TAX COURT OF NEW JERSEY

Joshua D. Novin
Judge

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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE TAX COURT COMMITTEE ON OPINIONS

February 10, 2017

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Re: New Jersey Turnpike Authority v. Elizabeth City
Docket Nos. 004383-2014 & 013888-2015

Dear Mr. Casey and Mr. Blau:

This constitutes the court's opinion on plaintiff's motion for summary judgment, seeking entry of an order declaring a parcel of plaintiff's property exempt from local property taxation.

These appeals challenge the local property tax assessments imposed by the City of Elizabeth ("defendant") on a parcel of real property owned by the New Jersey Turnpike Authority ("plaintiff"), and improved with a monopole cellular communications tower. For the reasons stated more fully below, the court concludes that the record before the court does not support granting a local property tax exemption for plaintiff's property. Accordingly, the court denies plaintiff's motion for summary judgment.

I. Findings of Fact and Procedural History

Pursuant to R. 1:7-4, the court makes the following findings of fact and conclusions of law based on the briefs, Statement and Counter Statement of Undisputed Facts, and the Certifications of Maura K. Tully, Jose Dios, and Enrico Emma.[1]

Plaintiff is the fee simple owner of the real property commonly known as "R Schiller St," designated as Block 1, Lot 1010.A on defendant's municipal tax map (the "subject property").[2] The subject property consists of a New Jersey Turnpike Authority maintenance yard with a monopole cellular communication tower and related equipment (the "cell tower"). According to plaintiff, the cell tower was erected by a predecessor of AT&T, is owned by plaintiff and is leased back to AT&T. The subject property was exempt from local property taxation for several years, however, in or about 2013, defendant's tax assessor apparently determined that the cell tower was no longer entitled to local property tax exemption because it was leased to a private, for-profit entity.

Plaintiff filed Complaints with the Tax Court on March 19, 2014 ("2014 Complaint"), and August 20, 2015 ("2015 Complaint"), challenging the 2014 and 2015 tax year assessments on the subject property. Plaintiff's 2014 Complaint was filed under the Correction of Errors statute, N.J.S.A. 54:51A-7, charging that the 2013 tax year local property tax assessment for the subject property contained a "typographical error, an error in transposition or a mistake in the tax

[1] Plaintiff's Notice of Motion for Summary Judgment, Certification of Maura K. Tully, Statement of Undisputed Facts and brief relate only to docket numbers 004383-2014 and 013888-2015. Although plaintiff subsequently submitted to the court the Certification of Jose Dios in support of the motions for summary judgment, the Certification wrongly identifies docket number 012218-2016. The court has nonetheless considered the Certification of Jose Dios in support of plaintiff's motions for summary judgment with respect to docket numbers 004383-2014 and 013888-2015. As no Notice of Motion, Statement of Undisputed Facts or legal brief was filed by plaintiff under docket number 012218-2016, as required under R. 4:46-2(a), this letter opinion does not address that matter.

[2] Plaintiff's Statement of Undisputed Facts, legal brief and Certification of Maura K. Tully inaccurately identify the Property as Block 2, Lot 1010.A.

assessment." The 2014 Complaint further alleges that the cell tower is "exempt from real property taxation" as a New Jersey Turnpike Authority "Turnpike project" and "communication facility" under "N.J.T.A [sic] 27:23-4." Plaintiff's 2015 Complaint "contests the [2015] assessments [on the subject property] on the ground that the assessments are in excess of the true or assessable value of the property."

On March 2, 2016, plaintiff moved under R. 4:46-2, seeking entry of an Order granting summary judgment declaring the cell tower, a "communication facility" and "highway project" within the meaning of N.J.S.A. 27:23-4 and, therefore, exempt from local property taxation under N.J.S.A. 27:23-12.

In support of its motions for summary judgment, plaintiff argues that the "primary purpose" of the subject property is to "function as one of the Authority's maintenance yards, which function is essential to the operations of the Authority. . ." Plaintiff contends that it "has the right to use" the cell tower for "its own purposes and in furtherance of an essential Authority function." Plaintiff submits that, under a Master Lease Agreement dated August 20, 1991 (the "Lease"), AT&T is solely responsible for maintaining and operating the cell tower.[3] However, as part of the consideration provided under the Lease, plaintiff is afforded "the right to use [the cell tower] as part of its operations." Thus, plaintiff maintains that the cell tower constitutes a "communication facility" and therefore, is exempt from local property taxation pursuant to N.J.S.A. 27:23-12.

Defendant does not dispute that plaintiff owns the subject property and cell tower. However, defendant characterizes the "genesis" of the Lease as AT&T's "desire to construct, install, operate and maintain radio transmitting and receiving equipment in connection with its cellular telephone business. . ." Although defendant acknowledges that the Lease expresses

[3] Although both plaintiff and defendant recite in their briefs select content from portions of the Lease, a copy of the Lease was not furnished to the court.

plaintiff's "desire to improve services available to the traveling public," defendant asserts that the cell tower was primarily erected, functions, and operates for the provision of cellular telephone service to AT&T's private customers. As evidence of this objective, defendant emphasizes that plaintiff assigned AT&T the following rights and obligations under the Lease: (1) sole and exclusive use of "all equipment and improvements. . . including but not limited to the towers, associated antennas, the modular equipment building, transmission and power lines, telephone lines, and all other radio transmitting and receiving equipment"; (2) the opportunity to void plaintiff's right to use and install equipment on the cell tower if such equipment interferes with AT&T's operations; (3) the right to allow third parties to install equipment on the cell tower and to collect rent from those third parties; (4) the obligation to pay plaintiff 15% of any rent paid AT&T for the sublet of space on the cell tower; (5) the right to access the real property at all times for ordinary operation and maintenance activities; (6) the obligation to perform all repairs necessary to keep the cell tower in good condition; (7) the obligation to arrange for a separately metered electrical supply and to pay all charges for electricity and other utilities for the cell tower; (8) the obligation to construct and maintain a fence around the cell tower; and (9) the obligation to pay all real estate taxes assessed against the subject property arising from improvements constructed by AT&T. Moreover, defendant argues that plaintiff does not "use[] the [cell] tower" and therefore, it does not serve the essential government functions for which plaintiff was created, and thus, should not be exempt from taxation.

Defendant further disputes plaintiff's assertion that the 2013 year local property tax assessment for the subject property was the result of any typographical error, error in transposing or mistake for which the Correction of Errors statute, N.J.S.A. 54:51A-7, is applicable.

On May 3, 2016, the court heard oral argument on plaintiff's motions for summary judgment. During oral argument, defendant highlighted that the record was devoid of any evidence from plaintiff and/or plaintiff's representatives that plaintiff makes use of the cell tower or that the cell tower is integral to plaintiff's performance of essential governmental functions. Accordingly, following oral argument, the court afforded the parties the opportunity to submit supplemental briefs and certifications addressing plaintiff's actual use of the cell tower and how it furthers plaintiff's performance of essential government functions.

After several adjournments, on September 21, 2016, plaintiff submitted to the court the Certification of Jose Dios, plaintiff's Deputy Chief Information Officer, dated September 20, 2016. Mr. Dios's Certification states that plaintiff is "currently involved in several capital improvement projects," including a "new District Facility" and an "Authority truck wash and trailer facility" located in Elizabeth. Although no "network connection" currently exists between the "new District Facility" and "truck wash and trailer facility," according to Mr. Dios, a "fiber line is proposed to be run from the District Office" to the cell tower to enable communications with the truck wash facility.

II. Conclusions of Law

A. Summary Judgment

R. 4:46-2 instructs that summary judgment should be granted:

> if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In Brill v. Guardian Life Insurance Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202,

214 (1986)), our Supreme Court adopted the federal approach to resolving motions for summary judgment, in which "the essence of the inquiry [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In conducting this inquiry, the trial court must engage in a "kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Ibid. The standard established by our Supreme Court in Brill is as follows:

> when deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Id. at 536.]

Considering all of the material evidence before it with which to determine if there is a genuine issue of material fact, the court must view most favorably those items presented to it by the party opposing the motion and all doubts are to be resolved against the movant. Ruvolo v. American Casualty Co., 39 N.J. 490, 491 (1963). Thus, denial of summary judgment is appropriate when the evidence presented by the non-moving party is of such a quality and quantity that reasonable minds could return a finding favorable to the party opposing the motion. Id. at 540. However, summary judgment may not be denied simply because the non-movant demonstrates the existence of a disputed fact. Id. at 540-41. "By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where a party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Id. at 529. When the party opposing the motion merely presents "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious," then an otherwise

meritorious application for summary judgment should not be defeated. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954). Hence, "when the evidence is so one-sided that one party must prevail as a matter of law. . . the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. E.d. 2d at 214).

In consideration of the above standards, the court concludes that summary judgment in these matters is not appropriate based upon the record before the court.

B. Tax Exemption

It is well-settled that unless expressly exempted by our Legislature, "[a]ll property real and personal. . . shall be subject to taxation annually. . ." N.J.S.A. 54:4-1. Our Legislature's authority to grant tax exemptions is expressly limited by our State's Constitution of 1947, which provides, in part, that "[e]xemption from taxation may be granted only by general laws." N.J. Const., art. VIII, § 1, para. 2. In considering the grant of a tax exemption, our Legislature "must base tax exemptions on the property's use, not the owner's identity." Township of Holmdel v. New Jersey Highway Authority, 190 N.J. 74, 87 (2007). Tax exemption statutes, which are "based on the personal status of the owner rather than on the use to which the property is put, run afoul of" our State's Constitutional mandate that all property be "assessed for taxation under general laws and by uniform rules." New Jersey Turnpike Auth. v. Township of Washington, 16 N.J. 38, 44-45 (1954).

The court's "interpretation of statutory tax exemption [provisions is] governed by principles of general statutory construction." Township of Holmdel, supra, 190 N.J. at 87 (citing Walter Reade, Inc. v. Dennis, 36 N.J. 435, 440 (1962)). Thus, tax exemptions "in favor of nongovernmental owners are strictly construed," and should not be expanded beyond the clear

intent of our Legislature. Ibid. Conversely, local property "tax immunities for governmental authorities should be liberally construed because they facilitate the provision of public services." Township of Holmdel, supra, 190 N.J. at 88 (citing Walter Reade, Inc., supra, 36 N.J. at 440). This philosophy is derived from the rationale that "[i]t would be strange for the Legislature to enable the Authority to choose among several modes of rendering [a] public service and then encumber the choice with tax consequences." Ibid.

By design, "property employed primarily for a public use does not lose immunity because [an] agency incidentally derives some private business income from it." Moonachie v. Port of New York Authority, 38 N.J. 414, 427 (1962). Our courts have "recognized that private lease agreements do not automatically forfeit an agency's tax immunity." Township of Holmdel, supra, 190 N.J. at 88-89. When "a government property or facility is leased to a private entity and the private entity operates the property or facility in accordance with the agency's statutory purpose, the tax immunity may still apply." Ibid. Nonetheless, "a tax exemption based upon a statute specifying a particular public use is clearly lost when the use to which the property is put is foreign to the prescribed use and the revenue motive in adopting the use is the primary or exclusive one." Moonachie, supra, 38 N.J. at 427.

Here, plaintiff charges that the cell tower is effectively, per se, exempt from local property taxation because plaintiff owns it, the cell tower is a "communication facility" under N.J.S.A. 27:23-4, and it is located within a "maintenance yard" serving "function[s] essential to the operations of the Authority. . ." As a consequence, plaintiff asserts, "the overall property [is] exempt from taxation." Moreover, because plaintiff "has the right to use [the cell tower]. . . for its own purposes and in furtherance of an essential Authority function[s]," plaintiff maintains that the subject property is exempt from local property taxation.

Conversely, defendant maintains that plaintiff has failed to demonstrate that it employs the cell tower in any manner in the maintenance, function, improvement, management or operation of the Authority. Moreover, defendant argues that plaintiff has not offered any evidence that the cell tower furnishes a vital public service that has been statutorily entrusted to plaintiff. Instead, defendant contends that operation and maintenance of the cell tower benefits only AT&T's private clients and subscribers.

C. New Jersey Turnpike Authority

In order to evaluate whether the cell tower at issue is actually being used by plaintiff and/or advances plaintiff's mandate to provide essential public services, it is necessary to briefly review the statutory provisions which resulted in the formation of the New Jersey Turnpike Authority.

The New Jersey Turnpike Authority was established by the New Jersey Turnpike Authority Act of 1948 (L. 1948, c. 454) for the purpose of constructing "a turnpike across a portion of the State of New Jersey from [the] New York State line to the Delaware River at Lower Penns Neck Township, Salem County." Newark v. New Jersey Turnpike Authority, 12 N.J. Super. 523, 526 (Ch. Div. 1951). In composing the statute, our Legislature sought to "facilitate vehicular traffic," "remove the present handicaps and hazards on the congested highways," and provide for the "construction of modern express highways embodying every known safety device. . ." N.J.S.A. 27:23-1.

To fulfill these laudable goals, plaintiff was empowered "to acquire, construct, maintain, improve, manage, repair and operate transportation projects. . ." in such locations as it shall determine are necessary, in its discretion. Ibid. The statutory scheme defines a "transportation project" as:

> . . .in addition to highway projects, any other transportation facilities or activities determined necessary or appropriate by the authority in

> its discretion to fulfill the purposes of the authority, and the costs associated therewith.
>
> [N.J.S.A. 27:23-4.]

Moreover, N.J.S.A. 27:23-4 defines the term "highway project" as:

> . . . the acquisition, operation, improvement, management, repair, construction, . . . and maintenance of the New Jersey Turnpike. . . including the demolition and removal of toll houses and toll barriers, and of. . . any other highway or feeder road at the locations and between the termini as may hereafter be established by the authority or by law and acquired or constructed under the provisions of this act by the authority, and shall include but not be limited to all bridges, parking facilities, public highways, feeder roads, tunnels, overpasses, underpasses, interchanges, traffic circles, grade separations, entrance and exit plazas, approaches, toll houses, service areas, stations and facilities, communications facilities, administration, storage and other buildings and facilities, and other structures directly or indirectly related to a transportation project, intersecting highways and bridges and feeder roads which the authority may deem necessary, desirable, or convenient in its discretion for the operation, maintenance or management, either directly or indirectly, of a transportation project, and includes any planning, design or other preparation work necessary for the execution of any highway project, and adjoining park or recreational areas and facilities, directly or indirectly related to the use of a transportation project as the authority shall find to be necessary and desirable, and the costs associated therewith.
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> [N.J.S.A. 27:23-4 (emphasis added).]

In support of its motions, plaintiff highlights that the term "communication facilities" is specifically identified in the definition of a "highway project." Subsequently, plaintiff charges that a "transportation project," by definition, includes a "highway project," according the cell tower local property tax exemption under N.J.S.A. 27:23-12.

Under N.J.S.A. 27:23-12,

> [t]he exercise of the powers granted by this act will be in all respects for the benefit of the people of the State, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of

> transportation projects and other property by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon any transportation project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom, and any transportation project and any property acquired or used by the Authority under the provisions of this act. . . shall be exempt from taxation. The Legislature reaffirms that all existing facilities and property, and their operations, and management, of the authority and of the New Jersey Highway Authority, as transferred to the authority, are deemed public and essential governmental functions and are exempt from local taxes or assessments.
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> [N.J.S.A. 27:23-12 (emphasis added).]

In interpreting the statutory language under N.J.S.A. 27:23-12, our Supreme Court has concluded that the phrase, "property acquired or used by the Authority under the provisions of this act" must be construed "in the conjunctive" in light of the constitutional principles requiring that all property be assessed uniformly for taxation. New Jersey Turnpike Auth. v. Washington Twp., supra, 16 N.J. at 45. See also New Jersey Turnpike Authority v. Monroe Twp., 29 N.J. Tax 55, 64 (Tax 2016). "Any other construction [of the statutory language]. . . would destroy the tax exemption of the Turnpike Authority. . ." and would be at odds with the core principles of our State Constitution's Uniformity Clause which requires all real property be assessed under uniform rules and according to the same standard of value. New Jersey Turnpike Auth. v. Washington Twp., supra, 16 N.J. at 45. Thus, a local property "tax exemption must be based on the property's use and the property must, in fact, be put to that use." Township of Holmdel, supra, 190 N.J. at 87. When the property which benefits from the tax exemption does not fall "'within the scope' of the agency's statutory purpose," the tax exemption must be denied. Township of Holmdel, supra, 190 N.J. at 88 (quoting Moonachie, supra, 38 N.J. at 427). Were this court to conclude, as plaintiff requests, that the cell tower is exempt from taxation because it is a "communications facility," and thus, a "transportation project," without examination into the use of the cell tower,

or how the cell tower furthers plaintiff's statutory mandate, would amount to conferring a local property tax exemption based on plaintiff's status and would offend our State's Constitution.

Thus, a necessary predicate for exemption from local property taxation under N.J.S.A. 27:23-12, is that the property be used: (1) "in furtherance of the agency's statutory mandate"; Township of Holmdel, supra, 190 N.J. at 89, or (2) "used for such [agency's] purposes, or held with the present design to devote it within a reasonable length of time to such use." New Jersey Turnpike Auth. v. Washington Twp., supra, 16 N.J. at 45. A property which is "not now in the public use or presently intended for public use is taxable even when owned by bodies having a right to tax exemption with respect to property used for an appropriate purpose." Id. at 44.

1. Communications Facilities

The court observes that N.J.S.A. 27:23-4 offers no clear definition of the term "communication facilities." Defendant implores the court to take a restrictive view of the statutory scheme, arguing that the plaintiff's primary purpose is transportation and not communication, and that "[cellular] telephone communication was not even invented when the Turnpike was authorized." However, this argument flows contrary to the broad powers afforded by our Legislature to the New Jersey Turnpike Authority to "acquire, construct, maintain, improve, manage, repair and operate transportation projects. . . at such locations as shall be established by the authority in its discretion or by law. . ." N.J.S.A. 27:23-1. The court recognizes that in 1948, when the New Jersey Turnpike Authority was formed, cellular communication as we now know it did not exist, however, other modes of wired and wireless communication did exist, including telephones, manual telephone switchboards, two-way radios, radio antenna with attached transmitters and receivers, and radiofax receivers. Thus, it is likely that our Legislature viewed communications facilities as buildings or structures that provide a means or medium of

communication, which thereby "facilitate vehicular traffic" and "remove the present handicaps and hazards on the congested highways." N.J.S.A. 27:23-1.

Moreover, in enacting the New Jersey Turnpike Authority Act, our Legislature declared that its goals were "to provide for the. . . construction of modern express highways embodying every known safety device. . ." N.J.S.A. 27:23-1. Thus, our Legislature envisioned not only plaintiff's construction of an expansive highway and roadway system, but use of modern and innovative technology to operate, maintain and provide safe passage to those who traveled along its roadways. In the sixty-nine years that have elapsed since enacting the New Jersey Turnpike Authority Act, our society has become increasingly technologically driven, demanding access to wireless communication devices, such as mobile phones, pagers, global positioning system devices (GPS), and computers. The exchange of information in this manner is accomplished by the transmission and receipt of radio waves in the form of oscillating electric and magnetic fields along a network of towers, or cellular communication. Thus, although the specific use of portable wireless communication devices could not have been contemplated by the Legislature when the New Jersey Turnpike Authority was created, under the broad spectrum of the statutory language, the court concludes that a monopole or cellular tower is a "communication facility[y]" under N.J.S.A. 27:23-4.

2. Use

The use of property to further an agency's purposes or statutory directives does not require the agency engage in direct, day-to-day, tangible and physical operation of that property. Use can also encompass passive or indirect conduct by the agency, or by a private entity on behalf of the agency, which furthers the agency's purposes or statutory mandate to furnish essential public services. See Walter Reade, Inc., supra, 36 N.J. at 440 (concluding that the New Jersey Highway

Authority was "expressly authorized to operate its facilities either directly or through arrangements with others"); New Jersey Turnpike Authority v. Monroe Twp., supra, 29 N.J. Tax at 67 (concluding that the "acquisition of land by the Turnpike for mitigation of environmentally sensitive areas impacted by a turnpike construction is also part of a transportation project"); Moonachie, supra, 38 N.J. at 429 (concluding that possession of a tract of land by the Port Authority of New York to serve as a sound barrier around the Teterboro Airport complex was exempt from local property taxation because it was for a purpose consistent with its statutorily described public function).

Here, based upon the submissions of the parties, the court concludes that plaintiff did not make actual use of the cell tower for New Jersey Turnpike purposes during the tax years at issue. The Certification of Maura K. Tully, submitted in support of plaintiff's motions for summary judgment, asserts only that "the Authority has the right to use" the cell tower, but fails to recite that plaintiff actually made use of the cell tower or affixed communications equipment to the cell tower in connection with its day-to-day operations. Moreover, the Certification of Jose Dios, submitted by plaintiff following oral argument, further fails to provide any evidence of plaintiff's actual use of the cell tower during the tax years at issue. To the contrary, the Certification of Jose Dios acknowledges that plaintiff does not make use of the cell tower, offering only that "a fiber line is proposed to be run from the District Office to the existing monopole. . ." (emphasis added). Neither the Certification of Maura K. Tully, nor the Certification of Jose Dios, presents the court with any evidence that plaintiff made actual use of the cell tower in its New Jersey Turnpike operations.

However, this does not end the court's inquiry; the court must also examine whether the cell tower and Lease between plaintiff and AT&T furthers plaintiff's statutory mandate to perform

essential government functions. When a public agency leases property owned by it for "a purpose foreign to its statutorily described public function, it engages in competition for tenants with private owners who may be pursuing the same objective" and will suffer loss of its local property tax exemption. Moonachie, supra, 88 N.J. at 424. Conversely, when "a government property or facility is leased to a private entity and the private entity operates the property or facility in accordance with the agency's statutory purpose, the tax immunity may still apply." Township of Holmdel, supra, 190 N.J. at 88-89. Thus, the locus of the court's inquiry is whether AT&T's perpetuation and maintenance of the cell tower and associated cellular transmission equipment represents a private enterprise's delivery of commercial services to its customers or furthers plaintiff's statutory purposes to provide essential public services. Stated differently, the inquiry is whether a reasonable nexus exists between plaintiff's statutory purpose to provide essential public services and the cell tower and cellular communication devices which were affixed thereto.

Our Supreme Court has observed that:

> In today's world, prompt and reliable information is essential to the public welfare. Evidencing the need for such information is the proliferation of wireless communications instruments such as mobile phones, which rely on antennas for the transmission of signals. For successful transmission, the antennas often are placed on tall structures such as buildings, towers, or, as here, monopoles.
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> [Smart Smr v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 315 (1998).]

In reaching this conclusion, the Court observed that under The Telecommunications Act of 1996, Congress authorized the Federal Communications Commission (the "Commission") to license carriers to provide wireless telecommunications services. 47 U.S.C.A. § 301. Pursuant to this authorization, no person is permitted to "use or operate any apparatus for the transmission of. . . communications or signals by radio [in the United States or any territory thereof], except under

and in accordance with this Act and with a license. . . granted under the provisions of this Act." Ibid. The Commission, in taking action to "manage the spectrum to be made available for use by the private mobile services," is required to consider whether such actions will: "(1) promote the safety of life and property; (2) improve the efficiency of spectrum use. . . ; (3) encourage competition and provide services to the largest feasible number of users; or (4) increase interservice sharing opportunities between private mobile services and other services." 47 U.S.C.A. § 332.

Our Legislature, in enacting the New Jersey Turnpike Authority Act, intended for plaintiff to develop, create, operate and maintain an expansive highway and roadway system within New Jersey, employing available modern technology, thereby affording safe passage to all who travelled on its roadways. N.J.S.A. 27:23-1. Moreover, our Supreme Court has recognized that in today's world, access to wireless communication has become essential to interests of public welfare, assistance, and safety. Thus, the apparatuses, media, and instruments which are responsible for the transmission of those cellular communication signals may promote and foster the safety and well-being of the travelers on those roadways.

Here, defendant argues that the cell tower should not enjoy exemption from local property taxation because it was "primarily erected, operated, and maintained for the provision of cellular telephone service to AT&T's private customers." However, defendant's argument fails to recognize that the cell tower may serve a dual purpose. Although a cell tower or cellular communications tower may serve a distinct commercial purpose, for the customers who pay a fee to use the carrier's equipment, it is nonetheless possible for a cellular communications tower to simultaneously promote safety of life and property. That plaintiff may realize some financial or pecuniary gain from entering into the lease with AT&T does not inevitably result in the "forfeit[ure

of] an agency's tax immunity." Walter Reade Inc., supra, 36 N.J. at 441. The focus of the inquiry turns on "whether the property is utilized in furtherance of the agency's statutory mandate." Township of Holmdel, supra, 190 N.J. at 88-89.

Unfortunately, the record before the court fails to disclose how many other cellular communications facilities serve plaintiff's roadways or where those cellular communication apparatuses are located. Further, the record is devoid of any evidence that the cell tower at issue in these matters serves any portion of the New Jersey Turnpike roadway, or is in some way essential or instrumental to plaintiff furnishing safe passage or travel along portions of the New Jersey Turnpike. The absence of this relevant and probative information raises concern about whether the cell tower is simply advancing AT&T's private business plan or is furthering plaintiff's statutory mandate to furnish essential public services.

Thus, a genuine issue of material fact exists in this matter, namely, whether plaintiff leased the cell tower to AT&T in an effort to "improve services available to the traveling public" and promote the safety and well-being of travelers who utilized plaintiff's roadways, or whether, as defendant maintains, the cell tower was primarily erected, operated, and maintained to provide cellular telephone service to AT&T's private customers in the Union County vicinity.

III. Conclusion

The record before the court does not support entry of an order declaring the subject property exempt from local property taxation. Accordingly, the court denies plaintiff's motions for summary judgment.

An order reflecting this opinion will be simultaneously entered herewith.

Very truly yours,

Hon. Joshua D. Novin, J.T.C.