IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Holme Circle Civic Association and Thomas McCurdy and Joseph Razler	:	
v.	:	No. 733 C.D. 2010
Zoning Board of Adjustment of the City of Philadelphia and T-Mobile USA	:	Submitted: January 14, 2011
Appeal of: T-Mobile USA	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: June 15, 2011

T-Mobile USA (T-Mobile) appeals from an order of the Court of Common Pleas of Philadelphia County (Trial Court) that granted the appeal of the Holme Circle Civic Association and Thomas McCurdy and Joseph Razler (collectively, the Association) from an order of the Zoning Board of Adjustment of the City of Philadelphia (Board).[1] The Association appealed the Board's order concluding that the wireless equipment of T-Mobile was an "Antenna," and not a

[1] By order of this Court dated August 23, 2010, we granted the Association's motion to replace, within the caption hereto, the name of Sean McAleer with the names of Thomas McCurdy and Joseph Razler.

"Wireless Service Facility," pursuant to the Zoning and Planning provisions of Title 14 of the Philadelphia Code, and thusly did not require a grant of a Special Use Permit. In addition to granting the Association's appeal, the Trial Court further remanded the matter to the Board for a full hearing on whether T-Mobile was entitled to a Special Use Permit for the equipment at issue. We reverse.

On September 28, 2006, T-Mobile applied to the City of Philadelphia, Department of Licenses and Inspections (hereinafter, L&I) for a Zoning/Use Registration Permit seeking to construct a proposed wireless telecom site upon an existing three-story, thirty-four unit apartment building (the Property) located within an R-5 Residential zoning district in the City of Philadelphia (City). T-Mobile's application listed the proposed work thusly:

> PROPOSED WIRELESS TELECOM SITE, TO INCLUDE:
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> -FOUR (4) BTS EQUIPMENT CABINETS AT GRADE, MOUNTED ON A 12' X 16' CONCRETE PAD WITH 6' HIGH ESTATE FENCE & PLANTED SCREEN
>
> -TWELVE (12) PANEL ANTENNAS ROOF MOUNTED AT BUILDING CORNERS AND NOT MORE THAN 15' IN ANY DIRECTION
>
> - 1 200 AMP POWER SERVICE & 1 T-1 TELCO LINE
>
> EQUIPMENT MEASURES: 63.54' X 51.18' X 37.01'

See, Original Record (O.R.), Application For Zoning/Use Registration Permit. On January 1, 2007, L&I issued an over-the-counter Zoning Permit in response to T-Mobile's application. Id. On January 19, 2007, L&I issued a Building Permit for

the installation of the wireless telecom site. Id. T-Mobile thereafter erected its wireless telecom site upon the Property, with the antennas upon the roof of the building that existed thereon.

Sean McAleer, a neighboring resident to the Property, thereafter filed a Petition of Appeal with the Board challenging L&I's issuance of the Zoning Permit, asserting in material part that the Property was not zoned commercial, and that the wireless equipment was aesthetically unpleasing. Public hearings before the Board ensued, at which both parties appeared and presented argument, testimony, and evidence. On May 29, 2008, the Board denied McAleer's appeal. In support thereof, the Board issued Findings of Fact and Conclusions of Law (hereinafter, Board Opinion.).

In its Opinion, the Board concluded that under Section 14-231(8)(a) of Title 14 of the Philadelphia Code,[2] an antenna for a Wireless Service Facility placed on a structure that is not a one or two family dwelling is permitted as a matter of right, and without need for a Board grant of a Special Use Permit. Board Opinion at 4. The Board further concluded that an antenna on an existing building not exceeding 15 feet in any direction – such as the antennas at issue presently – does not constitute a Wireless Service Facility as defined in the Philadelphia Code, and therefore is permitted as of right in an R-5 Residential district. Id. at 4-5 (citing in part to Section 14-102(9) of the Philadelphia Code, defining an Antenna).

[2] While the Philadelphia Code in its entirety is not contained within the Original Record, relevant portions are contained therein appended to various pleadings in this matter. We note that there is no dispute in this case regarding the actual language of the relevant provisions.

Noting that the record showed that T-Mobile's multiple antennas upon the roof of the Property did not exceed 15 feet in any direction, the Board concluded that L&I properly issued the over-the-counter Zoning/Use Permit as a matter of right, and that McAleer had failed to meet his burden in support of his appeal. Id. at 5.

McAleer, individually and as president of the Holme Circle Civic Association, thereafter timely appealed the Board's Opinion to the Trial Court, which considered the matter without receiving additional evidence. By Opinion and Order dated March 23, 2010 (Tr. Ct. Opinion), the Trial Court granted the Association's appeal and remanded the matter to the Board for a full hearing to determine whether T-Mobile was entitled to a Special Use Permit under the Philadelphia Code for the equipment at issue.

In its analysis, the Trial Court concluded that the relevant portions of the Philadelphia Code were ambiguous, and that the Board erred as a matter of law in deferring to L&I on the question of whether the equipment at issue was an "Antenna" less than 15 feet in dimension under the Philadelphia Code, thereby allowing construction as of right. Tr. Ct. Opinion at 4-10. The Trial Court concluded that the Board's failure to properly consider the definition of "Wireless Service Facilities" under the Philadelphia Code, which would require a Special Use Permit, was error. Id. at 5. The Trial Court further concluded that while the Board apparently considered the definitions of Antenna and Wireless Service Facilities to be mutually exclusive, the definition of Wireless Service Facilities admits on its face to include, *inter alia*, antennas. Id. at 5-6. The Trial Court reasoned that the Board's flatly stated view that the equipment at issue was an

antenna, because it is not a facility, gives no effect to the Philadelphia Code's Wireless Service Facility definition, and thus construes the Philadelphia Code in a manner producing an absurd or unreasonable result. Id. at 6. Given those perceived inconsistencies, the Trial Court reached beyond the plain meaning of the Philadelphia Code's provisions and utilized the principles of statutory construction, applying the legislative history behind the amendments to the Philadelphia Code to its interpretation of the provisions at issue. Id. at 7-10.

The Trial Court emphasized that L&I could issue an over-the-counter permit with only reliance upon the specifications set forth in the Philadelphia Code, including the 15-foot antenna definition. Id. at 10. However, the Trial Court reasoned that once that permit issuance was appealed, the Board was required to review the application in light of the Philadelphia Code's provisions as a whole, without reliance solely upon L&I's definitional determination. Id. at 10-11. Concluding that the Association had presented evidence sufficient to overcome the presumption that the application was for an antenna subject merely to over-the-counter approval, the Trial Court concluded that the Board erred in failing to review the evidence of record in relation to the Philadelphia Code's provisions in their entirety. Id. at 11. Accordingly, the Trial Court granted the Association's appeal, and remanded the matter for further proceedings before the Board on T-Mobile's entitlement to a Special Use Permit pursuant to the Philadelphia Code.

On April 5, 2010, T-Mobile filed with the Trial Court a Motion to Amend Order of March 23, 2010, seeking certification therefrom that the Trial

Court's order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, pursuant to Section 702(b) of the Judicial Code, 42 Pa.C.S. §702(b).[3] By order dated April 14, 2010, the Trial Court so amended its March 23, 2010, order. Reproduced Record (R.R.) at 7a.

On April 23, 2010, T-Mobile filed with this Court a Petition for Permission to File an Interlocutory Appeal pursuant to Pa.R.A.P. 311(f)(2).[4] By

[3] Section 702(b) of the Judicial Code reads:

> Interlocutory orders
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> * * *
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> (b) Interlocutory appeals by permission.--When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

[4] Pennsylvania Rule of Appellate Procedure Rule 311(f)(2) reads:

> Interlocutory Appeals as of Right
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> * * *
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> (f) Administrative remand. An appeal may be taken as of right from: (1) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative

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order dated May 26, 2010, this Court noted that the Trial Court's March 23, 2010, order was appealable as of right pursuant to Pa.R.A.P. 311(f)(2), and ordered that T-Mobile's Petition for Permission to File an Interlocutory Appeal be treated as a timely notice of appeal pursuant to Pa.R.A.P. 1316.[5]

Where no additional evidence was presented subsequent to a zoning board determination, this Court's scope of review is limited to determining whether the board committed a manifest abuse of discretion or an error of law. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). The zoning board of adjustment abused its discretion if its findings were not supported by substantial evidence, which is such relevant

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> discretion; or (2) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

[5] Pennsylvania Rule of Appellate Procedure Rule 1316(a) reads:

> Incorrect Use of Petition for Permission to Appeal or Petition for Review
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> (a) General rule. The appellate court shall treat a request for discretionary review of an order which is immediately appealable as a notice of appeal under the following circumstances:
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> > (1) where a party has filed a timely petition for permission to appeal pursuant to Pa.R.A.P. 1311; or
> >
> > (2) where a party has filed a timely petition for review from a trial court's refusal of a timely application pursuant to Pa.R.A.P. 1311 to amend the order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b).

evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

The Sections of the Philadelphia Code at issue *sub judice* first define the terms "Antenna" and "Wireless Service Facilities":

> (9) *Antenna.* Equipment including antennas, auxiliary structures and cables that transmit and receive radio or other wireless telecommunications signals but not including commercial radio or television broadcasting; provided however that each antenna itself, that portion of the facility propagating and receiving signals, shall not exceed 15 feet.
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> * * *
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> (140). *Wireless Service Facilities.* Towers, antennas, equipment, equipment buildings and other facilities used in the provision of wireless services, but not to include antennas to be placed on existing structures[.]

Sections 14-102(9), 14-102(140) of the Philadelphia Code. The Philadelphia Code also addresses the allowance and/or prohibition of Wireless Service Facilities, as defined above, within an R-5 zoning district:

> Residential District Rules and Exceptions
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> * * *
>
> *Wireless Telecommunications*
>
> (a) In … "R-5" …, Wireless Service Facilities (Facilities) shall be prohibited except with the granting of a [Board] Special Use Permit, provided that all of the following conditions have been met, further provided that antennas to be placed on an existing structure which is not located on a lot containing a one or two family dwelling shall be permitted: …

Section 14-231(8)(a) of the Philadelphia Code. The remainder of Section 14-231(8)(a) specifies the requirements that must be met to obtain a Special Use Permit, which requirements are not presently at issue herein. Id.

T-Mobile primarily argues that the Trial Court erred in reversing the Board's denial of the Association's appeal.[6] T-Mobile asserts that contrary to the Trial Court's characterization of the dispositive issue as whether or not the equipment at issue is an Antenna under the Philadelphia Code definition, the key issue is the distinction between installing an Antenna on a newly built tower or structure, and installing an Antenna on a structure that already exists. T-Mobile asserts that the relevant provisions of the Philadelphia Code are not ambiguous on their face when read as a whole, that both L&I and the Board were correct in their interpretations, and that both L&I and the Board did consider and analyze the definition of a Wireless Service Facility pursuant to the Philadelphia Code, contrary to the Trial Court's assertion. We agree.

Addressing each of the Philadelphia Code Sections implicated *sub judice*, and applying the facts of record thereto, we can discern no ambiguity. First, Section 14-102(9) defines an Antenna for purposes of the Philadelphia Code. The Association has not challenged T-Mobile's evidence that its equipment includes "antennas, auxiliary structures and cables that transmit and receive … wireless telecommunications signals[,]" as the basic Antenna definition of Section

[6] The Association has chosen not to file a brief with this Court in this matter. Additionally, by order of this Court dated December 28, 2010, the Board was precluded from filing a brief herein due to its timely failure to do so. As such, this matter will be considered

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14-102(9) requires. Further, there is no evidence of record herein, and no assertion by the Association, that the equipment at issue serves a commercial radio or television broadcasting signal, as the exclusionary clause of the Philadelphia Code's Antenna definition provides. Additionally, there is no evidence of record, and no assertion by the Association, that the four antennas on top of the Property exceed 15 feet in any dimension. The Board's Findings confirming the above facts are indeed supported by substantial evidence.[7] Board Opinion at Findings 1, 3, 8, 9, 16; Conclusions 3, 4, 5, 6 (and supporting Exhibits). Thus, under the plain language of Section 14-102(9) of the Philadelphia Code, the equipment at issue is an Antenna.

Moving to the Philadelphia Code's definition of Wireless Service Facilities pursuant to Section 14-102(140), we find no contradiction or ambiguity in conjunction with the Philadelphia Code's definition of an Antenna. Under the express and plain language of Section 14-102(140), an Antenna under Section 14-102(9) could potentially also be a Wireless Service Facility, or a component thereof.[8] Section 14-102(140) of the Philadelphia Code. However, Section 14-102(140) plainly and clearly excludes from the definition of a Wireless Service Facility "antennas to be placed on existing structures." Id. Having determined that

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upon the record, and the brief of T-Mobile.

[7] We note that the Association has not challenged the evidence supporting any of the Board's Findings. See O.R., Petition of Appeal to the Board, and attached supporting letter from McAleer.

[8] Contrary to the Trial Court's assertion on this point, which is not supported by any citation to the Board's Opinion, we find no analysis or conclusion within the Board's Opinion

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under the Philadelphia Code the equipment at issue is an Antenna, we need only address whether the instant placement is "on an existing structure" to determine whether the Philadelphia Code's definition of Wireless Service Facility applies herein.

Contrary to the Trial Court, we find no ambiguity whatsoever in the phrase "existing structure" within Section 14-102(140). The definition of the phrase "existing structure" is self-evident. As the Trial Court notes, when the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning thereof. Section 1921 of the Statutory Construction Act of 1972, 1 Pa.C.S. §1921; Colville v. Allegheny County Retirement Board, 592 Pa. 433, 926 A.2d 424 (2007). Accordingly, it is plainly, clearly, and unambiguously obvious that an "existing structure" under Section 14-102(140) of the Philadelphia Code refers to a structure that already exists. As there is no dispute herein that the Property contained a 3-story residential complex that pre-existed the installation of T-Mobile's antennas and related equipment thereon, T-Mobile's antennas are excluded from the definition of a Wireless Service Facility under the plain and clear language of Section 14-102(140). Due to the Antennas' placement upon an undisputedly existing structure, the same are excluded from the definition of a Wireless Service Facility under the Philadelphia Code, as those respective terms are defined.

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that asserts that these two Sections are mutually exclusive.

Finally, we examine the Philadelphia Code's Residential District Rules and Exceptions within Section 14-231(8)(a). This Section provides for the requirement of a grant by the Board of a Special Use Permit for Wireless Service Facilities within an R-5 residential zoning district. However, as noted above, the Antennas at issue herein is excluded from the Philadelphia Code's plain definition of a Wireless Service Facility, and as such, no Board Special Use Permit is required under the Philadelphia Code's terms.

We note that, *arguendo*, even if the Antennas at issue were considered a Wireless Service Facility under the Philadelphia Code, Section 14-231(8)(a) of the Philadelphia Code plainly exempts from the requirement for a Board Special Use Permit, by clear and unambiguous language, "antennas to be placed on an existing structure which is not located on a lot containing a one or two family dwelling" within an R-5 zoning district. There is no dispute in this matter that the building upon the Property on which T-Mobile has placed its Antennas is a thirty-four unit building, and as such, the project at issue need not seek a Special Use Permit under the Philadelphia Code.

The Board, thusly, did not err as a matter of law in concluding that the Antennas at issue herein were not a Wireless Service Facility under the terms of the Philadelphia Code, that the Antennas were within the dimensional requirements of an Antenna pursuant to Section 14-102(9) of the Philadelphia Code, and that the Antennas were not subject to a requirement of a grant of a Special Use Permit pursuant to Section 14-231(8)(a) of the Philadelphia Code. Board Opinion at 4-5. Additionally, the Board did not err in concluding that the Zoning/Use Permit

issued for the Antennas at issue was properly issued as an over-the-counter permit by L&I.

Accordingly, we reverse.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 15th day of June, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is reversed.

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JAMES R. KELLEY, Senior Judge