IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen J. Evers, Esq., Appellant	:	
v.	:	
Clarks Summit Borough/ Borough Council	:	
v.	:	
Nextel Partners, Inc.	:	No. 871 C.D. 2010 Argued: December 6, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 22, 2011

Stephen J. Evers, Esquire (Evers) appeals the order of the Court of Common Pleas of Lackawanna County (trial court) which granted Nextel Partner Inc.'s (Nextel) Conditional Use Application and dismissed his Land Use Appeal.

Nextel's Application for Conditional Use Approval For a Wireless Communications Tower (Monopole)

On June 23, 2005, Nextel submitted a Conditional Use Application and Site Plan to the Borough of Clark's Summit (Borough) to construct a 150-foot high, wireless communications tower (monopole). Nextel proposed to construct a facility consisting of an unmanned equipment shelter and a steel, free-standing monopole on a 60'x60' parcel (Property) leased from Philip Dettore., Jr. The Property is adjacent to an active railroad and the Evers' residence.

The Property is located in a Highway Commercial Zoning District which allows cell towers as a Conditional Use.

Conditional Use Standards for Cell Tower/Antenna

Section 809 of the Clark's Summit Borough Zoning Ordinance (Zoning Ordinance) sets the standards for conditional use approval of a cell tower.

> 809 Communications/Reception Antennae
>
> The following regulations shall apply to cellular phone antennae, antennae for communication service regulated by the PA Public Utility Commission, other commercial antennae and associated facilities, and certain antennae accessory to residential structures. Such antennae and associated facilities shall be permitted only in the districts as provided on the Schedule of Uses.
>
> 809.1 Purposes
>
> A. To accommodate the need for cellular phone and similar antennae while regulating their location and number in the Borough in recognition of the quasi-public nature of cellular phone systems.
>
> B. To minimize the adverse visual effects of antennae and antennae support structures through proper design, siting and vegetative screening.
>
> C. To avoid potential damage to adjacent properties from antennae support structure failure and falling ice, through engineering and proper siting of antennae support structures.
>
> D. To encourage the joint use of any new antennae support structures and to reduce the number of such structures needed in the future.
>
> 809.2 Use Regulations

****

B. New Structures. An antenna site with an antenna that is either not mounted on an existing structure, or is more than ten (10) feet higher than the structure on which it is mounted shall require conditional use approval in accord with this §809.

****

809.3 Standards

A. Location Requirement. The applicant shall demonstrate, using technological evidence, that the antenna must go where it is proposed, in order to satisfy its function in the company's grid system….

B. New Tower. If the applicant proposes to build a new tower (as opposed to mounting the antenna on an existing structure), the Borough may require the applicant to demonstrate that it contacted the owners of tall structures within one-quarter of a mile radius of the site proposed, asked for permission to install the antenna on those structures, and was denied for reasons, other than economic ones….

C. Antenna Height. The applicant shall demonstrate that the antenna is the minimum height required to function satisfactorily. No antenna that is taller than this minimum height shall be approved….

D. Setbacks from Base of Antenna Support Structure. If a new antenna support structure is constructed (as opposed to mounting the antenna on an existing structure), the minimum distance between the base of the support structure and property line shall be not less than the height of the antenna. Lesser set backs may be approved provided the applicant documents to the satisfaction of the Borough Council that the collapse of the antenna will not affect adjoining properties….

****

H. Co-Location; Other Uses. …[T]he applicant shall provide evidence of written contact with all wireless service providers who supply services within the

> Township for the purpose of assessing the feasibility of co-located facilities….
>
> I. Licenses and Other Regulations. The applicant must demonstrate that it has obtained the required licenses from the Federal Communications Commission….
> ****
>
> K. Color and Lighting. Antenna support structures under two hundred (200) feet in height shall be painted silver or have a galvanized finish retained, in order to reduce visual impact…No antenna support structure may be artificially lighted except in accord with Federal Aviation Administration requirements….
>
> L. Communications Interference. The applicant shall demonstrate that the radio, television, telephone or reception of similar signals for nearby properties will not be disturbed or diminished.
>
> M. Historic Structures. An antenna shall not be located on a building or structure that is listed on a historic register or within five-hundred (500) feet of such a structure.
>
> N. Discontinued Use. Should any antenna cease to be used as a communications facility, the owner or operator or then owner of the land on which the antenna is located, shall be required to remove the same within one (1) year from the abandonment of use….

Clark's Summit Borough Zoning Ordinance, Section 809.

Borough Engineer's Review

The Borough's Engineer, William G. Karam & Associates, reviewed Nextel's submissions and found they were "not in compliance" with the Zoning Ordinance. In a letter dated July 13, 2005, Borough Engineer identified a number

of "deficiencies." Letter to Clark's Summit Borough from William G. Karam Associates, Inc, July 13, 2005, at 1; Reproduced Record (R.R.) at 155a.

Specifically, Nextel did not address Section 809.3A's requirement that the applicant demonstrate by technical evidence that the antenna must go where it was proposed. Nextel did not address Section 809.3B's requirement that the applicant demonstrate that it contacted owners of tall structures. Nextel did not provide any technical data regarding minimum operational characteristics required by Section 809.3C. The monopole's proposed 150-foot height exceeded height requirements and setback requirements under Section 809.3D. Nextel did not provide enough detail to establish the monopole's support structure and safety under Section 809.3E. Nextel failed to address Section 809.3H's requirement that the applicant provide evidence of efforts to determine co-located facilities from other providers. Other requirements were not addressed including the monopole's color, lighting, communications interference, and distance from historic structures or information pertaining to the discontinued use of the monopole.

On July 20, 2005, Nextel appeared before Clark's Summit Borough Planning Commission where it was furnished with a copy of Borough Engineer's July 13, 2005, letter. Nextel introduced a registered engineer who gave an overview of the leased parcel, the characteristics and size of the monopole, the set backs, and Nextel's need for the monopole. The Planning Commission voted to accept the Application for review and suggested a meeting with Nextel's representatives "to work out some of the details." Minutes of Planning Commission Meeting, July 20, 2005, at 6; R.R. at 153a.

Information Submitted on August 31, 2005

On August 31, 2005, Nextel submitted a "packet of information" entitled "Itemization of Compliance with the Clark's Summit Borough Zoning Ordinance for the Conditional Use Request of Nextel Partners to Establish a Telecommunications Facility on Lands Leased from Philip Dettore, Jr. Located at 213 North State Street, Clark's Summit, PA." Memorandum to Borough Council from Virginia Kehoe, Clark's Summit Borough Manager, September 7, 2005, with attachment, R.R. at 85a-89a.

The four-page typewritten document addressed each of the deficiencies identified by the Borough Engineer. Nextel also attached revised maps, dated August 12, 2005, which relocated the proposed monopole and which showed the leased area was increased to a 90'x90' or an 8,100 square-feet lot "at the direction of the Borough Planner and Engineer.[1]"

Nextel indicated that a technical presentation by Radio Frequency Engineers would be submitted at the Special Hearing to carefully explain Nextel's need for a 150-foot monopole, the affect of a potential collapse on adjoining properties, and why the site was needed to meet Nextel's network coverage and capacity needs. Nextel further indicated that there were no suitable structures within one quarter of a mile of the proposed site, and explained the reasons why thirteen other sites were investigated but rejected.

[1] Itemization of Compliance with the Clark's Summit Borough Zoning Ordinance for the Conditional Use Request of Nextel Partners to Establish a Telecommunications Facility on

(Footnote continued on next page…)

Nextel's "Deemed Approval"

On September 13, 2005, Borough Council conducted a Special Hearing to allow Nextel to submit evidence in support of its Application. Nextel asserted it was entitled to a "deemed approval" under Section 913.2(b)(2) of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §10913.2(b)(2)[2], because Borough Council failed to conduct a hearing within sixty days of Nextel's Application. Borough Council rejected this assertion and conducted a hearing where both parties submitted exhibits and testimony.

Nextel presented the testimony of Matt Burtner (Burtner), a site acquisition specialist. Burtner testified that Nextel explored 12 other sites before settling on the land of Mr. Dettore. Hearing Transcript (H.T.), September 13, 2005, at 14; R.R. at 173a. He testified that Cingular intended to co-locate on the monopole. He believed there were no historic structures within 500 feet of the site and indicated that according to Nextel's "historic study" of the area and "response letters" there would be no historical impact in violation of Section 809.3.M. H.T. at 28; R.R. at 187a.

Shaun Paul (Mr. Paul), Nextel's radio frequency engineer, explained in detail Nextel's need for the particular site. He testified that without this site, Nextel would not have enough capacity to support demand. H.T. at 51; R.R. at 210a. There was a large amount of growth in a short period of time and the site

---

(continued…)

Lands Leased from Philip Dettore., Jr. Located at 213 North State Street, Clark's Summit, PA. at 1; R.R. at 86a.

[2] Act of July 31, 1968, P.L. 805, *as amended*.

was "a sufficient distance" from other sites to eliminate frequency interference and provide the most "offload" or alleviation of usage from another site. Mr. Paul explained that the antenna must go on the Dettore Property site because of "terrain," "geography," and the particular elevation of the Property. H.T. at 70, 72, 74; R.R. at 229a, 231a, 233a. He also explained that the monopole needed to be located at the Property because of zoning issues, and a "willing landlord." N.T. at 82; R.R. at 241a. In other words, there were other sites more "preferable" but they were not accessible for various reasons such as zoning, and availability.

Roger Johnson (Johnson) explained the structure of the monopole, its safety, and how it was designed to collapse upon itself if it fell. Johnson stated that the pole is "tapered" and comes in "sections" and that the monopole would not "tip" or "fall like a tree" onto adjoining properties. N.T. at 102-104; R.R. at 261a-263a. He testified that the pole would be designed to have a specific failure point near the top so if it did fail, "it would crumple upon itself." H.T. at 103-104; R.R. at 262a-263a. When asked by a Borough Council member if it "could" fall like a tree, Johnson answered "Yes. If the weak link is somewhere down near the bottom." H.T. at 104; R.R. at 263a. With the exception of one tower that was overloaded and in the process of being upgraded, he was not aware of any such tower failure in the mid-Atlantic area and Pennsylvania. H.T. at 111-112; R.R. at 270a-271a. Johnson said that the monopole was designed to withstand 100 mph gust speeds and 80-85 mph sustained wind speeds. H.T. at 96; R.R. at 255a.

On October 5, 2005, Borough Council voted unanimously to deny the Application because Nextel failed to satisfy its burden to demonstrate that it met the substantive requirements of the Zoning Ordinance. Findings of Fact and Conclusions of Law were issued on October 27, 2005. Most significantly,

Borough Council noted that the Zoning Ordinance required the monopole be set back from the property line a distance which was at least its height. On this property, however, that was not attainable. Borough Council recognized that it "could" approve lesser setbacks. However, Nextel did not demonstrate to Borough Council's satisfaction that the collapse of the monopole would not affect the adjoining properties. Specifically, Borough Council pointed to Johnson's testimony where he "conceded" that the tower "could fall like a tree" under certain conditions. Borough Council concluded that this concession represented "a significant risk to persons, property or potential catastrophe with the railroad." Borough Council Findings of Fact and Conclusions of Law, October 27, 2005, at 16-17.

On November 2, 2005, Nextel filed a Land Use Appeal. Evers, who resided next to the Property, petitioned and was granted the right to intervene. On June 18, 2007, the trial court agreed that Nextel was entitled to a "deemed approval."

Evers appealed to this Court, and also filed the Land Use Appeal at issue here, which challenged the substantive merits of the "deemed approved" Conditional Use Application. Evers' Land Use Appeal was stayed pending this Court decision.

The decision of the trial court to grant the "deemed approval" was upheld by this Court in Nextel Partners, Inc. v. Clarks Summit Borough/Borough Council, 958 A.2d 587 (Pa. Cmwlth. 2008). The record was returned to the trial court with instructions to review the substantive merits of the Application and issue its own findings of fact and conclusions of law.

Trial Court's Subsequent Consideration of Evers' Land Use Appeal and Merits of Conditional Use Application

The trial court scheduled argument on Evers' Land use Appeal to determine whether Nextel's "deemed approved" Application for Conditional Use met the substantive requirements of the Zoning Ordinance. The trial court took no additional evidence but relied on the record developed before Borough Council. The parties were permitted to file proposed findings of fact and conclusions of law based on the record.

On April 27, 2010, the trial court granted Nextel's Application and dismissed Evers' Land Use Appeal. The trial court made its own findings of fact and conclusions of law and concluded that Nextel established compliance with the specific requirements of Section 809.3. Significantly, the trial court found that even though the proposed monopole did not meet the Zoning Ordinance's "one-to-one" set back requirement Nextel successfully proved that collapse of the monopole would not cause harm to surrounding properties because it was designed to collapse upon itself and not fall across any property lines. The trial court also acknowledged the concerns of residents about the general safety of the community but concluded that there was no showing by credible, probative or relevant evidence that the proposed tower would substantially and adversely affect the health and safety of the community.

On appeal[3], Evers raises three issues: (1) whether the trial court erred when it considered the information submitted by Nextel on August 31, 2005, because it modified the Application after it was "deemed approved;" (2) whether Nextel met all of the general and specific requirements of the Zoning Ordinance; and (3) whether the trial court abused its discretion when it disregarded the concerns of Borough Council, neighbors and residents regarding safety, property values and the character of the neighborhood?

An applicant for conditional use approval has the burden of establishing compliance with the specific, objective criteria of the zoning ordinance. Joseph v. North White Hall Township Board of Supervisors, __ A.3d __, 2011 WL 837135 (Pa. Cmwlth. 2011). Once that burden is satisfied, the applicant has made out a prima facie case and must be granted a conditional use unless the objectors present sufficient evidence that the proposed use will have a detrimental effect on the public health, safety and welfare. Id. The fact that a certain use is permitted as a conditional use evidences a legislative determination that such use would not have an adverse impact on the public interests in normal circumstances. K. Hovnanian Pa. Acquisitions, LLC v. Newtown Twp. Bd. of Supervisors, 954 A.2d 718 (Pa. Cmwlth. 2008). The zoning ordinance may place the burden of persuasion as to the general detrimental effect of the proposed use on

[3] This Court must decide whether the trial court committed an abuse of discretion or error of law in rendering its decision. Kissell v. Ferguson Township Zoning Hearing Board, 729 A.2d 194 (Pa. Cmwlth. 1999). An abuse of discretion will be found if the findings are not supported by adequate evidence in the record. In re Appeal of Deemed Approved Conditional Use, 975 A.2d 1193 (Pa. Cmwlth. 2009). Even if another court might reach a different conclusion that does not make the conclusion of the trial court wrong if it is supported by substantial evidence. Id.

the health, safety and welfare upon the applicant but may not shift the duty to present evidence of such detrimental effect to the applicant. Manor Healthcare Corp. v. Lower Moreland Twp. Zoning Hearing Bd., 590 A.2d 65 (Pa. Cmwlth. 1991); Bray v. Zoning Bd. of Adjustment, 410 A.2d 909 (Pa. Cmwlth. 1980).

I.
Did the Trial Court Err when it Considered the Information Submitted by Nextel on August 31, 2005?

In his first issue, Evers argues that the trial court erred when it considered the amended Site Plan and other documents submitted by Nextel on August 31, 2005, because Nextel increased the leased area from a 60'x60' site, to a 90'x90' site, after the effective date of the "deemed approval."

Evers contends that "deemed approval" of the June 23, 2005, Application occurred on August 22, 2005, sixty-one days after the application was filed. He contends that by increasing the size of the leased site on August 31, 2005, Nextel unilaterally "modified" the original "deemed approved" Application. Evers argues that, consequently, the August 31, 2005, submission should have either: (1) extended or tolled the date for "deemed approval;" or (2) been considered a "new" Application.[4]

[4] In Nextel Partners, Inc., this Court already concluded the submission made by Nextel to the Borough on August 31, 2005, pursuant to the Zoning Ordinance requirements did not constitute a "new" application or toll the time limits imposed upon the Borough by the MPC for scheduling a conditional use hearing. This Court stated: "Applicant [Nextel] did not submit inconsistent land development and zoning applications for the property, nor did it abandon its initial conditional use application through submission of a 'new and distinct' application. Rather, Applicant [Nextel] filed its conditional use application and, prior to the hearing in this matter, provided the information necessary to demonstrate compliance with the Ordinance and

(Footnote continued on next page…)

The question is whether Borough Council may consider changes to the size of the leased site after an application which was based on a 60x60' leased site was deemed approved. This Court can discern no reason why not based on the particular circumstances of this case. The proposed changes which increased the leased site area were favorable to the Borough and were ostensibly done to conform to the Borough's Ordinance. Moreover, as explained more fully below, the general setback standards which Nextel was attempting to meet were not applicable to cell towers/antennas, which are governed by specific standards and setback requirements.

The Dissent contends that an applicant should not be allowed to make concessions in his application after it is approved (or deemed approved). In other words, even if the applicant wants to change his application to meet ordinance requirements he may not do so.

(continued…)

obtain conditional use approval." Nextel Partners, Inc., 958 A.2d at 593. (Emphasis added). The Dissent suggests that the Majority misread Nextel because in Nextel, the panel "did not in any way decide the issue now before us in this case—namely, what relevance, if any, does the information Nextel submitted to the Borough *after* the sixtieth day have to a substantive challenge to the *deemed* approval." (emphasis in original).

Contrary to the Dissent, the Nextel Court made an explicit pronouncement, based on these same exact facts here, that Nextel's August 31, 2005, submission was not a separate or new application, but was merely "information necessary to demonstrate compliance with the Ordinance and obtain conditional use approval." So, this Court did in fact, in Nextel, precisely decide the relevance of that material in the direct context of the application it held was deemed approved. The only way the board and trial court could have erred was if the materials submitted on August 31, 2005, constituted a new or different application. Because this Court already held in the first appeal that the August 25, 2005, submissions were necessary to demonstrate compliance with the ordinance and obtain conditional use approval, this Panel is not at liberty to find differently.

Contrary to the Dissent, there is nothing in the law which states that an applicant may not, after his application is approved, (deemed or not), modify his application to reflect compliance with ordinance requirements. In fact, this practice is often done, and is appropriate unless the change or modification changes the issues before the Board. The change of the lot dimensions from 60'x60' to 90'x90' did not change any issue before the Board, such that a new application before the Zoning Officer was necessary. Robert S. Ryan, *Pennsylvania Zoning Law and Practice* §9.4.11 (1970) explains that amendments of this type which are designed to conform the application to the requirements of the ordinance are allowed. Ryan explains:

> Generally amendments which do not change the issues should not be permitted, but a modification in the applicant's drawings or plans which is significant in terms of the issues involved probably requires a remand to the zoning officer in cases which must arise by "appeal" or a continued hearing in other cases, to afford the opposition time to prepare its defense. The obvious exception is the amendment designed to conform the application to the requirements of the ordinance, as where an applicant who has been seeking three variances amends his plans to eliminate the need for one. (Emphasis added).

Again, Nextel amended its application to conform to the requirements of the Ordinance regarding minimum lot size.[5] There is nothing in the MPC or

[5] The Dissent's solution not only thwarts the timeliness concerns of Section 913.2(b)(2) of the MPC, it would serve no logical or practical purpose. If this Court reverses, as the Dissent recommends:

> 1) the case would be sent back to the trial court to remand to the board to hear protestant's reasons why the original

(Footnote continued on next page…)

Ordinance which prevented Nextel from increasing the leased size to 90x90' during the subsequent course of the proceedings, as long as it did not change the issues which would have required a new application before the zoning officer.

The issue before Borough Council, before and after August 22, 2005, (the effective date of the deemed approval), was always whether Nextel was entitled to a conditional use approval to install a 150 foot monopole on lands leased from Philip Dettore, Jr., located at 213 North State Street. The increase in size of the leased site did not modify or change that basic issue. The supplemental information was clearly submitted *as part of the original conditional use application process*, following consultation with the Borough officials and in response to comments from the Borough Engineer.

To remand the matter for the trial court to "apply the correct scope of review" would seem to be a waste of time. Critically, the trial court's ultimate conclusion was that regardless of a 60x60' or 90'x90' leased site, the specific standards applicable to cell towers/antennas applied to the application. Those

(continued…)

> application which contained the 60'x60' lot should be denied; - *even though Nextel already agreed to a larger lot area*;
>
> 2) Nextel would then have to "re-file" an application (because the Dissent does not agree it is allowed to amend it) which proposes a 90'x90' lot; and
>
> 3) the board would then hold a new hearing to consider if the 90'x90' lot size was sufficient to meet the ordinance minimum lot size requirements even though a hearing was already held on a 90'x90' lot size and the application was approved on that basis.

specific standards required a one-to-one set back, unless the court finds a lesser set back will not affect adjoining properties, which is precisely what the trial court held.

Because this issue was already decided against Evers in context of the companion appeal, and because this Court continues to find it to be without merit, this Court will not reverse the trial court on this basis.

II.
Did Nextel Meet All of the General and Specific Requirements of the Zoning Ordinance?

In his second issue, Evers contends the trial court erred when it concluded that Nextel was *only* required to meet the "specific" standards set for communications towers in Section 809.3. Evers asserts that Nextel was also required to meet the requirements established under the Zoning Ordinance for all development in the Borough. He claims the trial court "did not address, or even mention, any of the general standards of the Ordinance … such as minimum lot size, set backs, height limitations established in §404." Evers' Brief at 9.

Section 404.3 – Development Standards for HC Zoning Districts

First, Evers asserts that the trial court failed to consider whether Nextel met Section 404.3's Schedule of Development Standards for non-residential uses in HC Zones. Section 404.3 required a minimum lot size of 7,500 square feet, minimum width of 60 feet; minimum depth of 100 feet; minimum

front yard set back of 25 feet; minimum rear yard set back of 10 feet; minimum side yard set back of 10 feet; and a maximum building height of 40 feet.

Without elaboration, Evers asserts that Nextel "obviously" did not meet "numerous" Section 404.3 standards. Evers' Brief at 9. This Court rejects Evers' proposal for several reasons.

First, Evers' argument is based on the incorrect premise that the proposed site was 60'x60.' However, this Court has rejected this argument. Burtner testified that the leased site is 90'x90' or 8,100 square feet. So, the front, side and rear yard set backs were met, as was the lot size requirements. Also, the Site Plan Z-1 shows compliance with Section 404.3's front, rear and side yard setback requirements. Site Plan Z-1; R.R. at 447a.

In any event, this Court is not convinced that Section 404.3's general development standards were applicable to cell towers/antennas.

Section 809 specifically states that "[t]he following regulations shall apply to cellular phone antennae…." Section 809.3 entitled "Standards" addresses the particular height and set back requirements specifically for cell towers/antennas. While the Development Standards in Section 404.3 limit building height to 40 feet or three stories in HC Zoning Districts, Section 809.3.C, which specifically applies to antennas, states that the antenna shall be "the minimum height required to function satisfactorily. No antenna that is taller than this minimum height shall be approved…." (Emphasis added).

In addition, Section 809.3 provides that "the minimum distance between the base of the support structure and property line shall be not less than the height of the antenna." Lesser set backs may be approved provided the applicant documents to the satisfaction of the Borough Council that the collapse of the antenna will not affect adjoining properties…. (Emphasis added). Clearly, the standards in Section 404.3 and 809.3 are in conflict.

Undoubtedly, the intent of the Zoning Ordinance was for the specific standards for cell towers/antennas to control the set back and height requirements for cell towers/antennas. Cell towers/antennas are unique structures that warrant unique standards. Section 404.3's 40-foot building height restriction may not be interpreted to negate the clear height restrictions tailored specifically to regulate cell towers/antennas.[6]

Here, the trial court properly considered the specific height and set back requirements of Section 809.3, and concluded, based on the credible testimony presented by Nextel, that: (1) 150 feet was the minimum height required for the monopole to function satisfactorily; and (2) lesser setback was appropriate because the monopole "would crumple upon itself" and not affect adjoining properties. H.T. at 103-104; R.R. at 262a-263a. The trial court did not err when it disregarded the structure size/density requirements of Section 404.3.

[6] Moreover, Section 332(c)(7) of the Federal Telecommunications Act, 47 U.S.C. §332(c)(7), preempts Section 404.3 of the Zoning Ordinance to the extent that it prohibits or has the effect of prohibiting the provision of personal wireless services by limiting the height of cell towers/antennas to 40 feet.

The Dissent recommends that the matter be vacated and remanded to the trial court to apply the proper scope of review. Because Section 404.3 standards did not apply, it was not relevant whether Nextel proposed a 60x60' site or a 90x90' site in its application. Regardless of whether Nextel's application proposed 60x60 leased site or a 90x90 leased site, the trial court held, on the record, that lesser setback was satisfactory because Nextel proved that adjoining properties would not be affected because if the monopole failed, it would collapse upon itself and not tip over like a tree. Therefore, a remand is not necessary.

Express Standards for Antennae

Next, Evers contends that the trial court erred when it concluded Nextel met the fifteen specific standards in 809.3. However, the only standards Evers expressly addressed in his Brief are Sections 809.3(A) and 809.3(D). Accordingly, the Court will limit its analysis to those two Sections.

Section 809.3(A) – Location Requirement

Evers contends that the trial court erred when it concluded that Nextel demonstrated that the monopole "must" go where it is proposed. He points this Court to several places in Burtner's testimony where he uses the word "preference." Specifically, in response to a question by Borough Solicitor, Burtner testified as follows:

> Q. It looks to me like it's down in that one corner, is that due to the preference of the lessor or is there a technological reason for that?
>
> A. Well, it is the preference of the lessor…."

H.T. at 104; R.R. at 265a.

This Court has thoroughly reviewed the record and is satisfied that Burtner was referring to the particular location on Mr. Dettore's property where he wished for the monopole to go so it would not interfere with his garden.

Mr. Paul, Nextel's radio frequency engineer, explained from a technical standpoint Nextel's need for the Detorre property. Those reasons included demand, capacity, distance from other sites, frequency interference, terrain, geography and elevation. The trial court was well within its authority to credit this unrebutted testimony and conclude, as it did, that Nextel met its burden of showing that the monopole must go where it was proposed.

Section 809.3(D) – Setback Requirements

Evers contends that Nextel acknowledged that it did not meet the one-to-one setback requirement of Section 809.3(D). He claims the trial court erred when it approved a "lesser setback" because Nextel failed to establish that the collapse of the antenna would not affect adjoining properties. This Court must disagree.

As mentioned, the trial court credited the unrebutted testimony of Nextel's expert, Johnson, who explained that the monopole was designed with the weak-link at the top so that if a failure were to occur the monopole would collapse upon itself and not tip over like a tree. The trial court noted that although Johnson did acknowledge that it was still possible for the monopole to fail at the base, he posited that this was unlikely to occur. Based on his past experience, Johnson never heard of a monopole falling/collapsing under normal circumstances. Thus, the trial court found that while Nextel did not meet the one-to-one setback

requirement, it did show that a collapse of the monopole was unlikely and would not affect adjoining properties.

There was no error.

III.
Did the Trial Court Disregard the Concerns of Borough Council, Neighbors and Residents Regarding Safety, Property Values and Character of the Neighborhood?

In his last issue, Evers asserts that the trial court erred because it disregarded the concerns of Borough Council, neighbors and residents regarding the safety, property values and character of the Borough. Once again, this Court disagrees.

As Nextel points out, the trial court did not dismiss the concerns of the opponents or Borough Council but rather considered the testimony of those who spoke at the hearing, and determined that the testimony did not rise to the level required to justify a denial of the conditional use. Such a conclusion was within the discretion of the trial court and will only be disturbed with a showing of an abuse of that discretion.

The testimony presented by the opponents was merely opinion testimony, which included speculative potential impacts if the tower should fail, without any evidentiary support that such an event had any reasonable likelihood of occurring. Other testimony concerned personal opinions regarding aesthetics.

The trial court properly conducted an independent review of the evidence and made its own findings of fact. In so doing, it properly assessed the credibility and weight of the testimony presented. This Court discerns no error.[7]

Accordingly, for the foregoing reasons, the trial court is affirmed.

_____

BERNARD L. McGINLEY, Judge

[7] Evers claims the trial court was required to impose conditions on the approval. However, neither the MPC nor the Zoning Ordinance requires the trial court to impose conditions. Section 603(c)(2) of the MPC, 53 P.S. §10603(c)(2) provides that in allowing a conditional use, the governing body "may" attach conditions and safeguards. Section 1108.2B.5.c of the Zoning Ordinance contains similar language and provides: "In granting a conditional use, the Borough Council may require such reasonable conditions and safeguards…as it determines necessary." (Emphasis added). The trial court determined that there were no safeguards or conditions necessary in accordance with its authority under the MPC and Zoning Ordinance.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen J. Evers, Esq., Appellant	:	
v.	:	
Clarks Summit Borough/ Borough Council	:	
v.	:	
Nextel Partners, Inc.	:	No. 871 C.D. 2010

O R D E R

AND NOW, this 22nd day of September, 2011, the Order of the Court of Common Pleas of Lackawanna County in the above-captioned matter is hereby affirmed.

_____

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen J. Evers, Esq., Appellant	:	
v.	:	
Clarks Summit Borough/ Borough Council	:	No. 871 C.D. 2010
	:	Argued: December 6, 2010
v.	:	
Nextel Partners, Inc.	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE BROBSON **FILED:** September 22, 2011

I respectfully disagree with the majority's conclusion that the trial court did not err in considering the information Nextel Partners, Inc. (Nextel) submitted to the Clarks Summit Borough (Borough) Council (Council) following the expiration of the Council's mandatory sixty-day hearing period under Sections 908(1.2) and 913.2(b)(2) of the Pennsylvania Municipalities Planning Code (MPC).[1]

[1] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10908(1.2), 10913.2(b)(2). Section 908(1.2) requires the governing body (in this case Council) to conduct its first hearing on a conditional use application within sixty (60) days of receipt of the application. If that hearing is not timely held, Section 913.2(b)(2) provides that "the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time."

In *Nextel Partners, Inc. v. Clarks Summit Borough/Borough Council*, 958 A.2d 587 (Pa. Cmwlth. 2008) (*Nextel I*), this Court had one issue before it—*i.e.*, whether the trial court erred in concluding that Nextel was entitled to a deemed approval of its conditional use application and site plan under Section 913.2(b)(2). There, Council argued that Nextel's application was not complete as of the sixtieth day from the submission date, which, in Council's view, explained why Nextel continued to supply information to the Borough after the sixtieth day. We rejected that argument and, in doing so, agreed with the trial court. Nextel's submission of additional information in response to the Borough's engineer's comments to Nextel's application did not toll the sixty-day period or constitute a new application. Thus, Nextel was entitled to the deemed approval under Section 913(b)(2) of the MPC. The Court, however, did not in any way decide the issue now before us in this case—namely, what relevance, if any, does the information Nextel submitted to the Borough *after* the sixtieth day have to a substantive challenge to the *deemed* approval. I thus disagree with the majority that *Nextel I* disposes of this question.

Nextel chose to claim a deemed approval under Section 913(b)(2) of the MPC. I read Section 913(b)(2) as providing for a deemed approval as of the sixty-first day—regardless of when the applicant seeks the deemed approval, when the governing authority recognizes and provides notice of the deemed approval, or when the deemed approval becomes effective.[2] When an applicant relies on a

[2] This Court has earlier concluded that the *effective* date of a deemed approval may not happen until some affirmative event acknowledging the deemed approval occurs. *See Richland Township Planning Commission v. Bobiak*, 552 A.2d 1143 (Pa. Cmwlth. 1989) (holding that deemed approval that occurred in 1974 did not become effective until governing body issued approval of the 1974 preliminary subdivision plan, thus concluding that five-year limitation period in former Section 508(4) of the MPC did not begin to run in 1974).

deemed approval under the MPC, the applicant is entitled only to a deemed approval of what was before the governing body on the sixty-first day. Likewise, any substantive challenge to a deemed approval must be evaluated against the application that was deemed approved and not against subsequent revisions and amendments to the approved application designed to stave off substantive challenges.

Here, Nextel sought deemed approval from Council at Council's untimely hearing on Nextel's application. Council rejected the request, and, instead, proceeded to consider all of the information Nextel submitted in support of its initial application, including the revisions and amendments made after the sixtieth day—*as if the deemed approval had not occurred*. Because in *Nextel I* we affirmed the trial court's conclusion that the Council erred in denying the deemed approval, this case must be placed in a posture similar to where it would have been had Council granted the deemed approval.

What the majority seems to be saying is that an applicant who invokes the deemed approval provision of the MPC can cure defects in its application as it exists on the sixtieth day by subsequent submissions and amendments. I simply do not agree that this is a proper application of the deemed approval language in the MPC. Consider a situation where an applicant promptly moves for a deemed approval on the sixty-first day, and the governing authority grants the request and posts the deemed approval. A private citizen then appeals to the trial court, challenging the deemed approval on substantive grounds—*i.e.*, the application did not comply with the governing ordinance. Under the majority's rationale, the applicant could stave off the challenge before the trial court by requesting the opportunity to present evidence in the absence of a full record, consisting not of

evidence to support the application as filed, but evidence in the form of actual *amendments to* the application to conform the already deemed approved application to the ordinance. Such an approach does a disservice to the local government because it takes out of the local government's hands the ability to review the "revised" deemed approved application in the first instance. It also does a disservice to the citizens, making any challenge to a deemed approval a moving target.

In this case, the majority would essentially allow Nextel to get both the benefit of a deemed approval because of the absence of a timely hearing and the benefit of Council's untimely hearing. I do not believe this is what the General Assembly intended. Instead, I believe that under the MPC, the scope of review of a trial court in a substantive challenge to a deemed approval is the status of the application at the time the deemed approval occurred as a matter of law—*i.e.*, on the sixty-first day in the absence of a hearing. The trial court thus exceeded its scope of review in this case by considering Nextel's subsequent *amendments* to the application.[3] I would, therefore, vacate and remand to the trial court to apply the proper scope of review.

In my view, when Council finally conducted its hearing, the case essentially split into two distinct proceedings: (1) the deemed approval action based upon the state of the original application at the expiration of the hearing deadline, which is the subject of *this* land use appeal; and (2) the Borough's review and denial of the application as if the deemed approval had not occurred. When both were appealed, the trial court should have approached them distinctly.

[3] This is not to say that the trial court was required to disregard Nextel's clarifications or explanations of its deemed approved application and site plan. I object only to the consideration of evidence that altered or changed the deemed approved application and site plan.

Instead, it conflated the two. This is a procedurally complicated matter; however, based upon the foregoing, I respectfully dissent from the majority's decision.

P. KEVIN BROBSON, Judge