

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Akram Abouras,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
Upper Southampton Township	:	
Zoning Hearing Board and	:	No. 124 C.D. 2008
T-Mobile Northeast, LLC	:	Submitted: July 11, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: September 4, 2008

Akram Abouras (Abouras) appeals the order of the Court of Common Pleas of Bucks County (common pleas court) that affirmed the Upper Southampton Township Zoning Hearing Board’s (ZHB) grant of a variance from the fifty foot minimum buffer yard and the side and rear setback provisions of the Upper Southampton Township Zoning Ordinance (Ordinance).

The property is located at 945 Street Road, Upper Southampton Township (Property). The Upper Southampton Sewer Authority is the legal owner of the Property. The Property contains a one hundred thirty-one foot water tower and a one and one-half story brick building. T-Mobile Northeast, LLC (T-Mobile) entered into a lease with the Upper Southampton Municipal Authority and Upper Southampton Sewer Authority for placement of antenna facilities on the water tower together with easements for access and utilities. T-Mobile proposed to construct a ten foot by twenty foot concrete pad and attach two cabinets containing

radio and electronic equipment. The pad would be located within the twenty foot side yard and 20 foot rear yard setback requirements and within the required fifty foot buffer yard.<sup>1</sup>

On February 21, 2007, the Upper Southampton Township Board of Supervisors granted T-Mobile conditional use approval to establish a cellular telecommunications facility at the Property subject to T-Mobile obtaining the necessary variances. T-Mobile sought a variance from these requirements on the following basis:

Due to the physical presence of an underground water line on the property and the need to place the telecommunications compound in close proximity to the water tank, it is not possible to strictly comply to the set back and buffer requirements. The subject property is also non-conforming to the extent that the existing water tank is located within the buffer yard area and the building on the property encroaches into the side yard set back to the same extent as the proposed T-Mobile equipment pad.

T-Mobile Variance Application, February 20, 2007, at 4; Reproduced Record (R.R.) at 11a.

On April 11, 2007, the ZHB heard the variance application. The ZHB granted party status to Abouras. The chairman of the ZHB explained that party status meant that Abouras and Katherine Mendla (Mendla)<sup>2</sup> were entitled to:

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<sup>1</sup> Under Section 185-22 of the Ordinance, twenty foot side and rear yard setbacks are required in a CC Controlled Commercial District. Under Section 185-60.B.(1) of the Ordinance, a fifty foot wide buffer yard is required in a CC Controlled Commercial District along the boundaries between the more intensive commercial district and all residential districts.

<sup>2</sup> Mendla was also granted party status.

present witnesses, . . . to cross examine witnesses of other parties, however, anyone else in the audience who does not wish to be a party will be heard relative to what you have to tell us before the conclusion of this hearing. So you don't have to be a party to speak to the matter.

Party status also gives you the right to appeal if you so desire. As an individual you don't have that right unless you are a party.

Notes of Testimony, April 11, 2007, (N.T.) at 4-5; R.R. at 26a-27a.

William Benner, T-Mobile's attorney, explained the hardship that confronted T-Mobile. If T-Mobile placed the concrete pad in a place that conformed with the requirements in the Ordinance, it would interfere with the water lines on the Property. N.T. at 8; R.R. at 30a. Philip Burtner (Burtner), a professional civil engineer who performed services for T-Mobile in connection with the variance application, testified that there were existing water pipes underneath where T-Mobile initially proposed locating the pad. The location of the pad there would impede the Water Authority's ability to maintain its lines. N.T. at 16; R.R. at 38a. The cabinets to be placed on the pad measured thirty-two inches deep, fifty-three inches wide, and sixty-six inches tall. N.T. at 18; R.R. at 40a. Abouras had no questions for Burtner. N.T. at 19; R.R. at 41a. Mendla questioned Burtner regarding the hardship. N.T. at 22; R.R. at 44a. Burtner also testified that the encroachment into the setbacks were identical to the existing building. N.T. at 35; R.R. at 57a.

After T-Mobile concluded its case, Abouras declined the opportunity to present witnesses or testimony. Mendla stated that T-Mobile claimed hardship just to "break our wonderful zoning rules." N.T. at 40; R.R. at 62a.

The ZHB granted the variances and made the following findings of fact and conclusions of law:

15. The Board finds Mr. Burtner's testimony credible and probative especially as it applies to the issue of hardship.

16. The Board specifically finds that applicant [T-Mobile] could comply with all Zoning Ordinance requirements but for the water authority's insistence that its existing 12" water main not be blocked so that the main can be properly maintained at all times.

17. A unique physical hardship exists in that applicant [T-Mobile] is prevented from complying fully with the Zoning Ordinance requirements because doing so would interfere with the sewer authority's existing underground water line on the property.

18. The existing municipal water tower does not conform to the buffer yard requirements. . . . Also, the existing building on the property is set back only 18 feet from the side yard. The existing building on the subject property encroaches into the side yard setback area to the same extent as would the T-Mobile equipment pad.

19. Location of applicant's [T-Mobile] concrete pad and equipment cabinets within the required side, rear and buffer setbacks is no more of an encroachment than what already exists on the property, and, in comparison to the huge existing water tower, is *de minimis* in nature. The pad and cabinets will be much less visible to neighbors.

20. Approval of the requested dimensional variances is necessary to enable applicant [T-Mobile] the reasonable use of the subject property.

21. Both the requested buffer yard variance and the requested side yard and rear yard setback variances represent the least modifications possible to the dimensional regulations in issue.

22. The Board specifically finds that there would be no detrimental effect to the community if the requested variances were to be granted.

....  
CONCLUSIONS OF LAW

....  
3. The existence of an underground public water main connecting the water tower to the main in Street Road and the water authority's stated desire for access to service that water main is a unique physical hardship preventing applicant from fully complying with all Zoning Ordinance requirements for setbacks and buffer yards.

4. The requested variances are dimensional in nature and subject to a less stringent standard under *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh . . .* and its progeny. Since applicant [T-Mobile] is seeking dimensional variances within a permitted use, it is asking only for a reasonable adjustment of the zoning regulation in question. (Footnote and citation omitted).

ZHB Decision, May 2, 2007, Findings of Fact Nos. 15-22 and Conclusions of Law Nos. 3-4 at 4-6; R.R. at 83a-85a.

Abouras appealed to the common pleas court. Abouras contended that the ZHB abused its discretion and/or committed errors of law when it granted the variance to T-Mobile where T-Mobile failed to prove unnecessary hardship and failed to prove that unique physical conditions of the Property necessitated a variance.

T-Mobile moved to dismiss the appeal on the basis that Abouras did not have standing. The common pleas court consolidated the appeal and the motion to dismiss. Without taking any additional evidence, the common pleas court affirmed. The common pleas court did not rule on the motion to dismiss.

The common pleas court agreed with the ZHB that the water main constituted a unique physical condition of the Property. The common pleas court further determined that the underground piping created a hardship unique to the Property which was not created by T-Mobile.

Before this Court, Abouras contends that the ZHB committed an abuse of discretion.<sup>3</sup>

The Honorable Susan Devlin Scott ably disposed of this issue in her comprehensive opinion. Therefore, this Court shall affirm on the basis of her opinion. Akram Abouras and t/a Beaux Chevaux Farm v. Upper Southampton Township Zoning Hearing Board and T-Mobile Northeast, LLC, (No. 07-04352-19-5, Filed February 15, 2008).<sup>4</sup>

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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<sup>3</sup> Because the common pleas court took no additional evidence, this Court's review is limited to a determination of whether the ZHB abused its discretion or committed an error of law. The ZHB abuses its discretion when its findings are not supported by substantial evidence. Hitz v. Zoning Hearing Board of South Annville Township, 734 A.2d 60, 65 n. 9 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 562 Pa. 676, 753 A.2d 821 (2000).

<sup>4</sup> Abouras also contends that the common pleas court erred when it determined that the ZHB granted the variance based on a *de minimis* standard. Abouras failed to include this issue in his Statement of Matters Complained of on Appeal filed pursuant to Pa.R.A.P. 1925(b). Issues not contained in a 1925(b) Statement are considered waived. Solebury Township v. Solebury Township Zoning Hearing Board, 914 A.2d 972 (Pa. Cmwlth. 2007).

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No. 124 C.D. 2008

**ORDER**

AND NOW, this 4th day of September, 2008, the order of the Court of Common Pleas of Bucks County No. 07-04352-19-5), filed February 15, 2008, in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge