

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

October 28, 2010

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Re: *Sea Pines Village Condominium Association of Owners, et al. v. Board of Adjustment, et al.*
C.A. No. S10A-01-003 THG

Upon a Petition for Review of a Decision of the
Sussex County Board of Adjustment: **Reversed.**

Date Submitted: September 16, 2010

Date Decided: October 28, 2010

Dear Counsel:

This is the Court's decision on review of a decision of the Sussex County Board of Adjustment ("Board").¹ The Petition was filed by Sea Pines Village Condominium Association of Owners ("Sea Pines"), Gary Bogossian, John Hoefflerle, Barbara McNally, Fred McNally, David R. Gerk, Dana S. Gerk, Barbara A. Gerk, Ronald J. Gerk, James G. E. Williams, Heather R. Williams, Richard Hicks, Lois Dawson, Harold S. Marriott, Laura W. Marriott, and J. Daniel Costello (collectively, "Petitioners"). Defending the Board's decision are AT & T and Pepper & Steiner, Inc., as well as the Board itself and

¹ See 9 Del. C. § 6918.

its members in their official capacities (collectively, “Respondents”). The Board granted AT&T’s application for a special use exception to erect a 100-foot tall telecommunication tower on commercially zoned property within 500 feet of residentially zoned property. For the reasons explained below, the Board’s decision is REVERSED.

Facts

In August 2009, AT&T requested a special use exception to place a 100-foot tall telecommunication tower on commercially zoned property owned by Pepper & Steiner, Inc., located at District 1-34, Map Number 17.07, Parcel Number 191.00, and also known as 32929 Coastal Highway, Sussex County, Delaware (“Pepper & Steiner Property”).² On September 21, 2009, the Board held a hearing on the application. AT&T presented testimony in support of its request for the special use exception. The owner of the Pepper & Steiner Property spoke in favor of the application. Several members of the public testified in opposition to the proposal. At the hearing, it became clear that the Board posted a notice concerning AT&T’s application on the incorrect property, that is, the notice was not posted on the Pepper & Steiner Property but was posted on a parcel adjacent thereto. After testimony was taken, the matter was tabled until the Board’s October 19, 2009, meeting. Prior to the October 19th meeting, three motions for rehearing were filed; one on behalf of Sea Pines, one on behalf of the towns of Bethany Beach and South Bethany Beach, and one on behalf of the Bethany Beach Landowners Association (“BBLA”). On October 19th, the Board considered two of the motions for rehearing³ and denied them. The matter was continued until the Board’s November 2, 2009, hearing.

² Although the site is zoned commercial, because the proposed tower would be erected within 500 feet of residentially zoned lots, a special use exception is required. *Sussex County Code* § 115-194.2(A).

³ It appears the motion filed on behalf of BBLA was not considered. Nevertheless, BBLA’s motion raised the same issues that the other two motions for rehearing raised.

On November 2nd, the Board considered the merits of the application only and refused to consider materials submitted to the Board by Petitioners after the September 21st hearing. The Board concluded AT&T's application met the technical requirements imposed by the Sussex County Code and orally approved the application. The hearing transcript indicates the application passed by a vote of 3-2. On December 14, 2009, the Board issued its Findings of Facts on the application. The Findings of Fact indicate that the decision to approve the application was unanimous. On January 4, 2010, the Board considered a motion for rehearing filed by Sea Pines and denied the motion. Petitioners filed this appeal and the Court granted the writ of certiorari.

Standard of Review

In reviewing a decision of the Board of Adjustment, this Court may make only two determinations: whether substantial evidence on the record supports the Board's factual findings and whether the Board's decision is free from legal error.⁴ Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion.⁵ Where substantial evidence exists, this Court will not reweigh the evidence and substitute its own judgment for that of the Board.⁶ The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable.⁷ This Court is authorized to "reverse or affirm, wholly or partly, or may modify the decision brought up for review."⁸

⁴ *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976), *aff'd* 379 A.2d 1118 (Del. 1977).

⁵ *Cingular Pennsylvania, LLC v. Sussex Co. Bd. of Adjustment*, 2007 WL 152548 (Del. Super.)

⁶ *McLaughlin v. Board of Adjustment of New Castle County*, 984 A.2d 1190 (Del. 2009).

⁷ *Mellow v. New Castle Bd. of Adjustment*, 565 A.2d 947, 955 (Del. Super. 1988).

⁸ 9 Del. C. § 6918(f).

Discussion

Petitioners raise several arguments on appeal. They may be briefly summarized as follows:

1. The published, posted, and mailed notices of the public hearing concerning AT&T's application were insufficient;
2. The Board erroneously relied upon insufficient and/or incorrect evidence;
3. The Board improperly tabled the application after the hearing and improperly failed to consider materials subsequently submitted;
4. The Board's oral and written decisions failed to articulate sufficiently the Board's rationale for granting the special use exception;
5. Subsequent to the grant of the special use exception, AT&T has violated its building permit and the Board has failed to enforce the terms of said permit; and
6. Petitioners are entitled to costs and attorneys' fees due to the gross negligence and/or bad faith of the Board in rejecting Petitioners' arguments concerning the inadequacy of notice at the hearings below.

Because the Court concludes that the notice given in this case was insufficient, the Board's decision is reversed on procedural grounds, as illuminated below, and the arguments as to the merits of the Board's decision are moot.

A. Notice

Petitioners' arguments based upon the inadequacy of the notice provided by the Board rely on several State and County Code provisions, as well as the Board's Rules.

The Board's jurisdiction is given to the Sussex County government pursuant to Chapter 69 of Title 9 of the Delaware. Chapter 69 establishes the Planning and Zoning Commission as well as the

Board. The Code specifies that any rules promulgated to govern the Board's procedure must be consistent with the provisions of Chapter 69:

The county government shall provide and specify in its zoning or other regulations, general rules to govern the organization, procedure and jurisdiction of the Board of Adjustment, which rules shall not be inconsistent with this subchapter, and the Board of Adjustment may adopt supplemental rules of procedure not inconsistent with this subchapter or such general rules.⁹

Section 6908 of Title 9 provides: "Any public hearing required by this subchapter shall be held in accordance with § 6812 of this title." That section, in turn, reads as follows:

- (a) Any public hearing required by this chapter shall be held within the County and notice of the time and place thereof shall be published in 2 newspapers of general circulation in the County. Notice shall be published at least 15 days before the date of the hearing. *In addition, notice of the hearing shall be posted on the property itself.* The notice shall state the place at which the text and maps relating to the proposed change may be examined.
- (b) Public notice of any formal action taken in regard to public hearings as required by this chapter shall be published once in a newspaper of general circulation in the county within 15 days of such action.¹⁰

The Sussex County Code governs the procedure for applications for special exceptions:

- A. Applications for special exceptions ... may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the Director in accordance with rules adopted by the Board. The application and accompanying maps, plans or other information shall be transmitted promptly to the Secretary of the Board, who shall place the matter on the docket, advertise a public hearing thereon and give written notice of such hearing to the parties in interest. The Director shall also transmit a copy of the application to the Planning and Zoning Commission, which may send a recommendation to the Board or appear as a party at the hearing.
- ...
- C. The Board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and decide the same within 30 days following the hearing.

⁹ 9 Del. C. § 6915.

¹⁰ 9 Del. C. § 6812 (emphasis added).

Upon the hearing, any party may appear in person or by agent or by attorney. Public notice of a hearing shall consist of publication at least 15 days prior to the hearing in a newspaper of general circulation in the county, specifying the time, place and nature of the hearing. *In addition, the Board may cause the date, time, place and nature of the hearing to be posted conspicuously on the property, in accordance with the rules of the Board.* In exercising its powers, the Board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as ought to be made and, to that end, shall have all the powers of the Director.¹¹

Finally, the Board has internal rules of procedure that are also implicated in the Board's decision.

Rule 3.2 reads:

Public notice, property posting and advertisement of meetings and public hearings shall comply with all applicable provisions of State law and County ordinances. In addition, notice of a public hearing shall be mailed to an appellant or applicant (or attorney or agent for the appellant or applicant) at least 15 days before the date of the hearing.

Rule 3.3 provides:

At the time that an appeal or application is made to the Board, the Planning and Zoning Office shall prepare a listing of names and addresses of property owners whose property lies within a 200 foot radius of the boundaries of the property subject to the appeal or application. The Director of Planning and Zoning shall cause a copy of the public notice of the public hearing to be mailed to each person, partnership or corporation whose name appears on the list. Failure to comply with the provisions of Rule 3.3 shall not be considered a defect in the requirements for public notice of a public hearing.

The Delaware Code, the County Code, and the Board's Rules appear to contradict each other, specifically with regard to the questions of whether the Board is required to post notice on a property subject to a special use exception application and whether the Board must notify by mail all people owning property within 200 feet of the property subject to such an application.

Petitioners' argument based on insufficient notice is three-fold:

First, Petitioners argue the property was not properly posted as required by 9 *Del. C.* § 6812. Respondents counter that § 6812 is applicable to only those public hearings required under Chapter 68,

¹¹ *Code of Sussex County*, § 115-208 (emphasis added).

or Subchapter I of Chapter 69, that is, subdivision plans or rezonings, which fall under the jurisdiction of the Planning and Zoning Commission. Respondents assert that the actions taken on behalf of the Board are governed by the County Code and the Board's Rules. Because the County Code provides that the Board *may* post the property to be affected by the application, Respondents assert the posting in this case, while admittedly erroneous, is not grounds for reversal.

Second, Petitioners assert the failure to notify all property owners living within the 200 foot radius of the boundaries of the Pepper & Steiner Property via mail of AT&T's application was a violation of Rule 3.3 of the Board's Rules. In response, Respondents point to the last sentence of Rule 3.3, which reads: "Failure to comply with the provisions of Rule 3.3 shall not be considered a defect in the requirements for public notice of a public hearing." In light of this "unambiguous" language, Respondents assert the Board's failure to mail notice to all "interested parties" does not constitute grounds for reversal.

Third, Petitioners argue the published notice was insufficient because it failed to include a precise address or tax parcel number for the affected property. Respondents counter the published notice need not include those facts and, because the published notice identified the time, place and nature of the hearing, it complied with the County Code. Moreover, Respondents argue Petitioners are procedurally barred from presenting this argument as they did not raise it below.¹²

The Court could easily get bogged down in an effort to determine how the Delaware Code, the County Code and the Board's Rules interact. However, after due consideration, I decline to address the issue of what, specifically, the Board must do to perfect each type of notice (posted, mailed, and

¹² Due to the nature of this decision, it is unnecessary to reach this argument. However, I observe that one might have difficulty in raising an argument regarding the adequacy of a notice that one has not seen. *See also Down Under Ltd. v. Delaware Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 677 (Del. Super. 1989) (noting that constitutional issues need not be presented to an administrative agency as a prerequisite for their consideration by a reviewing court).

published)¹³ and hold only that, when the Board elects to post the property that is the subject of an application for a special use exception, the Board must post the correct property.

A full examination of each notice provision and the applicability thereof is unnecessary in this case because it was virtually impossible for any member of the public to discern which property was subject to the special use request due to the Board's notification procedure. In the first instance, assuming without deciding, that the notice published in the newspaper need not comply with 9 *Del. C.* § 6812 (as Respondents argue), any reasonable person who read the notice and went in search of the property was entirely misled by the incorrectly posted property.

The published notice read:

NOTICE OF PUBLIC HEARING
COUNTY BOARD OF ADJUSTMENT HEARING

In accordance with Chapter 115, of the Code of Sussex County, a hearing will be held on request for a special use exception as provided by: Chapter 115, Article XXV, Subsection 115-194.2, Item A of said ordinance of **AT&T** who are seeking a special use exception for a telecommunication tower, to be located east of Route One, 100 feet north of Jefferson Bridge Road.

The hearing will be held in the County Council Chambers, County Administrative Office Building, Georgetown, Delaware, on Monday evening, **SEPTEMBER 21, 2009, at 7:00 P.M.**

All interested parties should attend and present their views. If unable to attend the public hearing, written comments will be accepted but must be received prior to public hearing.

¹³ I observe, however, that it would behoove the Board to clarify its procedural requirements as to notice of public hearings. Indeed, at the September 21st Board hearing, there appeared to be disagreement among the Board members as to what the notice requirements are: one Board member stated that the "only" notice requirement was that adjacent property owners be notified. Nevertheless, the testimony below, taken as a whole, reveals that the Board has a practice of posting the affected property as well as a practice of notifying residents within 200 feet of the affected property; these practices are compatible with a neighboring property owner's procedural due process rights concerning matters with the potential to affect his property rights.

For additional information, contact the Planning and Zoning Department at 302-856-7878.

The notice posted on the incorrect property and the notice mailed to an incomplete list of those living within 200 feet of the Pepper & Steiner Property contained the same description of the affected property. This description did not contain a street address, a tax parcel number, or identify a site where the plans for the proposal could be reviewed. Although such failings may or may not constitute a violation of the requirements of published notice, the Court can comfortably draw the logical conclusion that one who viewed the notice and was curious about the location of the property would drive up Route One, near Jefferson Bridge Road, and look for a property identified by a posting. What the person was obligated to do if he was *unable* to locate a posted property in that area is not before the Court. However, the Court finds that the investigating party is not under an obligation to investigate further *once a posted property is identified in the area described by the published notice*.¹⁴

As the Board's attorney stated at the October 19, 2009, Board hearing, "The question [is] if the County opts to post the property, does it have to be perfect?" Assuming, without deciding, that mailing notice to residents living within 200 feet is not required by law, that posting the property itself is not required by law, and that the published notice in this case was compliant with the requirements of the Delaware Code and the County Code, the Court concludes the posting of the erroneous property violated the surrounding residents' right to be heard on the application. Respondents cite the fact that several people showed up at the hearing as evidence that the notice was effective. However, even those who showed up did not know which property was being discussed until hearing testimony from AT&T's

¹⁴ Displaying incredible determination and curiosity, which only serves to underscore how contentious this application was to the residents of the area, several people *did* investigate further and even *they* were unaware that the Pepper & Steiner Property was the correct property until the September 21, 2009, hearing before the Board.

representatives.¹⁵ As a matter of law, then, Petitioners and those similarly situated were not provided “notice in a meaningful time and manner”, as required by the due process clauses of the United States Constitution, Amendments V and XIV and the Delaware Constitution of 1897, Article 1, Section 7.¹⁶

In sum, the Court holds, assuming without deciding that the Board is not required to post the property subject to a special use exception application, when the Board does, in fact, opt to post the property, it must do so properly. In light of the facts presented in this case, notice was insufficient and the Board’s decision approving the special use is REVERSED.

B. Attorneys’ Fees and Costs

¹⁵ Lou Kilmer, a member of the Bethany Beach Town Council, testified he was sent to the hearing for fact-finding on behalf of the Council after reading a newspaper article about the application in the preceding Friday’s paper. (The September 21st hearing was held the following Monday.) Mr. Kilmer pointed out to the Board that the property posted was not the Pepper & Steiner Property. Dan Castello, a resident of Bethany Beach and a Board Member of the BBLA, testified that he got “wind” of the hearing the previous Friday. Mr. Castello told the Board he went for a walk to try to locate the property and, upon finding the posting on a property with a “For Sale” sign out front, called the listing realtor. The realtor told Mr. Castello the application did not concern the listed property. Hal Marriott, a resident of Sea Pines, testified he found out “by chance” about the hearing on Sunday afternoon and did not have a chance to secure an appraiser’s opinion regarding the effect the cell phone tower would have on his property value. Margaret Young, a member of the Bethany Beach Town Council, testified she learned of the hearing from reading the newspaper over the weekend. She, too, questioned AT&T’s testimony that the cell phone tower would not affect property values. John Hefferle, representing Sea Pines, spent the day “running around trying to get some information on this” and, at the hearing realized he was looking at the wrong property, “I’m thinking it’s the lot ... where the sign was posted. I didn’t realize it was supposed to be at the gas station.” Mr. Hefferle testified that he did not have time to speak to the other residents of Sea Pines regarding their opinions on the application due to the lack of notice.

¹⁶ *Tarapchak v. Town of South Bethany Board of Adjustment*, 1998 WL 109829, at *3 (Del. Super.). *Accord County Council v. Green*, 516 A.2d 480, 481 (Del. 1986) (outlining the minimum due process requirements for a public hearing: “[s]uch proceedings require adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result and, most importantly, an adherence to the statutory or decisional standards then controlling”). The case before the Court is substantially different from that of *Lynch v. City of Rehoboth Beach*, where the court rejected the petitioners’ claim that their procedural due process rights were infringed. In that case, petitioners were present, represented by counsel, and able to present expert testimony in support of their arguments at the underlying hearing. 2005 WL 1074341, at * 3-4 (Del. Ch.).

In accordance with the American Rule on costs and attorneys' fees, generally one who takes an appeal from a Board decision bears his own costs and attorneys' fees. Section 6918(g) of Title 9 of the Delaware Code provides for an exception where it is apparent to the Court that the Board "acted with gross negligence or in bad faith or with malice in making the decision appealed from." Petitioners urge the Court to find the Board acted with gross negligence or bad faith in the present case. In light of the inconsistencies between the Delaware Code, the Sussex County Code, and the Board's Rules, I cannot conclude the Board acted in bad faith or with gross negligence in denying Petitioners' petitions for rehearing based on insufficient notice. Accordingly, each party hereto will bear its own costs and attorneys' fees.

Conclusion

For the reasons stated herein, the Board's decision approving AT&T's application for a special use exception to install a 100-foot communications tower within 500 feet of residentially owned property is REVERSED. Each party to this appeal shall bear its own costs.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary