In the Zone

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Case Reinforces That Burden of Proof Falls on Objectors of Cell Towers

By Kimberly A. Freimuth

In the case of *Global Tower, LLC v. Hamilton Township*, 2012 WL 4061190 (Sept. 14, 2012), Global Tower, LLC (Global) entered into a lease agreement with the owners of a 30-acre tract of land (Property) to allow Global to erect a 250-foot radio tower and install related equipment (collectively, the Tower) inside a 100 by 100 foot lease area (Lease Area). The Property is in the C Zoning District of Hamilton Township, Pennsylvania, which permits radio and television transmission or receiving towers as a "special use" or special exception. As such, Global filed an application with the Hamilton Township Zoning Hearing Board (ZHB) seeking "special use" approval to construct the Tower within the Lease Area. Twenty hearings were held on Global's application and, at the conclusion of the hearings, Global and the underlying property owners agreed to the imposition of a number of restrictions on the application in an attempt to alleviate the concerns of the objectors raised during the hearings. Nevertheless, the ZHB denied Global's application.

In denying Global's application, the ZHB concluded that the Lease Area constituted a new "lot," which required Global to comply with the bulk regulation requirements of the Zoning Ordinance. Because Global did not apply for a variance from these sections of the Zoning Ordinance, the ZHB found that Global's submission failed to comply with the Zoning Ordinance.

Global appealed the ZHB's decision to the U.S. District Court for the Middle District of Pennsylvania, arguing that the ZHB improperly denied its application in violation of the federal Telecommunications Act of 1996 (TCA). Both the ZHB and Global filed motions for summary judgment, which motions were referred to a Magistrate Judge for a report and recommendation. The Magistrate recommended that Global's motion for summary judgment be granted and the ZHB's motion be denied.

The ZHB first argued that there was substantial evidence to support its decision that Global failed to satisfy its burden regarding the Zoning Ordinance's special use requirements. Second, the ZHB argued that Global failed to demonstrate that it had been unreasonably discriminated against in the denial of its application. Global, on the other hand, argued that the rejection of the Tower, after two nearly identical towers had been previously approved in the Township, constituted unreasonable discrimination and further argued that the ZHB's decision was not supported by substantial evidence. Global's argument was based on the fact that the ZHB had previously approved two other radio towers in the township.

The court pointed to the pertinent sections of the TCA and noted that, while the TCA preserved the traditional authority enjoyed by state and local governments to regulate land use and zoning, the TCA altered the traditional deference in several important ways. The TCA states that nothing in the Act is intended to limit or affect the authority of the state or local government over decisions regarding the placement, construction and modification of personal wireless services facilities. However, the regulation of the placement, construction and modification of personal wireless service facilities by any state or local government (1) shall not unreasonably discriminate among providers of functionally equivalent services and (2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. In addition, the TCA provides that any decision by a state or local government to deny a request to place, construct or modify personal wireless service facilities shall be in writing and shall be supported by substantial evidence contained in a written record. Therefore, the court noted that denials subject to the TCA are reviewed by the court more closely than standard local zoning decisions.

The Magistrate determined, and the court agreed, that the ZHB failed to require the objectors to establish with a high probability the diminution in property values that Global's Tower would cause. The court agreed with the Magistrate that neither aesthetic reasons, nor the conservation of property values, nor the stabilization

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of economic values in a township are, singly, or combined, sufficient to promote the health, morals, safety or general welfare of the township or its residents. Parties in opposition to a special exception cannot sustain their burden of proof by merely introducing evidence that their property values may decrease; rather, they must show a high degree of probability that it will substantially affect the health and safety of the community. The court found that the ZHB improperly applied the burden of proof in requiring that Global prove that property values would not be impaired, rather than requiring the objectors to demonstrate by a high probability that the Tower would pose a negative impact on the safety and welfare of the community. The court noted that ZHB improperly reviewed the evidence to highlight the deficiencies in Global's case as opposed to examining the sufficiency of the evidence offered by the objectors.

The court also noted that, even if ZNB had properly applied the burden of proof, the objectors failed to establish their objections with a high degree of probability. The court agreed with the Magistrate that there was no evidence of record to prove that Global's Tower differed from the impact correlated with other uses allowed within the C zoning district, such as multifamily residential use, commercial use or industrial use. As such, the court agreed with Global that there was no substantial evidence of record to support the ZHB's decision denying the application.

With respect to the discrimination claim under the TCA, the court noted that in order to preserve the ability of local governments and zoning boards to take into account the uniqueness of land, the TCA explicitly contemplates that some discrimination is permitted and any discrimination need only be reasonable. Relief under the TCA's discrimination provision requires a showing that the other provider is similarly situated, such that the structure, placement or cumulative impact of the existing facilities makes them as or more intrusive than the proposed facility.

In support of its claim, Global provided a chart comparing and contrasting the similarities and differences between Global's proposed Tower and the two previously approved towers to show that they are similar in structure, placement and cumulative impact. The Magistrate concluded that the evidence failed to form a reasonable basis for the ZHB to treat the three towers differently. The court agreed with the Magistrate and found that Global convincingly established that it was similarly situated to the previous two tower applicants in the Township.

Interestingly, in making its decision on the discrimination claim, the court also determined that the lease did not constitute land development or create a new lot that would trigger the application of the bulk regulation requirements of the Zoning Ordinance. The court noted that the mere fact that Global entered into the lease agreement in order to construct the Tower, by itself, did not qualify as land development for purposes of the Pennsylvania Municipalities Planning Code. Further, the court agreed with the Magistrate who determined that Global's proposal did not involve the type of extensive development that impacts the community in terms of use of sewer capacity, traffic ingress and egress and parking concerns. Therefore, the court found that the lease did not constitute land development or create a new lot, which would trigger the application of the bulk regulation requirements. For this reason, failure to comply with these requirements did not justify the basis for the ZHB's denial of the application.

This case will prove useful for cell tower companies in that it reinforces the fact that the burden of proof is on the objectors to a special exception application to prove that the proposed use will create a degree of impact that would be abnormal for a cell tower use, a standard difficult to prove. In addition, it notes that zoning decisions involving the TCA will be more closely scrutinized by the court.

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PA DEP Proposes Anti-degradation Policy for On-lot Septic Systems

By Robert W. Gundlach, Jr.

On February 8, 2013, the Pennsylvania Department of Environmental Protection (PA DEP) delivered a presentation to the Sewage Advisory Committee highlighting a proposed new policy addressing the use of on-lot septic systems in High Quality (HQ) and Exceptional Value (EV) watersheds.

PA Chapter 93 anti-degradation regulations provide special protection for HQ and EV watersheds as part of PA DEP's federally-approved water quality standards program. And the draft policy is intended to address the issue of siting on-lot septic systems in these special protection watersheds primarily for new residential development.

Septic systems are considered nonpoint pollutant sources because

they do not add pollutants to surface water through a pipe or similar conveyance. Chapter 93 requires that water quality in HQ and EV waters be protected and maintained. Namely, the PA DEP must "assure that cost-effective and reasonable best management practices (BMPs) for nonpoint source control are achieved."

While septic systems are inherently protective of surface water quality when properly designed, operated and maintained, nitrates can pose potential concern in groundwater and drinking water wells.

A 2011 Environmental Hearing Board (EHB) decision, *Pine Creek Watershed Assoc. v. PA DEP* (EHB Docket No. 2009-168-L, Nov. 10, 2011), brought the issue to a head. In Pine Creek, PA DEP approved the use of septic systems in a small residential development in an EV watershed (Pine Creek in Berks County). The approval was appealed to the EHB on the basis that water quality in Pine Creek would not be properly maintained and protected under Chapter 93 anti-degradation requirements.

PA DEP relied primarily on a groundwater plume analysis using a model developed to design constructed wetlands to assert that nitrate would not reach the creek because the natural wetland present on the site would effectively remove the pollutant.

The EHB ruled in November 2011, that the wetland model relied upon by PA DEP was not appropriate. As such, PA DEP's approval of the plan was rescinded.

The Pine Creek decision established a legal and scientific standard that is extremely difficult to meet, thereby jeopardizing any future development using septic systems in HQ and EV watersheds.

Through its proposed draft policy, PA DEP is attempting to implement a BMP approach for septic systems to maintain and protect water quality in HQ and EV watersheds.

Some of the BMPs outlined by the proposed draft policy include limiting on-lot system density to one-acre lot minimums; offering credit for the setback distance of the septic system from the river or stream; use of riparian buffers; use of a permeable reactive barrier; and use of denitrifying technologies with septic systems.

The proposed draft policy has not yet been published in the *PA Bulletin* but merely presented to the SAC for input and feedback from the advisory committee.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 515 proposes to amend the Pennsylvania Municipalities Planning Code (MPC) by attempting to benefit absentee land and mineral owners by requiring municipalities to provide notice to any person requesting notice involving a municipality's adoption of, or changes to, zoning ordinances, zoning maps, land development ordinances and other similar ordinances.

The proposed legislation would add to the MPC definitional section the terms "electronic notice" and "mailed notice." Furthermore, the proposed legislation would require that a municipality notifies a landowner or an owner of a mineral interest in land when that person requests either mailed notice and/or electronic notice and supplies the municipality with the requisite information.

For example, a landowner or an owner of a mineral interest in land could request mailed notice, provide the municipality with a stamped self-addressed envelope prior to the public hearing and then that landowner or owner of a mineral interest in land would receive notice from the municipality involving a municipality's adoption of, or changes to, zoning ordinances, zoning maps, land development ordinances and other similar ordinances.

Representative Richard Stevenson, who represents residents of Mercer County and Butler County from the 8th District of Pennsylvania and is one of the sponsors of House Bill No. 515, wrote the proposed changes "will be a significant benefit to absentee land and mineral owners, who do not subscribe to local papers, and may not otherwise become aware of proposed actions that could affect their property."

Rep. Stevenson had sponsored a similar bill, House Bill No. 1484, in May of 2011, where it passed in the House by a vote of 190-0 but did not pass in the Senate.

As for the status of House Bill No. 515, shortly after it was introduced, it was referred to the local government committee, where it remains.

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The Implied Warranty of Habitability is Extended by PA Superior Court

By Robert W. Gundlach, Jr.

On November 5, 2012, the Pennsylvania Superior Court reversed and remanded back to the Bucks County Court of Common Pleas a case of first impression addressing the reach of Pennsylvania's implied warranty of habitability for residential home construction.

At issue in *Conway v. The Cutler Group, Inc*. (2012 PA Super 242) was the question of whether the implied warranty of habitability extends beyond the initial user-purchaser of a home to a second or subsequent purchaser. The appellate court held that it does.

The Conways purchased a home from another owner and subsequently experienced water infiltration into their bedroom years later. Upon professional inspection, it was determined that the infiltration was the result of various construction defects. The Conways filed suit against the builder for breach of the home's implied warranty of habitability.

The implied warranty of habitability, first recognized by the Pennsylvania Supreme Court in 1972 (*Elderkin v. Gaster*, 288 A.2d 711 (Pa. 1972)), is meant to protect the consumer by balancing the relationship between the experienced builder and the average home purchaser. It warrants that the home is constructed in a "reasonably workmanlike manner and that it is fit for the purpose intended-habitation." Indeed, it removes certain latent construction defects from the doctrine of *caveat emptor* and shifts the risk of those defects to the builder. (See *Elderkin*, 776-777).

In Conway, the builder argued that the implied warrant only extends to the initial purchaser and not subsequent owners of the home. Furthermore, he contended that the alleged defects did not render the home unfit to live in.

The various Courts of Common Pleas across Pennsylvania have been divided on the question of whether subsequent purchasers can pursue claims against builders for breach of implied warranty of habitability. However, Courts of Common Pleas decisions are not binding on the Superior Court.

The Superior Court found that the implied warranty is not a contractually dependent remedy, but rather it exists independently even absent a contract between the builder and current homeowner, who may not be the initial user-purchaser.

The court points out that it is not only the new home purchaser who relies on the skill of the builder to construct a suitable living unit. Second and subsequent purchasers also implicitly trust that the home is habitable and free from latent construction defects. Indeed, regardless of how many times the title changes hands, the court found that the same assurance exists that the home is free from hidden structural defects.

Furthermore, the court opined that it would be inequitable to re-shift the risk of a potential latent defect from the builder back onto the second or subsequent homeowners – particularly when hidden defects may not manifest themselves until years later.

It is important to point out, however, that the *Conway* decision does not advocate unlimited liability against the homebuilder. The plaintiff still has the burden to show that the alleged defect is latent, attributable to the builder's design or construction and affects habitability. Moreover, all homeowners must commence their claims within 12 years after the completion of construction before the statute of repose expires.

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