

Zoning Bulletin

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Telecommunications—Zoning Board Denies Wireless Carriers Special Exception Application to Construct Wireless Facility

Wireless carrier argues denial violates the Telecommunications Act of 1996

Citation: *New Cingular Wireless PCS, LLC v. Fairfax County Bd. of Supervisors*, 2012 WL 922435 (4th Cir. 2012)

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

VIRGINIA (03/19/12)—This case addressed the issue of whether a county board of supervisors violated the federal Telecommunications Act of 1996 by effectively prohibiting wireless services when it denied a wireless service provider's special exception application to construct an 88-foot telecommunications tower in a residential neighborhood.

The Background/Facts: New Cingular Wireless ("AT & T"), contending that it could only provide limited in-building and in-vehicle wireless services in the Fort Hunt area of Fairfax County, Virginia (the "County"), submitted a special exception application to the County's Board of Supervisors (the "Board"). Under the County's zoning ordinance (the "Ordinance"), a party seeking to build a

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telecommunications facility in a residential neighborhood had to submit a special exception application to the Board.

Here, AT & T proposed a facility consisting of a 15-foot tall storage shed and an 88-foot tower disguised as a tree (the "tree monopole"). The facility was to be erected behind a Masonic lodge in an otherwise residential neighborhood, approximately 100 feet from nearby residences.

Under the Ordinance, the Board could approve the special exception application if it was "harmonious with" and would not "adversely affect the use of ... neighboring properties" Under the County's Policy Plan, which comprised a portion of the County's Comprehensive Plan, it was stated that new telecommunications should be located "on properties that provide the greatest opportunity to conceal the telecommunications facilities," and designed to "provide[] the least visual impact on residential areas"

Ultimately, the Board denied AT & T's special use exception because it did not conform to the County's Comprehensive Plan or the standards for approval of a special use exception under the Ordinance. In its denial, the Board specifically noted that the proposed facility:

- (1) was to be located 100 feet from two of the neighboring residences;
- (2) would extend thirty-eight feet above the closest tree;
- (3) would rise approximately forty-eight feet above the average height of the existing trees on the adjacent property;
- (4) was to be located on a site containing concrete pads, with only a few trees and a small, grassy area with dense brush;
- and (5) called for supplemental vegetation that, when full grown, would not reach a sufficient height to minimize the tree monopole's visual impact.

The Board also took community opposition into consideration as one of the factors it considered in the denial.

Following the Board's denial of the special exception application, AT & T filed a complaint pursuant to 47 U.S.C.A. § 332(c)(7)(B)(v). It alleged that the Board's decision: violated the "substantial evidence requirement" (§ 332(c)(7)(B)(iii)) of the federal Telecommunications Act of 1996 (the "Act"); and that it amounted to an effective prohibition of wireless services in violation of § 332(c)(7)(B)(i)(II).

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the Board. The court found the Board "reached a reasonable decision" to deny the special exception application based on a determination that the proposed facility was not in harmony with the Ordinance and the County's Comprehensive Plan. The court also determined that the denial did not amount to an effective prohibition of wireless services in violation of the Act, particularly in light of evidence of the Board's previous approval of numerous zoning applications for telecommunications facilities.

AT & T appealed.

DECISION: Affirmed.

The United States Court of Appeals, Fourth Circuit, agreed with the district court. It held that substantial evidence supported the Board's denial of AT & T's special exception application.

In addressing AT & T's argument that the Board had violated the "substantial evidence requirement" of the Act, the court explained that the "substantial evidence requirement" mandates that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct or modify personal wireless service facilities shall be ... supported by substantial evidence." 332(c)(7)(B)(iii).) In determining that the Board's decision to deny AT & T's application satisfied the substantial evidence requirement, the court explained that "a proposed telecommunications facility's inconsistency with local zoning requirements can be sufficient to establish substantial evidence supporting the denial of a zoning application." The court further noted that "even in the face of conflicting evidence presented by the wireless provider, sufficient evidence may support a board's decision where there is evidence that the proposed facility 'would be inconsistent with' a county's 'Comprehensive Plan' or 'Zoning Ordinance.'"

Here, the court found that the Board had identified a number of ways (listed above) in which AT & T's proposed wireless facility would not be in harmony with the zoning objective and the Comprehensive Plan for that geographic area. Indeed, the court found that the proposed facility was "far from 'provid[ing] the least visual impact on residential areas,'" as required by the County's Policy Plan. When considering at all of the characteristics of the proposal (from distance to neighboring residences, to height of the tree monopole over existing trees, to vegetation at the proposed site), the court found them adequate to support the Board's conclusion that the proposed facility did not satisfy the County's Policy Plan or the standards for approval under the Ordinance.

In rejecting AT & T's argument that the Board's denial of AT & T's special exception application had the effect of prohibiting a carrier from providing personal wireless service in the area, in violation of the Act, the court explained that a zoning board could limit the level of wireless services available without violating the Act; the Act did not guarantee 100% coverage. Moreover, in order for AT & T to prevail on this argument, the court said it had to meet one of two standards: It had to establish (1) that the Board had a general policy that effectively guaranteed the rejection of all wireless facilities; or (2) that the denial of its application for this one particular site was "tantamount" to a general prohibition on service.

Here, in arguing the second theory, the court found that AT & T failed to provide evidence to establish "a lack of reasonable alternative sites" and failed to demonstrate that further reasonable efforts to gain approval for alternative facilities would be "fruitless." Based on this failure of proof, the court found that the summary judgment was properly granted to the Board on AT & T's claim that the Board's denial of its application violated subsection B(i)(II) of the Act.

See also: *AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999).

See also: *360 degrees Communications Co. of Charlottesville v. Board of Sup'rs of Albemarle County*, 211 F.3d 79 (4th Cir. 2000).

Case Note: In its decision, the court also said that if a zoning board denies a permit “based on the reasonably-founded concerns of the community, then undoubtedly there is substantial evidence to support the [board’s] decision.”

Preemption—Outdoor Advertising Company Argues it Does Not Need County Approval for Billboard

It contends town ordinance governing billboards preempts county ordinance governing billboards

Citation: *Adams Outdoor Advertising, L.P. v. County of Dane*, 2012 WL 375232 (Wis. Ct. App. 2012)

WISCONSIN (02/02/12)—This case addressed the issue of whether, when a town has enacted an ordinance regulating outdoor advertising (billboards) pursuant to Wis. Stat. § 60.23(29), a permit applicant that is subject to such a Town ordinance is also subject to a County zoning ordinance purporting to regulate the same outdoor advertising sign. More specifically, the issues addressed were: (1) whether, in addition to its authority to regulate billboards under Wis. Stat. § 59.70(22), a county has the authority to regulate billboards pursuant to its general zoning authority under Wis. Stat. § 59.69(4), and, if so, (2) whether a town ordinance enacted pursuant to the town billboard statute (Wis. Stat. § 60.23(29)) preempts a county’s billboard ordinance enacted under the general zoning statute (Wis. Stat. § 59.69(4)).

The Background/Facts: Adams Outdoor Advertising, L.P. (“Adams”) constructed an advertising billboard on a highway located in the Town of Madison (the “Town”) in Dane County (the “County”). Prior to constructing the billboard, Adams sought and obtained permits from the Town and from the Wisconsin Department of Transportation to construct the billboard. Adams did not seek a permit from the County.

After the County apparently cited Adams for not obtaining a County permit for the billboard, Adams brought a declaratory judgment action in circuit court. Adams asked the court to clarify whether it was required to obtain a billboard construction permit from the County.

Adams argued that it was not required to obtain a permit from the County to construct the billboard. Among other things, it argued that the County lacked legal authority to regulate advertising signs (billboards) that fell within the regulatory jurisdiction of the Town. It contended that the Town’s billboard ordinance preempted the County’s billboard ordinance.

In support of its position, Adams pointed to Wisconsin statutory law, § 59.70(22), which provides that County boards may regulate billboards by ordinance, but that “[s]uch ordinances shall not apply within cities, villages and

towns which have enacted ordinances regulating the same subject matter.” The town had enacted a billboard ordinance pursuant to its authority granted under Wis. Stat. § 60.23(29).

The County claimed that its authority to regulate billboards was not preempted by the Town’s billboard ordinance. The County contended that counties had the authority to regulate billboards pursuant to Wis. Stat. §§ 59.69(4) and 59.70(22). It argued that since it had enacted its billboard ordinance pursuant to its general zoning authority under Wis. Stat. § 59.69(1) and (4), and not under § 59.70(22), the Town’s billboard ordinance did not preempt the County’s billboard ordinance.

Finding there were no material issues of fact in dispute, and deciding the matter on the law along, the circuit court granted summary judgment in favor of Adams. The circuit court concluded that when, as here, a town has enacted a billboard ordinance under § 60.23(29), that ordinance preempts a county billboard ordinance enacted under the more general authority conferred in the county zoning statute, § 59.69. The circuit court granted declaratory relief in favor of Adams.

The County appealed.

DECISION: Reversed.

The Court of Appeals of Wisconsin held that a county has authority under both Wis. Stat. §§ 59.69(1) and (4) and 59.70(22) to enact ordinances regulating billboards and other similar structures. The court further held that, where, as in this case, a town approves a county zoning ordinance that includes a billboard ordinance enacted pursuant to the procedures set out in Wis. Stat. § 59.69(5)(c), the town’s billboard ordinance adopted under the town billboard statute does not preempt a county’s general zoning authority to regulate billboards in that town. Consequently, the court concluded that, under the facts of this case, the Town’s billboard ordinance did not preempt the County’s billboard ordinance.

In so holding, the court interpreted the statutes according to their plain meaning. The court interpreted the statute granting general zoning authority to counties—§ 59.69(4)—as conferring zoning authority to counties to regulate “structures” which include billboards. Thus, the court concluded that the County could, under its general zoning authority granted by § 59.69(4), regulate the construction and maintenance of billboards within its geographic limits.

Although the statutory scheme for local regulation of billboards did contain preemption language, that language applied only to county billboard ordinances enacted under Wis. Stat. § 59.70(22), said the court. In contrast, the court found that neither Wis. Stat. § 59.69 (granting general zoning authority to counties, including over billboards) nor Wis. Stat. § 60.23(29) (granting towns zoning authority over billboards) contained preemption language. Thus, based on this statutory construction, the court concluded that “there is nothing that precludes a county, pursuant to its zoning authority, from regulating billboards in a town that has approved the county’s pertinent zoning ordinance, even if the town has enacted its own billboard ordinance under the town billboard statute.”

The court concluded that, under the facts of this case—where the Town had approved the County’s zoning ordinance, including the portion of the ordinance governing billboards and enacted under its general zoning authority pursuant to

§ 59.69(4)—the Town’s billboard ordinance did not preempt the County’s billboard ordinance. The County and the Town, found the court, shared regulatory authority over billboards located on property that abuts the subject highway maintained by the Town.

See also: *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828, 182 L.R.R.M. (BNA) 2592, 154 Lab. Cas. (CCH) P 60438 (2007).

See also: *State ex rel. Hensley v. Endicott*, 2001 WI 105, 245 Wis. 2d 607, 629 N.W.2d 686 (2001).

Case Note: Among other things, Adams had argued that, under the statutory rule of construction, the more specific statutes—§§ 59.70(22) and 60.23(2)—should have controlled over the more general statute—§ 59.69(4). The court said that, generally speaking, the rule of statutory construction that a more specific statute controls over a more general statute applies where two or more statutes on the same subject conflict. Here, the court found that Adams had failed to show that interpreting § 59.69(4) as permitting the regulation of billboards conflicted with §§ 59.70(22) and 60.23(29). Rather, found the court, “these statutes complement each other.”

Notice—City Adopts Ordinance Designating Downtown as Historic District

In enacting ordinance, City fails to provide actual notice to property owners in proposed district

Citation: *New Albany Historic Preservation Com’n v. Bradford Realty, Inc.*, 2012 WL 965565 (Ind. Ct. App. 2012)

INDIANA (03/22/12)—This case addresses the issue of whether a property owner is entitled to actual notice of the potential designation of a historic district, which encompasses his or her property.

The Background/Facts: In 1999, the City of New Albany (the “City”) adopted a historic preservation ordinance. Among other things, the ordinance clarified the powers and duties of the New Albany Historic Preservation Commission (“HPC”). It also instituted guidelines for the creation of historic districts, and elaborated on the procedures for modification and construction of structures within a historic district. The regulatory provisions of the ordinance required the owner of property in a historic district to request a Certificate of Appropriateness (“COA”) from the HPC prior to commencing work on most external modifications of the property.

In 2002, the City proposed an ordinance to designate the downtown district as a historic district. The City published a notice of public meeting on the issue

of the public designation in the local newspaper, and then held the public meeting. Neither the City nor the HPC gave actual notice of the hearing to owners of property located within the proposed boundaries of the historic district. On July 1, 2002, the ordinance designating the City's downtown a historic district (the "Ordinance") was adopted by the City's Council.

In 2008, Bradford Realty, Inc. ("Bradford") decided to repair the exterior of a house it owned and had used as income property since 1966. Bradford began to replace the original wood clapboard siding with "vinyl siding ... of the same color and approximate same width." The HPC soon sent a letter to Bradford notifying it that, since the property was in the downtown historic district, it needed a COA before proceeding with an exterior modification of the property. Bradford disagreed but applied for a COA under protest. Eventually, the HPC denied Bradford's COA application based on its finding that the utilization of vinyl siding was inconsistent with the HPC design guidelines.

Bradford then filed a Complaint for Declaratory Judgment against the HPC and City (collectively, "NAHPC"). Bradford alleged that NAHPC violated Bradford's due process rights because Bradford was not given actual notice of the enactment of the historic district. Bradford asked the court to declare the Ordinance void.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the circuit court issued summary judgment in favor of Bradford on its due process violation claim.

The NAHPC appealed. On appeal, the NAHPC argued that the enactment of the Ordinance was a legislative act which did not fall within the purview of the due process requirements of the 14th Amendment. Therefore, it contended, Bradford was not entitled to actual notice of the Ordinance.

Bradford countered that the Ordinance amounted to an adjudicative or administrative act, and thus required actual notice.

DECISION: Reversed in part, and affirmed in part.

The Court of Appeals of Indiana held that Bradford was not entitled to actual notice of the City's Ordinance designating the downtown as a historic district. The court said this was because the enactment of the Ordinance was a legislative act, not an adjudicatory act. Therefore, the court found it did not fall within the purview of the due process requirements of the 14th Amendment to the United States Constitution.

The court explained that the 14th Amendment provides that "[n]o state ... shall ... deprive any person of life, liberty, or property without due process." At a minimum, said the court, those "words of the Due Process Clause ... require that deprivation of ... property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Thus, in determining whether actual notice should have been given to Bradford, the court had to determine whether the ordinance was a legislative or adjudicative act. If it was an adjudicative act, it required actual notice, and if it was legislative, it did not.

Although the court recognized that the "line between legislation and adjudication is not always easily drawn," the court explained that: "[l]egislation is prospective in effect and, more important, general in its application."

Here, the court found that the City's Ordinance enacting the downtown district as historic was prospective and general in nature. The Ordinance purported to regulate only future conduct to be consistent with the provisions of the historic preservation ordinance; it did not impose fines for past behavior or require past improvements to be modified in any way. Moreover, the court found the Ordinance was generally and equally applicable to all property owners within its boundaries. "Merely because the historic district [did] not encompass the entirety of [the City] [did] not diminish its general character," said the court.

Accordingly, the court concluded that the City's enactment of the Ordinance was a legislative act which did not fall within the purview of the due process requirements of the 14th Amendment. On this ground, the court reversed the circuit court's grant of summary judgment in favor of Bradford, and granted summary judgment to NAHPC.

See also: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

See also: *L C & S, Inc. v. Warren County Area Plan Com'n*, 244 F.3d 601 (7th Cir. 2001).

See also: *Krimendahl v. Common Council of City of Noblesville*, 256 Ind. 191, 267 N.E.2d 547 (1971).

Case Note: The appellate court also found that Bradford's replacement of the wood siding with vinyl siding was a visible, conspicuous change in the exterior of the appearance, requiring a COA under the City's historic preservation ordinance.

Case Note: Bradford had also asked the court to find that the Ordinance was a regulatory taking of its property. The appellate court refused to do so, finding the Ordinance did not prohibit improvements or maintenance on existing structures; it merely regulated the manner in which the improvements or maintenance was to be performed.

Standing—Abutting Property Owners Challenge Issuance of Building Permit to Neighbor

Neighbor argues abutters are not "persons aggrieved" and therefore lack standing to bring challenge

Citation: *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 2012 WL 899046 (2012)

MASSACHUSETTS (03/20/12)—This case addressed the requirements for standing as a "person aggrieved" to maintain an action for judicial review of a decision of a zoning board of appeals. It also addressed what evidence a defendant must

produce, in the context of summary judgment, to rebut successfully the presumption of standing afforded to an abutting property owner.

The Background/Facts: George P. Fogg (“George”) lived in a single-family home at 91 Spooner Road in Brookline, Massachusetts (the “Town”). George’s mother, Frances, lived in a single-family home at 61 Spooner Road. Their properties were located on either side of and abutted the property at 81 Spooner Road (the “subject property”).

On June 30, 2004, 81 Spooner Road, LLC (the “Developer”), purchased the subject property. The Developer later obtained approval from the Town’s planning board to subdivide the subject property into two lots—81 and 71 Spooner Road. Thereafter, the Developer sold 81 Spooner Road and retained the newly created 71 Spooner Road. The Developer then sought and obtained a construction permit from the Town’s building commissioner, allowing the construction of a two-story single-family house at 71 Spooner Road.

George and Frances (collectively, the “Foggs”) challenged the issuance of the building permit. Among other concerns, they asserted that, construction of the house at 71 Spooner Road violated the density provisions of the Town’s zoning bylaw.

The Town’s zoning board of appeals (the “Board”) determined that the building permit should be rescinded.

After the issue of the Foggs’ standing (i.e., ability to maintain the action for judicial review of the Board’s decision)—which was raised by the Developer—was eliminated on summary judgment, the trial court affirmed the Board’s decision on the merits.

The Developer appealed. The Appeals Court affirmed the judgments, both as to standing and the underlying merits.

The Developer again appealed. The Developer’s sole argument on appeal focused on the Foggs’ standing. The Developer argued that the Foggs did not have standing to challenge the building commissioner’s decision before the Board because they were not “aggrieved” persons.

DECISION: Affirmed.

The Supreme Judicial Court of Massachusetts held that the Foggs were “aggrieved” persons with standing to challenge the building commissioner’s decision to issue a building permit for 71 Spooner Road.

In so holding, the court addressed both the requirements for: achieving “persons aggrieved” status; and what evidence a defendant must produce, in the context of summary judgment, to rebut successfully the presumption of standing afforded to an abutting property owner.

The court explained that under Massachusetts’ Zoning Act, G.L. c. 40A, only a “person aggrieved” has standing to challenge a decision of a zoning board of appeals. A “person aggrieved,” further explained the court, is one who “suffers some infringement of his legal rights.” The rights or interests that are allegedly infringed must be rights or interests that the Zoning Act is intended to protect, either explicitly or implicitly. Moreover, the alleged aggrievement must be more than a minimal or slightly appreciable harm.

The court further explained that abutters, like the Foggs, are entitled to a rebuttable presumption that they are “aggrieved” persons under the Zoning Act, and therefore, have standing to challenge a decision of a zoning board of appeals. Under such circumstances, the adverse party—here the Developer—can challenge the abutter’s presumption of standing by offering evidence “warranting a finding contrary to the presumed fact,” said the court. Such evidence that a defendant like the Developer must produce to rebut the abutters’ presumption of standing include showing either: (1) that, as a matter of law, the claims of aggrievement raised by the abutter are not interests that the Zoning Act is intended to protect; and/or (2) credible affirmative evidence refuting the presumption of standing—showing a finding contrary to the presumed fact (e.g., such as affidavits of experts establishing that the abutter’s allegations of harm are unfounded or de minimis).

Here, the court found that the Foggs, as abutters, enjoyed a presumption of standing to challenge the issuance of the building permit to the Developer. The court further found that the Developer failed to adequately rebut that presumption.

The court acknowledged that, because the issue of standing was raised in the summary judgment context, the Developer was not required to present affirmative evidence that refuted the Foggs’ basis for standing. It would be enough if the Developer could show that the Foggs had no reasonable expectation of proving a legally cognizable injury. If the Foggs had acknowledged during discovery a lack of substantive evidence to establish a legally cognizable injury, the Developer could have relied on those admissions to rebut the Foggs’ presumption of standing. The Developer attempted to do that here by relying on the Foggs’ testimony in which the Foggs arguably struggled to describe their injuries. However, the court found that the Foggs had not acknowledged a lack of substantive evidence to establish a legally cognizable injury. Rather, the court found that they alleged a legally cognizable injury: “Although not versed in the terminology of zoning law, the Foggs’ testimony clearly indicate[d] that one of their allegations of aggrievement was that construction of the house at 71 Spooner Road violated the density provisions of the zoning bylaw.” As such, the Developer could only rebut the Foggs’ presumption of standing by presenting independent evidence that would warrant a finding of no aggrievement. The court found the Developer failed to do so.

See also: *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 849 N.E.2d 197 (2006).

See also: *Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255, 797 N.E.2d 893 (2003).

Zoning News from Around the Nation

MARYLAND

Under legislation proposed by Governor Martin O’Malley and intended to curb growth in rural areas, limits would be placed on where septic systems could be installed. Counties would be required to designate land into four tiers: “The first and second would allow development and be on sewer systems or be in areas

where sewers are planned. The third tier would allow some development in rural areas and the fourth tier would be mostly off-limits for building." Under a recently introduced amendment to the legislation, counties (and not the state as originally proposed) would have the final say as to how county land is categorized.

Source: *The Baltimore Sun*; <http://articles.baltimoresun.com>

MASSACHUSETTS

A bill pending before the Joint Committee on Transportation "would mandate that the MBTA receive local approval from cities and towns prior to placing above ground advertisements in the communities [in which] the station is located." The bill reportedly may conflict with a 2008 Massachusetts Supreme Judicial Court decision that ruled that the MBTA's advertisements on MBTA property were not subject to the communities' zoning regulations.

Source: www.boston.com

MISSOURI

The state House of Representatives have given first-round approval in a voice vote to legislation that would declare that farmers have a "right to raise livestock." Under the legislation, livestock farmers "would not have to comply with local, state or federal laws" (zoning, environmental, or other) enacted after the farm goes into business or August 28, 2012, whichever is later. The bill must be approved once more by the House before it goes to the Senate.

Source: *Columbia Daily Tribune*; <http://www.columbiatribune.com>

NEW JERSEY

The New Jersey Appellate Division recently found that Governor Chris Christie had acted illegally in abolishing the New Jersey Council on Affordable Housing.

Source: *Star-Ledger*; <http://blog.nj.com>