 feet of a residentially zoned property.[2] Under the UDC, the applicant is required to review all co-location possibilities within a one-mile radius of the proposed site. In response to this and other requirements, prior to the hearing AT&T submitted to the Board a report prepared by David Volpe, an AT&T radio frequency engineer. The report explained AT&T's need for cellular phone coverage for a particular geographical area north of Route 202. The report also described the physical characteristics of the area which made coverage difficult, such as the geographical low point and an abundance of trees.

The Volpe report also reviewed five co-location possibilities, including the proposed site at Owensby Drive. The report explained why four of the five locations were not acceptable. It stated that the Owensby Drive site was an industrial/commercial site and already contained a 95-foot-high two-way tower. Because the height and structural capacity of the existing tower were not sufficient to meet AT&T's cellular communications needs, AT&T proposed to remove it and construct a new one.

At the hearing on December 16, 1999, AT&T presented the testimony of four witnesses: Larry Washington, of SBA, Inc., the site acquisition consultant for AT&T; Carl Petterson, of

[2]UDC § 3.326A.

Edwards & Kelcey, Inc., a civil/structural engineering firm; David Volpe, a radio frequency engineer with AT&T who prepared the co-location report; and Brian Merritt, a paralegal with the Department of Land Use of New Castle County. Mr. Washington testified to the need for the new tower, which would connect AT&T's coverage to its existing network in the area. Both Mr. Washington and Mr. Volpe explained the lack of adequate co-location opportunities and the topography of the region. Mr. Petterson testified as to site construction, engineering issues and compliance with the requirements of the Federal Communications Commission ("FCC").

Mr. Merritt testified on behalf of the Department of Land Use. He had reviewed the application and prepared a recommendation to be submitted to the Board on behalf of the Department. He concluded that AT&T had met the requirements for a Special Use Permit and recommended that the Board grant the application.

AT&T submitted a report prepared by Lucent Technologies analyzing the radio frequency environment in the vicinity following installation of the new tower in light of FCC regulations. The report concluded that, assuming a worst-case scenario for purposes of testing, the maximum level of radio frequency energy would be "at least 3000 times below the safety criteria adopted by the [FCC] as mandated by the Telecommunications Act of 1996."[3]

[3]Lucent Report at 3.

At the hearing the Prestons testified in opposition to construction of the tower. They cross-examined AT&T's witnesses at length on whether AT&T needed a new tower and whether there were other viable locations. Both Mr. and Mrs. Preston repeatedly emphasized their health concerns, although Mr. Preston acknowledged that such issues were outside of the Board's purview.[4] Neither Mr. or Mrs. Preston referred to lack of notice or diminished property values, issues which would become contentious as the case proceeded. After hearing the evidence presented by AT&T, Mr. Preston requested a continuance, asking for time to digest the information and to perhaps consult an expert.[5] Throughout the hearing, the Prestons discussed at length their concerns about the alleged health hazards of the proposed tower. The hearing concluded with Mr. Preston's overview of the situation and his request that AT&T locate the new tower on the other side of Route 202.

On January 12, 2000, the Board issued a written decision granting the application. Following the procedural history outlined in the "Posture" section of this opinion, the case is again before the Superior Court.

ISSUES

The Prestons raise four issues in their petition. They argue first that the Board did not comply with the UDC requirements for providing public notice of the hearing. Second, they argue that the Board's denial of their request for a continuance was an abuse of discretion and a violation

[4]Board Transcript at 24 (hereinafter referred to as "Tr. at ___").

[5]Tr. at 24.

of their state and federal rights to due process of law. Third, they argue that the Board's decision is not based on substantial evidence. Finally, they argue that the telecommunications tower exposes area residents to an increased risk of potential injury.

STANDARD OF REVIEW

The Court's scope of review on appeal of a Board decision is limited to the correction of errors of law and to a determination of whether or not substantial evidence exists on the record to support the Board's findings of fact and conclusions of law.[6] This Court may reverse or affirm, in whole or in part, or may modify the decision brought up for review.[7] The Court has discretion to take additional evidence, if necessary,[8] but has no authority to remand the case to the Board of Adjustment.[9]

DISCUSSION

A. Health and Environmental Issues

Although the Prestons discuss their health concerns in the final section of their opening brief, the Court addresses this issue first because its resolution affects the other issues. Congress enacted the Telecommunications Act of 1996[10] ("the Act") to promote a more efficient wireless communications system for consumers, and, to this end, the Act facilitates the construction of

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[6] *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241 (Del. 1976).

[7] Title 9 *Del. C.* § 1353(f).

[8] Title 9 *Del. C.* § 1353(e).

[9] *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 951 (Del. 1988), *aff'd*, 567 A.d 422 (Del. Super. 1989).

[10] Title 47 U.S.C.A.

communications facilities. The Act preempts the states' rights to regulate certain substantive aspects of telecommunications, such as the right to determine the environmental effects of radio frequency emissions where the facilities would operate within levels determined by the FCC to be safe. Section 332(c)(7)(B)(iv) provides as follows:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

At the hearing, AT&T presented evidence and testimony that the proposed monopole presented no health problems and that its emissions were well within FCC guidelines. The Lucent Report concluded as follows:

> The results of this analysis indicate that the maximum level of RF energy to which the public may be exposed is below all applicable health and safety limits. Specifically, in all normally accessible areas surrounding the installation, the maximum level of RF energy associated with *simultaneous and continuous operation of all proposed transmitters* will be at least 3000 times below the safety criteria adopted by the [FCC] as mandated by the Telecommunications Act of 1996. [This Act] is the applicable federal law with respect to consideration of environmental effects of RF emissions in the siting of personal wireless facilities. The maximum level of RF energy will also be at least 3000 times below the exposure limits of ANSI, IEEE, NCRP and the limits used by all states that regulate RF exposure.[11]

In its decision, the Board relied on this report to put to rest any health or environmental issues: "The applicant also commissioned a health study, which concluded that there were no reasonable health concerns associated with the construction of this tower."[12] Although the Board did not make an explicit finding that AT&T's proposed "facilities comply with the Commission's regulations

[11]Lucent Report at 3 (emphasis in the original).

[12]Board Decision at 2.

concerning such emissions," this Court is satisfied that the Board appropriately relied on the Lucent Report to determine that the emissions of the proposed tower fell within FCC standards. Beyond that, the Board had no authority to act. The Court concludes that the Board's decision declining to consider any health or environmental matters was supported by substantial record evidence and was not an error of law.

B. Denial of Request for Continuance

The transcript of the Board hearing shows that both Mr. and Mrs. Preston discussed the health risks allegedly posed by the new tower and cross-examined AT&T's witnesses on related issues.[13] When the chairperson asked Mr. Preston if his basic concern was health, he replied in the affirmative.[14] When he requested a continuance, Mr. Preston said he wanted to speak with an expert. It is clear from the transcript that Mr. Preston wanted to consult with an expert on the health issues:

> The other thing I would like to ask this. . . Board to do is that we've heard a lot of information today. Not only you but me. It's the first time I'm hearing this information. And I would like to be able to digest it. And also talk to an expert about this matter. And I would ask that this matter basically be stayed or continued until I can do that. . . .
>
> Maybe I can be convinced that this is okay, but I still am very much concerned about my health. I know that maybe, uh, you don't have control over the health issue because of the Act that controls this situation, but we are unhappy about it. And we live right next to it. And, uh, that's our situation.[15]

Thus, Mr. Preston again raised the health questions, despite his admission that federal law

[13]Tr. at 21-30.

[14]Tr. at 25.

[15]Tr. at 24.

governed the health and environmental issues. At every subsequent stage of the proceedings, the Prestons have raised questions about the possible health risks associated with the tower. While the Court understands the Prestons' legitimate concern for their health and well-being, they must understand that the Board has no authority to address the health or environmental effects of radio frequency emissions or enjoin the construction of a telecommunications tower if the radio frequency emissions meet FCC regulations. In light of the fact that the Prestons sought a continuance in order to explore the alleged environmental and health risks posed by the proposed tower, the Court concludes that the Board did not commit an error of law or abuse its discretion in denying the request for a continuance.

C. The Notice Requirements

The Prestons argue that they were not provided with adequate notice under the clear terms of 40 UDC § 31.340. Defendants respond that the Prestons are barred from raising the notice issue because they did not raise it at the hearing. Defendants further assert that, even if the issue were properly before the Court, the Prestons' argument fails because they were present at the hearing and therefore had constructive notice. Defendants also argue that the UDC mailing requirement is "not exclusive or outcome determinative on the effectiveness of the notice."[16] Finally, Defendants argue that the Prestons now raise the notice issue because they want time to prepare a response to perceived health and environmental issues, which are pre-empted by federal law.

At the time of the hearing in December 1999, the UDC required the Department of Land Use

[16]Answering Brief at 12.

to provide "notice of a public hearing through newspapers, posted notice, and mailed notice for meetings of the Board of Adjustment, Planning Board, and the Historic Review Board.[17] With regard to mailed notice, the UDC provided as follows:

> When a public hearing is required, the Department shall send a copy of the legal notice to the last known address of all property owners within one hundred (100) feet of the property no less than ten (10) days prior to the public hearing.[18]

The record in its current form provides no information about the manner in which the Department of Land Use provided notice. The Prestons allege that they did not receive a written notice and that they heard about the hearing from a neighbor two days before it was scheduled to take place. There was no evidence of either posted notices or newspaper notices. Defendants offer no facts whatsoever on this issue and proceed instead with legal argument. The Court accepts as credible the Prestons' assertion that they did not receive written notice as required by the UDC and construes Defendants' silence on this issue as an admission that either the requirements were not followed or Defendants cannot verify that the required notice was given.

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[17]UDC § 40.31.340.

[18]UDC § 40.31.340D. The Court notes that this rule was amended in November 28, 2000, to provide that mailed notice must be sent to"property owners within a 300-foot radius of the property or twelve (12) different property owners, whichever is greater; no less than ten (10) working days prior to the public hearing." These changes underscore the importance of the Department's duty to disseminate this information to the public.

Notwithstanding the Department's failure to provide proper notice, the Prestons attended the hearing and did not object to the inadequate notice at the hearing. They voiced their opposition to the construction of the tower and were given an opportunity by the Board members to make their case. Not only did the Prestons fail to object to the lack of notice at the hearing, they failed to contact the Board as soon as they learned about the hearing to challenge the notice. Given these facts, the Court must conclude that the Prestons waived any objection to the inadequate notice.[19]

[19]*See Brumbaugh v. DiMondi*, 1994 WL 145992 (Del. Super.).

The inadequate notice is not dispositive here for another reason. The record is clear that the Prestons' reason for wanting more time to prepare for the hearing was to garner support for their position on the health and environmental issues.[20] As stated both by this Court and the Board, these issues are preempted by federal law as long as the emissions are within FCC guidelines. Thus, although the Department failed to meet the UDC notice requirements, the Prestons were not denied any due process rights nor prejudiced because the health and environmental issues were outside the Board's authority. By so holding, however, the Court in no way means to minimize or condone the Department's failure to provide the required notice. It is incumbent on the Department of Land Use to comply with the explicit requirements in the UDC which require it to inform the public about hearings on land use issues. The County enacted detailed notice procedures for the Department of Land Use to ensure public awareness of such hearings. The law makes clear that citizens have the right to be informed about events that will affect their property. In this instance, because the Prestons waived their objection to the inadequate notice and further because the health issues they would have raised through expert testimony had the Board continued the hearing are beyond the Board's purview, the inadequate notice simply does not confer on this Court the power to reverse the decision of the Board of Adjustment.

D. Substantial Evidence

The Prestons make a series of arguments under the rubric of the substantial evidence standard. They argue that they were not able to present evidence of other viable co-locations within

[20]If the Court found that there were any issues at stake other than the health and environmental risks, the Court would consider taking additional evidence on the notice issue, as contemplated in 9 *Del. C.* § 1353(e).

the one-mile radius required by the UDC because they were denied adequate notice of the hearing. They also argue that no evidence was presented about the impact of the tower on property values. Finally, they argue that substantial evidence was not presented as to whether the Owensby Drive site was the least intrusive means of satisfying AT&T's needs.[21]

As explained earlier in this opinion, having failed to raise the issue of inadequate notice at the hearing, the Prestons are barred from raising it on appeal. Furthermore, their arguments for a different location are based on the alleged health and environmental risks of the Owensby Road location and are therefore preempted by federal law. The Board's decision was based on written and testimonial evidence that the other possible locations within a one-mile radius were unacceptable or unusable for various reasons. The Court concludes that the Board's decision was based on substantial evidence and was not rendered incorrect or otherwise illegal by the inadequate notice.

[21]Opening Brief at 17.

The issue of property values was also not raised at the hearing and is therefore not properly before this Court on appeal. The Prestons now argue that because AT&T did not present any evidence on this issue, the Board could not rule on it. There is no requirement that an applicant for a Special Use Permit demonstrate that the desired use not affect property values, and the Board made no such ruling. Section § 31.430 of the UDC requires an applicant for a Special Use Permit to show, *inter alia*, that the use is "compatible with the character of the land in the immediate vicinity. . . . [and] minimizes adverse effects, including visual impact on adjacent lands." The Board heard evidence on these factors. The parties agreed that there was an existing 95-foot tower on the Owensby Drive location, which, although shorter than the proposed tower, was considerably closer to the Prestons' house.[22] As part of their allegation that AT&T failed to conduct an adequate search, Mr. Preston acknowledged that there were three other towers equipped with blinking lights within view of their home.[23] Thus, the Board heard and considered evidence on the issues delineated in the UDC for a Special Use Permit. The Court concludes that the Board's decision was based on substantial evidence and did not constitute an error of law.

With regard to the Preston's final assertion that there was not substantial evidence to show that the Owensby Drive site was the least intrusive means of meeting AT&T's needs, this is a misstatement of the applicable standard. In its decision, the Board set forth the UDC's legal

[22]Tr. at 17, 29, 30, 32.

[23]Tr. at 22.

standards for a Special Use Permit, as well as additional requirements for commercial communications towers. While the overall import of these requirements is to minimize the negative aesthetic and/or economic effect of special uses, the Board was not required to determine that the proposed site was the least intrusive site available.

CONCLUSION

For the foregoing reasons, the Court concludes that the decision of the Board of Adjustment granting AT&T's application for a Special Use Permit must be and hereby is ***AFFIRMED.***

IT IS SO ORDERED.

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Jan R. Jurden, Judge

Date: _____