IN THE SUPREME COURT
OF THE STATE OF DELAWARE

NEW CINGULAR WIRELESS PCS a/k/a AT&T, Petitioner-Below, Appellant v. SUSSEX COUNTY BOARD OF ADJUSTMENT, SEA PINES VILLAGE CONDOMINIUM ASSOCIATION OF OWNERS, GARY BOGOSSIAN, JOHN HOEFFERLE, BARBARA MCNALLY, FRED MCNALLY and DAVID GERK, Respondents-Below, Appellees.	No. 392, 2012 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY C.A. No. S11A-06-010 THG

APPELLANT'S OPENING BRIEF

SAUL EWING LLP

Richard A. Forsten, Esq. (#2543)
Whitney W. Deeney, Esq. (#5155)
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Tel: (302) 421-6800

Attorneys for Petitioner-Below, Appellant New Cingular Wireless PCS a/k/a AT&T

Dated: August 30, 2012

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NATURE OF THE PROCEEDINGS

Cell phones have become an essential part of everyday life. The tremendous growth in cell phone use, coupled with the rise of "smart phones" and computer "tablets," has created a need for ever more wireless capacity and ever more telecommunications towers to provide such capacity. Yet despite this ever-growing demand, the struggle continues between citizens who demand capacity while at the same time object to the cell towers necessary to meet that demand. This case presents yet another example of that conflict, and demonstrates how what should be a straightforward land use decision on the merits often becomes tainted by political factors, inaccurate opposing arguments, and other issues which, in theory, should bear no role in the process.

Here, the Appellant, New Cingular Wireless PCS a/k/a AT&T ("AT&T"), applied to the Sussex County Board of Adjustment (the "Board") for a special use exception to build a telecommunications monopole or "cell tower" (the "Proposed Tower"). Following a public hearing, the Board voted to deny the application (the "Board Decision," A-78-80). The Board Decision denying the request candidly concedes "it is impossible for the Board to disregard the large number of individuals opposing the tower," although, of course, the volume of public opposition is an impermissible factor to consider. The Board also relied upon testimony which the record makes clear is not accurate and other evidence which is not "substantial."

Following the Board's Decision, AT&T appealed to the Superior Court, which upheld the Board's Decision ("Superior Court Decision," attached hereto as Exhibit A). AT&T then appealed to this Court.

SUMMARY OF THE ARGUMENT

1. The Board's Decision Should Be Reversed Because The Board Found The Proposed Tower Would "Adversely Affect" Neighboring Properties, Not That The Tower Would "Substantially Affect Adversely" Neighboring Properties As Required By The County Code.

2. The Board's Decision Is Arbitrary And Capricious, Not Supported By *Substantial* Evidence, Is Otherwise Contrary To The Evidence, And Should Be Reversed.

STATEMENT OF FACTS

The Proposed Tower

AT&T seeks a special use exception for a 100-foot cell tower, on property zoned C-1, General Commercial, located at 32919 Coastal Highway, just outside of Bethany Beach (the "Property"). A87-116.[1] If a tower "is to be erected within 500 feet of any residentially zone lot," as is the case here, a special use exception is required. *Sussex County Code* ("Code") §115-194.2(A). AT&T filed its application on February 9, 2011 (the "Application").[2]

In addition to the general requirement that a special use exception shall not "substantially affect adversely the uses of adjacent and neighboring property", all applications for a cell tower must meet certain technical requirements. *Code* §§ 115-194.2, 210. This includes "showing that existing structures within a two-mile radius of the proposed location are not available for collocation" and "substantiating the need for such tower at the proposed location." *Code* §115-194.2(D). At the public hearing, AT&T demonstrated that the Proposed Tower complies with all requirements.

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[1] References to the Appendix appear as "A-__." The Board's written Decision is cited as "Dec. ¶ __." Cited provisions of the *Code* are attached hereto as Exhibits O - Q.

[2] AT&T first filed an application for a tower at the Property in 2009. A89-90 and 114-116. After hearing almost identical testimony and seeing the same evidence as presented in support of the current Application, the Board found the Proposed Tower was needed, met the statutory requirements and would have no adverse effect on surrounding properties. *Id.* However, that decision was reversed on a procedural issue and AT&T then filed the current Application. In the interim, AT&T erected a temporary tower (the "Temporary Tower") on the Property. Consistent with Sussex County policy, the Temporary Tower remains in place during the pendency of this appeal.

The Board's Hearing on the Application

The Board conducted its public hearing on March 21, 2011. A-3-65. The Board first heard from AT&T and its witnesses, including:

- Mr. Tom Zolna: AT&T employee in charge of locating sites for telecommunications towers such as the Proposed Tower;
- Mr. Brock Riffel: radio frequency engineer for AT&T; analyzes gaps in coverage, the need for reliable coverage and potential locations for telecommunications towers to resolve such needs;
- Dr. Kenneth Foster: radio frequency emissions expert; testified as to the safety of the Proposed Tower;
- Mr. Mario Calabretta: engineering consultant; testified as to construction of the Proposed Tower, its compliance with national safety standards and the Code;
- Mr. Leland Trice: Member of the Appraisal Institute ("MAI"), independent certified general appraiser; testified as to his appraisal analysis concluding that the Proposed Tower would have no negative impact on neighboring property values;
- Mr. William McCain: MAI-certified, independent licensed real estate appraiser; testified as to appraisal analysis concluding that the Proposed Tower would have no negative impact on neighboring property values or rental incomes.

Following AT&T, the opponents presented their witnesses, including:

- Dr. Jeremy Raines: a consulting engineer; testified as to the need for the Proposed Tower and proffered hypothetical (but ultimately unworkable), alternatives thereto;
- Mr. Randall Handy: testified as to a "consulting report" performed by Handy Realty which proffers that the Proposed Tower would have a negative impact on neighboring property values;
- Mr. Glenn Piper: testified as to the results of a "consulting assignment" by Landmark Associates which concluded that the Proposed Tower would have a negative impact on neighboring property values;
- Neighboring homeowners: testified as to their concerns regarding the Proposed Tower;
- Town Council of Bethany Beach: testified that the Council believed AT&T had no interest in using the Bethany Beach water tower as potential collocation site for its cell tower.

The opponents did not contest that the Application complies with most of the Code requirements. However, they did dispute the need for the

Proposed Tower, the possibility of its location elsewhere, and whether it would adversely affect neighboring properties.

The Petitioner's Presentation to the Board

a) The Proposed Tower is necessary to address an established gap in reliable coverage.

As to the necessity of the Proposed Tower, Mr. Brock Riffel, the engineer in charge of this project, explained there is "roughly a two-mile long gap from north to south along Route 1, centered near the Town of Bethany Beach where AT&T currently is not providing reliable service to its customers." A8-9; Cellular Service Coverage Maps ("Coverage Maps"), A93-106. As shown in the Coverage Maps, in this two-mile gap "AT&T currently has unreliable, either in-car or building service, for its customers." A8-9; A93-106.[3] While AT&T has a few cell towers in the beach communities of Sussex County, these do not provide reliable coverage in the gap. A8-9; A93-106.

Numerous complaints from customers also confirm this gap. A-9. Customers have complained about incidents of no coverage, no data speed, dropped calls, and inability to make or receive a call. *Id.* Several letters were sent to the Board in support of the Application from AT&T customers who have experienced faulty or unreliable service in this gap. A404-421. In short, AT&T demonstrated that there is a need for a tower in the area to address a gap in coverage. Except for

[3] As part of its FCC license, AT&T is required "to provide reliable service to their customers throughout their licensed area." A8-9. Dr. Raines, testifying for the opponents, observed that there is no federal mandate to provide "seamless" coverage. A29 and A31. However, that observation is irrelevant. As Mr. Riffel's testimony makes clear, AT&T's license from the FCC requires it to provide *reliable* wireless service to its customers in this area. A8-9.

the self-serving anecdotal observations of a few opponents who claimed their cell service was fine, this evidence was unrebutted.

b) Another location for the Proposed Tower is not an option.

AT&T also presented substantial evidence regarding the lengths to which it has gone to determine a location for the Proposed Tower and whether collocation is a possibility. First, Mr. Tom Zolna, the AT&T employee responsible for locating cell tower sites (and who has been doing this job for almost twenty years), was tasked with finding potential sites for the Proposed Tower. A7-8. He was given a two-mile search ring within which the Proposed Tower must be located to address the coverage gap and the necessary criteria for any potential site. *Id.* Mr. Zolna examined over thirty-three possible sites. *Id.* For each site which met the necessary criteria, Mr. Zolna contacted the owner to inquire as to his or her interest in hosting the Proposed Tower on their property. *Id.; see also* A369-397.

Among others, Mr. Zolna approached the Town of Bethany Beach about using the Town's water tower. A7-8 and A587-592. However, by letter dated March 2, 2005, Bethany Beach informed AT&T that the Town had no interest in leasing space on its water tower. A8 and A587-592. This was reaffirmed shortly before AT&T filed its Application, when, on January 31, 2011, the Bethany Beach Town Council voted not to offer its water tower to AT&T as a possible location. A8 and A587-592.

Despite his comprehensive search, Mr. Zolna found no existing structure within the search ring, or close to it, which met the necessary criteria and was available for collocation. A7-8. In fact, the Property is the only location within the search area that met the

criteria *and* had an owner willing to work with AT&T. A8. Mr. Riffel affirmed Mr. Zolna's testimony and explained that any other potential site in the two-mile radius would either not solve the gap in coverage or would simply provide overlapping or redundant coverage. A10-13; A93-106. For example, Mr. Riffel examined the South Bethany Water Tank as a potential site for collocation, but determined that locating an antenna there would leave significant gaps in coverage. A11.

c) The Proposed Tower is the only resolution that will sufficiently address the established gap in coverage.

Mr. Riffel testified that the Proposed Tower would provide reliable service in the current gap for both in-building and in-car coverage, especially in downtown Bethany, the residences along Route 1, and for those driving Route 1 in the coverage gap. A9-10; A93-106.

Riffel also testified concerning the construction and design of the Proposed Tower. For example, the Proposed Tower must be 100 feet tall (well short of the 150 foot maximum height permitted by the Code), so its signal can rise above the surrounding "clutter," (*i.e.* trees, buildings, etc.), which "can attenuate radio frequency." A10-11 and 60. Installing two fifty-foot or four twenty-foot towers is not an option, because the trees in the subject area are sixty to sixty-five feet tall. A10. Instead, the Proposed Tower is the only option that will adequately address AT&T's gap in reliable coverage.

d) The Proposed Tower complies with national safety standards as well as the safety and other requirements of the Sussex County Code.

Mr. Calabretta, a civil engineer, testified regarding the Proposed Tower's design, placement and accompanying equipment shelter. A14-16. The setbacks for the tower are all in *excess* of those

required by the Code, the Proposed Tower is designed to accommodate at least two additional carriers, and it will be lit in accordance with the Code. A14-15. However, contrary to the belief of some opponents, these lights will not be flashing. A58. Mr. Calabretta also explained that the Proposed Tower will be constructed in compliance with all national safety standards to withstand high wind, ice accumulation, and other factors. A15. Further, the base of the Proposed Tower can withstand being under water for days and the equipment shelter is eighteen inches above flood plain elevation. A16. In sum, the Proposed Tower meets all safety requirements.

e) The Proposed Tower will have no adverse effect on neighboring property values.

AT&T also presented substantial evidence and testimony, based on real estate industry's standards, that the Proposed Tower will have no negative impact on neighboring property values. Specifically, AT&T presented the testimony and report of Mr. Leland Trice. A16-17; A241-347. Mr. Trice is MAI-certified and a certified general appraiser in Delaware, Maryland and Virginia and was retained to determine the potential impact of the Proposed Tower on the real estate values of surrounding properties. A16. Mr. Trice undertook a market study focused on Sussex County, including recent monopole construction. *Id.* In particular, he focused on the Bethany Beach area surrounding the existing Temporary Tower, and sales before and after its construction. *Id.* This market study was particularly beneficial as it focused on the exact location of the Proposed Tower, and, because this dispute has attracted press attention and coverage, the effect, if any, of that coverage would be captured in the study. *Id.*

Trice looked at sales a year prior to and a year after construction of the Temporary Tower, finding thirty-four transactions. *Id.* Of those, ten sales could be made into "matching pairs" - that is, "two properties that have sold that are very similar in most respects." A16-17. The matched pairs analysis is the accepted analysis in the appraisal industry, in terms of determining the impact of an event on property values. A17.[4] Here, the only variable between the properties in each pair is that one property was sold before construction of the Temporary Tower and one after. A16-17. Based on the "matched pairs" analysis, Trice found no evidence of value impairment and determined that the Proposed Tower would have no adverse impact on surrounding property values. A17; A243.

AT&T also presented the testimony of Mr. William McCain. A17-22; A190-239. Like Mr. Trice, Mr. McCain is also an MAI-certified licensed real estate appraiser and was also retained to consider the impact of the Proposed Tower on property values in the area. A17-18. Mr. McCain conducted a two-part study in this regard: (i) he reviewed the national and international studies examining the impact of communications towers on residential property values; and (ii) conducted a comparative analysis of regional sales data for residential properties located close to a tower. A18.

As to his review of professional studies, McCain examined numerous publications focused on the impact of communications towers or high voltage lines on property values. *Id.* These publications all

[4] The opponents' witnesses acknowledged that a "matched pairs" analysis is the industry standard. A35. Ironically, they did not do such an analysis.

concluded that, in general, properties surrounding communications towers simply follow the market at large. *Id.* Other publications confirmed there is *no* "market evidence to suggest any negative impact upon the property value of improved residential properties exposed to communications towers in this market area." *Id.*

McCain then conducted a regional sales data analysis of residential properties located adjacent to communications towers in the coastal resort areas of Rehoboth, Delaware through Ocean City, Maryland. A19. The study included the Village of Sea Pines ("Sea Pines") (next to the Proposed Tower) and a comparison of other Delaware resort area properties located with a direct view of a communications pole and nearby properties from which the same pole can not be seen. A19-22. The McCain study showed that "there was no discernible difference in the sale price" for properties without a view of a monopole "compared to the properties that are located with a direct view [of] and adjacent to the monopole." A19-20. Likewise, units close to and far from a telecommunications tower sold for approximately the same price per square foot. A20. The McCain analysis, consistent with national sales data and studies, concluded there was "no demonstrated reluctance by the market, for resort buyers to purchase property adjacent to a communications tower." A21.

McCain also went further and analyzed the impact of communications towers on rental rates. A21-22. Specifically, in Sea Pines, the McCain study found that the rental rates are very similar to comparable properties and there was no indication that the Temporary Tower had an impact on rental rates. A22; A236-239.

f) The Proposed Tower will not substantially adversely affect the uses of adjacent or neighboring properties.

AT&T also presented testimony confirming that the Proposed Tower will not otherwise "substantially affect adversely" the use of neighboring properties. Dr. Kenneth Foster testified that any emissions from the Proposed Tower are not a threat to the public health. A13. Dr. Foster's thorough testimony and comprehensive report were not challenged.

Additionally, Mr. Calabretta confirmed that the Proposed Tower will be safe. It will be built in compliance with national safety standards for wind speed, ice accumulation, flooding and other factors, as well as the requirements of the Code. A14-16 and 101.

In sum, AT&T's presentation confirmed that the Proposed Tower meets the Code's requirements and will not "substantially affect adversely" neighboring properties.

The Opposition's Presentation to the Board

a) The opposition's inaccurate testimony as to the need for the Proposed Tower and potential for collocation.

The opponents first offered the testimony of Dr. Raines a consulting engineer who focuses on electromagnetics, antennas, and radio frequency. A28. Dr. Raines did not indicate he had any experience in designing a cell tower site or cell network. Nevertheless, Dr. Raines questioned the need for the Proposed Tower in the planned location by offering several conjectural alternatives. A28-34. However, due to his lack of knowledge, expertise, or both, each of his purported alternatives are either not feasible, would not solve the gap in coverage, or are already in use by AT&T. For

example, Dr. Raines proposed that AT&T use directional antennas to solve the gap in coverage. A29. However, Mr. Riffel confirmed AT&T already uses directional antennas, yet the gap still exists. A60.

Raines also proposed that AT&T use femtocells (microbase stations used inside homes or businesses that provide a wireless link to AT&T cellular phones) to address the gap. A29-30. However, femtocells will not work in a cellular network because the cell numbers that use femtocells must be pre-programmed into the equipment, making their usage as a substitute for a cell tower wholly unfeasible. A60.

Dr. Raines also proposed the use of distributed antenna systems, or "signal boosters." A30-31. Dr. Raines' hypothetical resolution here fails on many fronts. First, as Dr. Raines' himself concedes, a signal booster can boost a signal where it is not needed and create interference. A30. Additionally, as Mr. Riffel testified, a distributed antenna system is just that, it requires multiple antenna locations distributing a signal, meaning that instead of just one facility, multiple facilities would be necessary. A60. Further, distributed antenna systems provide coverage exclusively to roads and would not provide reliable service to the residential and commercial areas of Bethany also at issue here. *Id.* As Mr. Riffel confirmed, this idea too will not work to solve the gap in coverage. Thus, Dr. Raines' hypothetical alternatives are not a solution and do not negate the need for the Proposed Tower.

In addition to Dr. Raines, the Bethany Beach Town Council offered testimony that AT&T had not explored use of the town's water tower for its Proposed Tower. A44. However, as indicated above, in both 2005

and 2011, the Town indicated that its water tower was not available. A8; A587-592. Thus, any suggestion that AT&T failed to explore the Bethany Beach water tower as a potential site is incorrect.

b) <u>The opposition's presentation regarding impact on real estate values was based on hearsay and incomplete reports</u>.

Next, the opponents presented the testimony of Landmark Associates and Handy Realty in support of their claim that the Proposed Tower would negatively impact surrounding property values.

First, Mr. Glenn Piper testified on behalf of Landmark regarding the results of its "consulting assignment" and the summary report of those results. A37-40; A502-531. This summary report is *not* an appraisal analysis and Piper confirmed that Landmark did not do a "matched pairs analysis." A37-39. Instead of using this industry accepted analysis, Piper's "Primary Research," as referenced in the report, was a realtor survey. A39-40; A502-531. That is, he sent a ten-question survey to 238 unidentified realtors asking for their opinion as to the possible impact of the Proposed Tower on neighboring property values. A39-40. Only eighteen of those surveyed responded. A515. These few responses are the basis for Piper's opinion that the Proposed Tower would have a negative impact on neighboring property values, even though there is no evidence that a "realtor survey" is an accepted tool in the appraisal industry.

Likewise, Mr. Handy testified on behalf of Handy Realty regarding its "consulting report." A35-37; A486-500. This report was also not an appraisal analysis, but a mere summary of Mr. Handy's opinions. In fact, the report itself states its purpose is not to act as an actual appraisal but to "provide the appraiser's opinion as to the impact of

the" Proposed Tower. A486-500. Mr. Handy's report is based only on a visit to the property, an "evaluation" of sales in the area, and a "poll" of twenty-five unnamed brokers and realtors. A35-36. Mr. Handy then took the results of his poll and his subjective evaluation of four sales in the area and "interpreted" what they meant. He performed no appraisal or valuation analysis at all. A36. Based only on his "intuition," "perception," and estimates, Mr. Handy concluded that the Proposed Tower would have a negative impact. A36-37. This despite the fact that Mr. Handy confirmed the "market or sales comparison approach is the most commonly used method in appraising residential properties . . . the method that the industry uses, generally." A35.

Several neighboring homeowners also offered their belief that the Proposed Tower would negatively impact the value of their properties. A41-57; A438-448; A602-1386. However, none of these homeowners offered any data to support their opinions nor did they attempt to quantify the impact or refute the Trice Group or McCain analyses.

c) The opposition's presentation regarding the Proposed Tower's impact on the use of neighboring properties was unsupported by any evidence.

While neither a construction engineer nor a safety expert, Dr. Raines also speculated regarding the safety of the Proposed Tower as well as potential disruptions to neighboring properties. Dr. Raines cited to "a number of general hazards or risks associated with the tower" including noise from generators if the Proposed Tower loses power or from maintenance workers, light pollution, potential for the tower to fall, increased lightning strikes and threat of fire. A31-

362. However, Dr. Raines offered no evidence as to these speculative problems. Opponents also showed a provocative video of a telecommunications tower in Maryland catching on fire and toppling over to stir the Board's emotions. A48-49.

Other individuals also offered their opinions regarding the Proposed Tower's purported impact on aesthetics and visual enjoyment as well as unfounded safety concerns. A41-57; A438-448. For example, Mr. David Gerk testified about alleged safety concerns, that the tower would have "flashing lights" and that it may be aesthetically unpleasing. A41-44. However, the tower will only have two non-flashing lights. A58. Further, while generators may turn on if the electricity goes out, or maintenance workers may need to visit the site, these events would be limited in frequency and duration, and, more importantly, the generators are contained in a protective equipment shelter, thereby minimizing noise. A1579-1583; A13-16.

As to concerns regarding risk of fire and that the tower may fall, AT&T's engineer, Mr. Calabretta, testified that the only reason the tower in the opponents' video caught fire was due to a retrofitting welding operation. A61. Because that tower was older, it was not designed with ports for certain cables which needed to be welded into the tower. *Id.* Additionally, Mr. Calabretta reiterated that the Proposed Tower will be built in compliance with current national safety standards and designed for the worst case scenario. *Id.* Further, while several individuals raised the concern of a potential fire caused by the nearby gas station and pumps, no evidence demonstrating a real or tangible threat therefrom was provided; and,

in fact, the gas pumps are more than 130 feet from the Proposed Tower with a building between the pumps and the tower. A1579-1583. Finally, certain opponents mentioned a purported danger of the "drop zone." However, nowhere do the opponents point to a requirement that towers be built to allow for such a "drop zone" or that it is even a common practice. Again, the Proposed Tower complies with all of the County's requirements and with national safety standards for such structures, including exceeding the required setback.

The Board's vote and written Decision

The Board voted on the Application at its next meeting on April 18, 2011. A66-77. Each Board member provided only a brief statement explaining his vote. *Id.* One Board member candidly admitted that "personally I'm not convinced that seeing a cell tower from where you live is going to adversely affect the use of your property." *Id.* Moreover, at least three Board members appeared to apply the wrong standard when they stated their belief the use would "alter the central character of the neighborhood," which is a slight mangling of one of the elements concerning the grant of a variance, not a special use exception. *Code* § 115-211(B)(4) ("variance, if authorized will not alter the essential character of the neighborhood"). Nevertheless, the Board voted to deny the Application by a 5-0 vote.

ARGUMENT

I. THE BOARD ERRED IN ITS DECISION BY FAILING TO APPLY THE CORRECT LEGAL STANDARD

A. Question Presented: Did the Board Err In It's Decision By Failing To Find That The Requested Tower Would "Substantially Affect Adversely" The Neighboring Properties, As Required By The County Code, By Merely Finding That Neighboring Properties Would Be "Adversely Affected?"

The County Code requires that a cell tower application should be granted if it meets certain technical requirements and does not "*substantially* affect adversely" neighboring properties. *Code*, §§ 115-194.2, 210 (emphasis added). The Board Decision, though, fails to apply this standard, instead finding that the cell tower would only "adversely affect" neighboring properties. A78-79; Dec. ¶¶ 6 and 10. There was no finding of substantiality, and the Board's Decision is therefore in error. At the request of the Court below, this issue was the subject of special supplemental submissions, although the Court below ultimately did not address this issue in its decision. *See* A1565-1578.

B. Standard Of Review: This Court Examines a Decision of the Board to Determine if it is Free from Legal Error and Whether it is Supported by Substantial Evidence.

In reviewing a decision of the Superior Court which, in turn, has reviewed the decision of an administrative body on the record, this Court will review the administrative body's decision directly and the standard of review is the same as that applied by the Superior Court. *Public Water Supply Co. v. DiPasquale,* 735 A.2d 378, 380 (Del. 1999) *citing Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

As this Court applies the same standard as the Superior Court in reviewing a decision of the Board, this Court should reverse the Board where the Board's decision is arbitrary, capricious, contrary to law or not supported by substantial evidence. *Janaman v. New Castle Co. Bd. of Adjustment*, 364 A.2d 1241, 1242-43 (Del.Super. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977)(Table); *Sullivan v. Marta*, 256 A.2d 736, 737 (Del. 1969). In particular, a decision will be reversed if it is not the product of reason and logical deduction. *Council of Civil Organizations of Brandywine Hundred v. New Castle Co. Bd. of Adjustment*, 1995 WL 717202, *8 (Del.Super.) (Ex. B); *see also Dempsey v. New Castle Co. Bd. of Adjustment*, 2002 WL 568126, *3 (Del.Super.) (Ex. C) (the Board's decision must be "the product of reason and logical deduction supported by substantial evidence in the record"). Moreover, an arbitrary and capricious decision is one:

> [w]hich is unconsidered or which is willful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case.

Riedinger v. Bd. of Adjustment of Sussex County, 2010 WL 3792198, *4 (Del.Super.) (Ex. D). Here, as demonstrated below, much of the Board's Decision ignores or disregards facts and circumstances, and is otherwise contrary to the evidence.

Further, in order to withstand judicial review, "the Board must create a record which enables the Court to exercise its review process." *Barbour v. Bd. of Adjustment of the Town of Bethany Beach*, 1993 WL 180353, *2 (Del.Super.) (Ex. E); *see also H.P. Layton P'Ship v. Bd. of Adjustment of Sussex County*, 2010 WL 2106187, *4 (Del.Super.) (same) (Ex. F).

C. Merits Of The Argument: The Board's Decision Should Be Reversed Because The Board Found The Proposed Tower Would "Adversely Affect" Neighboring Properties, Not That The Tower Would "Substantially Affect Adversely" Neighboring Properties As Required By The County Code.

By way of brief background, under the Sussex County Code, a special use exception for a cell tower must meet certain technical requirements (setback, etc.); and, so long as the technical requirements are met, the exception is to be granted unless the Board finds the proposed exception will "*substantially* affect adversely" adjacent and neighboring properties. *Code*, §§115-194.2, 210 (emphasis added). In setting forth the standard for the grant or denial of a special use exception, then, Sussex County Council specified that any adverse effects must be *substantial*. Presumably County Council reasoned that any opponent could always find some adverse effect, however modest, and, in recognizing the need for cell towers in today's modern era of wireless communications, the Council required that the adverse affects must be substantial. Substantiality matters, and insubstantial effects - even if adverse - are not enough.

Here, though, the Board did not apply the "substantially" standard. The Board merely stated that it thought adjoining properties would be "adversely affected" (*see* A78-79; Dec. at ¶¶ 6, 10) and never found the adverse effects to be "substantial." Thus, the Board failed to apply the correct legal standard.

Because the Board failed to apply the correct standard, the Board Decisions should be reversed. As this Court explained in *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Del. 1999) (text available in Westlaw, 1999 WL 624114) (Ex. G):

> [a] Board decision based upon the proper standard is a prerequisite to the court's performance of a review to determine the existence of substantial evidence. . .. Because the Board erroneously applied the [wrong] standard to the Hellings' variance request its decision must be reversed.

Id. **2, 3. *See also Gilman v. Kent County Dep't of Planning*, 2000 WL 305341 (Del.Super.) (Ex. H) (Board's denial reversed for failure to apply correct legal standard); *Bauscher v. City of Newark Bd. of Adjustment*, 2002 WL 183935 (Del.Super.) (Ex. I) (Board failed to apply correct legal standard, decision reversed); *Kostyshyn v. Commissioners of Bellefonte*, 2006 WL 1520199 (Del.Super.) (Ex. J); *Hanley v. City of Wilmington Zoning Bd. Of Adjustment*, 2000 WL 1211173 (Del.Super.) (Ex. K) (same). Thus, in accordance with *Hellings* and the great weight of authority, the Board's decision should be reversed.[5]

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[5] Ideally, at least from AT&T's perspective, a Court, having determined that the Board erred, would go on to decide the merits of the case. While such a view is not consistent with this Court's statement in *Hellings*, where this Court stated that upon reversal of a denial by the Board, an applicant must re-apply, AT&T submits that it is consistent with the intent of the General Assembly. AT&T noted this issue before the Court below, A-1565-1567, but because the Court did not reverse, it was not addressed. In any event, the Superior Court would be bound to follow this Court, and it would be up to this Court to modify its decision in *Hellings*.

II. THE BOARD DECISION IS ARBITRARY AND CAPRICIOUS, NOT SUPPORTED BY *SUBSTANTIAL* EVIDENCE, IS OTHERWISE CONTRARY TO THE EVIDENCE, AND SHOULD BE REVERSED

A. Question Presented: Is The Board's Decision Supported By Substantial Evidence Or Otherwise Contrary To The Evidence?

In addition to applying the wrong standard, the Board also erred because its decision is not supported by substantial evidence or is otherwise contrary to the evidence. This argument was raised below. *See* A-1403-1508.

B. Standard of Review: This Court Examines A Decision of the Board to Determine if it is Free from Legal Error and Whether it is Supported by Substantial Evidence.

As already set forth above, this Court will directly review a decision by the Board and will reverse the Board where the Board's decision is arbitrary, capricious, contrary to law or not supported by substantial evidence. *See Janaman, supra; Sullivan, supra.*

C. Merits of Argument: The Superior Court's Decision Is Not Supported By Substantial Evidence And, At Times, Is Directly Contrary To The Evidence.

The Board Decision contains ten numbered paragraphs which set forth the Board's rationale. The first three are either inconsequential, or deal with those requirements which the Board acknowledges are met by the Application. The balance of the paragraphs are arbitrary and capricious, contain legal error, are contrary to the evidence, or are not supported by substantial evidence. Each of these paragraphs will be considered in turn.

D. There is a Need for the Tower at the Proposed Location.

The first criterion addressed by AT&T in its presentation was the need for Proposed Tower to be placed in the proposed location.

Section 115-194.2(D) of the Code requires that "[e]xisting structures within a two-mile radius of the proposed location are not available for collocation [and the Applicant] shall include documentation substantiating the need for such tower at the proposed location." On this point, AT&T presented a wealth of substantial evidence, including, *inter alia*: coverage maps, testimony and a map regarding customer complaints in the area, letters from customers complaining of unreliable coverage and substantial testimony concerning AT&T's considerable efforts to find alternative locations. The upshot is: the proposed location is the only site available for a cell tower which addresses the entire gap in coverage. Yet, in response to this essentially unrefuted evidence, the Board found:

> AT&T did not prove a substantial need for a tower at the proposed location, or that existing structures within a two mile radius were not available for a co-location. Specifically, a letter dated January 31, 2001 from the Town of Bethany Beach indicated that the Applicant declined to consider the possibility of an antenna on the stand pipe at the Bethany Beach Water Plant. In addition, the Town of South Bethany indicated that it had never been contacted by the Applicant with respect to the possible placement of antennas on the water tower in the Town of South Bethany. Finally, the Board found persuasive the testimony and written report of Raines Engineering with respect to alternative tower locations in the area, and the possibility of the use of alternative methods of cellular transmission, such as utility pole antennas.

A78; Dec. ¶ 4. None of the Board's purported reasons for rejecting AT&T's thorough presentation stand up to close scrutiny.

With regard to the Town of Bethany Beach's claim that AT&T declined to consider an antenna on the Town's water tower, in fact, the exact opposite is true as discussed in the Statement of Facts, *infra*, pp. 6, 12-13. Twice the Town indicated it would not consider

co-location on the water tower and then, following the hearing, the Town again refused.[6] Whatever the reason for the Town's "testimony" (the Superior Court questioned whether Bethany Beach's actions were "cricket"), the Town's water tower cannot be a reason to deny the Application. Nor can the South Bethany water tower be a reason to deny the Application, as the uncontroverted evidence demonstrates it also is unsuitable. A11; A94-106.

With respect to Dr. Raines, the simple fact is that he is *not* an expert in cell towers or networks, and his testimony and report are flawed. Raines was wrong about "directional" antennae, wrong about Femtocells, and wrong about signal boosters/distributed antennae. A29-30; A58-60. In short, Raines' testimony was inaccurate and demonstrated to be so by AT&T. It provides no basis for the Board's findings.

Thus, there was no evidence, let alone "substantial evidence," upon which the Board could reach any conclusion other than that there is a substantial need for the Proposed Tower and that the Property is the only location in a two-mile radius that addresses the need. This is not a case where the Board heard conflicting evidence and carefully sifted and weighed what came before it.

E. AT&T Demonstrated a Gap in Service.

[6] The Court below knew that the Town again refused to consider use of its water tower following the Board hearing despite its own testimony, but refused to consider that fact in the mistaken belief that an appeal from the Board is only on the record. Superior Court Decision at 2-3. However, the Delaware Code specifically authorizes the Superior Court to receive additional evidence, 9 *Del.C.* § 6918, and thus the Court erred in concluding it could not consider the facts of which it had knowledge.

Next, in Paragraph 5, the Board states that it was:

> not persuaded as to AT&T's purported need for seamless service. The opponents' expert witness, Mr. [sic] Raines, contested that need, and given the opportunity the Applicant was unable to identify by source such a requirement. In addition, numerous individuals suggest that AT&T's cell phone service was adequate.

A78; Dec. ¶ 5. This "reasoning" is as flawed as that proffered in Paragraph 4. As a preliminary matter, AT&T notes that it is not sure why the Board is referring to "seamless service." It comes from the testimony of Dr. Raines, who claimed that there is no federal mandate to provide "seamless" coverage. A31. However, Dr. Raines' lack of expertise again demonstrates why his testimony is not probative. Quite simply, there is no requirement for "seamless" coverage - the requirement is one of "reliable" service.[7] A8-9.

As to the testimony of "numerous individuals" that "AT&T's cell phone service was adequate," the simple and uncontroverted fact is that there is a gap. AT&T introduced maps, letters and studies demonstrating a gap in coverage, dropped calls, etc. A7-22; A57-62; A94-106; A189-421. The anecdotal testimony of "numerous" individuals, all of whom oppose the Proposed Tower, does not change this fact. Moreover, AT&T cannot help but observe that the Temporary Tower had been in place for over a year at the time of the hearing and made service reliable. Thus, it is hardly surprising that opponents could claim service is acceptable. Regardless, AT&T provided more than enough evidence substantiating the gap in service and the need for the

[7] Of course, the fact that AT&T is seeking to construct a new tower should put to rest whether a new tower is needed or not. No one can seriously suggest that AT&T would go to the time, effort and very considerable expense of erecting a new tower if one were not needed.

Proposed Tower in the proposed location. The "evidence" purporting to rebut this conclusion is in error or insubstantial.

F. The Board's Rejection of AT&T's Appraisal Evidence and Acceptance of the Opponent's Evidence as to Real Estate Values is Illogical, Arbitrary and Capricious.

For the Board to grant a special exception, the proposed exception must not "*substantially affect adversely* the uses of adjacent and neighboring property." *Code*, §115-210 (emphasis added). On this point, AT&T presented two very detailed appraisals which demonstrate that the Proposed Tower will not *substantially* affect the value of surrounding properties. In contrast, the opponents' reports on this issue are little more than undocumented surveys of undisclosed realtors and hunches unsupported by any hard evidence or data. Nevertheless, the Board found as follows:

> Both the Applicant and the opposition presented real estate appraisers and reports. From a general standpoint, the Board found the appraisal testimony and information from the opposition more persuasive. By way of example, the appraisal of Landmark Associates pointed out that when supply outweighs demand, deficiencies in existing inventory (such as a nearby cell tower) are accentuated. The appraisal by McCain & Associates on behalf of the Applicant confirmed Landmark's opinion as to the oversupply and the ability to avoid undesirable properties. Landmark estimated that the cell tower would result in a reduction of real estate values by 10%-20%, and the report form Handy Realty estimated that reduction to be in the 15%-30% range. Handy also noted that there were 64 residential properties within just a 500' radius of the tower itself. The Board did not find persuasive the appraisal of the Trice Group on behalf of the Applicant, which found no measurable loss in value. It also found that the McCain appraisal noted insufficient data to utilize its preferred "matched pairs." From the opponents' expert testimony, the Board found that the use of properties in the surrounding community will be adversely affected by the proposed tower. In addition, the Board found that from the oppositions' lay testimony the use of properties in the surround community will be adversely affected by the proposed tower.

A78-79; Dec. ¶ 6. At first blush, this paragraph suggests that the Board heard conflicting evidence and did what it is supposed to do -- weigh the evidence and make appropriate findings. However, even a cursory review of the testimony, analyses, and reports demonstrates that the Board grossly misstates the evidence before it.

The Board's first mistake concerns the reports offered by opponents. Neither the Landmark nor Handy report was an actual appraisal. The Landmark report essentially consisted of two parts. Unable to do any matched pair analysis in the vicinity of the proposed location, Landmark instead purported to do a matched pair analysis for certain properties in a subdivision called Southhampton, but in his testimony, Mr. Piper conceded this was not a matched pairs analysis. A38. Moreover, the relatively modest difference in price (3%, 4%, and 12.5%) could be attributable to any number of factors and the Landmark report makes no effort to investigate those factors. A37-40. The other portion of the Landmark report was a survey which Mr. Piper emailed to 228 unnamed realtors and to which only 18 (8%) unidentified realtors responded. A515. Such an undocumented survey simply doesn't rise to the level of substantial evidence nor is it even evidence of value. Indeed, at least one other court has specifically rejected the attempt to use a "survey" of realtors as evidence concerning affect on value. *See Smith v. State of New York*, 268 N.Y.S.2d 873, 880 (N.Y. Ct.Cl. 1966); *see also See New Castle Co. Dept. of Finance v. Teachers Ins. and Annuity Ass'n*, 669 A.2d 100, 103 (Del. 1995) (only approaches generally considered acceptable in the financial community would be considered as evidence of value).

The Handy report is even more cursory, making no attempt to do any market analysis. Instead, Mr. Handy's report briefly discusses the three Sea Pines units that sold after September 21, 2009 and one then under contract. A486-500. His "analysis" as to the effect of the tower in two of the sales is nothing more than speculation, for the third, conflicts with other evidence, and for the fourth is incomplete. Where a purported valuation is based on incompetent evidence or ignores actual data, such that it fails to rebut competent evidence, it cannot form the basis for a board's decision. *See, e.g. First Union Bank of Del. v. New Castle Co. Dept. of Land Use*, 1999 WL 1236569 (Del. Super.) (Ex. L).

For the first of the four sales, Unit #12, Mr. Handy claims "[s]ale price was 12.3% reduction from original listed price . . . [and] probably was influenced by the fact that the approval was under review by the Superior Court." A492-493. How or why Mr. Handy reaches this conclusion is not explained. Perhaps the listing price was too high, the sellers simply needed to sell and took a low offer, or the unit needed some work. Conversely, for Unit #27, he notes "[s]ale price was 7.1% reduction from original listed price . . . [but] sale was after the [the decision overturning grant of first special exception and] cell tower should not have been perceived as an issue." *Id.* Why is that? The Temporary Tower was still in place, the contract may have been signed before the Court's decision, and most expected a new application to be filed. In fact, Unit #27 is identified as closing on the same date as Unit #4, for which Handy states that: "[t]he buyer, Greg Cox, indicated that the cell tower

definitely had a negative influence." *Id.* Which is it? How could the tower have an influence on one sale (Unit #4), but not another (Unit #27) on the same day? Finally, with respect to the fourth identified property, Handy identifies the list price, but does not identify the sales price, other than to state that the realtor told him the tower had a "negative influence." *Id.* In short, the Handy report is nothing more than conjecture, speculation and data that conflicts with other evidence offered by other opponents. It is not evidence that the Proposed Tower will "substantially affect adversely" neighboring property values nor is it consistent with any generally accepted method of valuation and should be rejected. *See New Castle Co. Dept. of Finance, 669 A.2d at 103, supra.*

In stark contrast, the Trice report contains a matched pairs analysis for the area around the cell tower and discerns no effect on value. A240-347. Similarly, the McCain report contained matched pairs analyses for a number of comparable communities and concluded there was no discernible effect on value, consistent with national literature on the subject. A190-239. Interestingly, Mr. McCain also spoke with Greg Cox, who told him with respect to Unit #4 at Sea Pines that the unit sold well under market "due to the foreclosure and subsequent auction terms." *Id.* Mr. McCain also presented the only report on rental values, which demonstrated that the Proposed Tower would have no affect on rental income or values. A236-239.

In view of these reports, the deficiencies with the Board's conclusions in Paragraph 6 are readily apparent. For example, the Board states that "the appraisal of Landmark Associates pointed out

that when supply outweighs demand, deficiencies in existing inventory (such as a nearby tower) are accentuated." A78-79; Dec. ¶ 6. That general statement may be true, but in no way addresses the actual data and analyses presented by AT&T, nor does it explain away the many problems with the Landmark and Handy reports. Similarly, the Board writes, "Handy also noted that there were 64 residential properties within just a 500' radius of the tower itself." *Id.* Again, this may be true, but it tells the reader nothing as to whether the Proposed Tower will have any effect on value let alone a substantial effect. The Board also simply states it "did not find persuasive the appraisal of the Trice Group," with no explanation. Given that the Trice report was the only report to offer a matched pairs analysis for the vicinity of the Proposed Tower, this conclusory statement is especially insufficient. The Board then dismisses the McCain report by stating it does not contain a matched pair analysis for Sea Pines, something also missing from the Handy and Landmark reports. Indeed, the dismissal by the Board of one report for lack of a matched pairs analysis at Sea Pines (although it contained other matched pairs analyses at other cell tower sites) while accepting two reports with the same deficiency is the very definition of arbitrary and capricious.

The Board ends Paragraph 6 with the conclusory statement that "the Board found from the oppositions' lay testimony the use of properties in the surrounding community will be adversely affected." *Id.* The basis for this statement is totally unexplained.

In sum, the alleged "reasoning" in Paragraph 6 does not stand up to scrutiny. The Board ignores the substantial evidence provided by AT&T, and instead credits the deeply flawed Landmark and Handy realtor surveys and unsubstantiated statements of opponents. This is not the sort of logical and careful sifting the Board is supposed to perform.

G. The Weight Given to Lay Testimony Regarding Property Values by the Board is Contrary to Law.

Paragraph 7 of the Board's Decision states:

> The Board also found persuasive the testimony of several individuals with respect to property values. By way of example, the evidence included a January 20, 2011 letter from Greg Cox, a realtor, who had recently purchased a unit in Sea Pines Village adjacent to the cell tower location. He did so with the understanding that the tower request had been denied, and before he learned that the matter would be reheard. He also included in his letter his personal observations that sales do not take place when prospective buyers learn of a potential cell tower. Other individuals also testified that the temporary tower in existence has created issues with property values and interfered with potential rental agreements.

A79; Dec. ¶ 7. The reasoning of this Paragraph is also flawed and cannot form a basis to sustain the Board's Decision. First, the question is whether the proposed tower will "substantially" "adversely" affect surrounding uses. *Code* § 115-210. That one opponent of the tower would like to undo his purchase is not evidence of a "substantial" effect.[8] Moreover, while Cox's letter claims that sales are being lost, the only hard, objective evidence concerning sales (the Trice report) discloses no effect on value. Mr. Cox's

[8] Mr. Cox's statements appear to change depending upon the individual with whom he is speaking. He told Handy the Proposed Tower definitely had a negative impact on the sales price for Unit #4 (in other words, he knew of the tower and was able to get the unit for less). A-493. He told McCain the unit sold for substantially less because it was subject of a foreclosure (A213-214) and told the Board he didn't know about the Proposed Tower when he purchased. A438. Which is it?

unsubstantiated personal feelings are not backed up by any data or analysis.

Similarly, the Board states "other individuals" (who are not named) testified that the Temporary Tower "created issues" (which issues are also unidentified). This vague reasoning provides no basis for this Court to understand what, if anything, is the basis for the Board's Decision and whether that basis can stand up upon appeal.

H. The Board's Conclusion that the Proposed Tower Will Have an Adverse Effect on the Uses of Surrounding Properties is Contrary to Law, is Arbitrary, Capricious and Not Supported by Substantial Evidence.

The Board also stated that it found:

> an adverse effect on uses of surrounding properties can exist separate and apart from a reduction in value. Several Sea Pines Village owners testified that the lighting on towers, required by the County's ordinance, disturbed residents. Others were concerned with the noise from generators in the event electricity was lost, maintenance work, potential fires, and increased lightning strikes. Another witness pointed out that the tower was significantly higher than trees in the area and was aesthetically out of character with the surrounding community.

A79; Dec. ¶ 8. However, the foregoing "reasons" simply do not provide a basis to deny the special use exception. The Board either mischaracterizes the evidence, ignores the evidence, or otherwise posits hypothetical situations that are not realistic.

For example, a few opponents testified that they would be bothered by flashing lights on the tower. A41-57. However there will only be two lights and neither will be flashing. A15 and A58. Moreover, if two lights were sufficient to block the Proposed Tower, then no cell towers could ever be built near residential property, as all towers are required to have a light every fifty feet. *Code* § 115-

194.2. Similarly, no evidence was introduced concerning noise, let alone evidence demonstrating a "substantial" adverse effect.

Additionally, the potential for accidents and fire presumably exists with respect to every structure; but, the Proposed Tower is being constructed in compliance with all modern standards. Again, if a possible fire or other accident were a reason to deny a special use exception, then there would be no basis to grant any special exception for a tower as the code allows. Vague and unsubstantiated concerns simply don't rise to the level of substantial evidence and don't constitute a basis to find a substantial adverse impact. *Gibson v. Sussex Co. Council*, 877 A.2d 54, 71-72 (Del.Ch. 2005) ("[a]bsent substantial evidence that increased traffic or congestion would result from the project, vague and unsupported traffic congestion concerns were not adequate grounds to deny [the application]").

Likewise, concerns over aesthetics do not provide a basis to deny the special exception. *See, e.g., Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 495-96 (2nd Cir. 1999) (board may not base its denial on generalized concerns about aesthetics and visual impacts); *see also Omnipoint Corp. v. Zoning Hearing Bd.*, 20 F.Supp.2d 875, 880 (E.D.Pa. 1998)(same). Thus, the hypothetical concerns raised by the Board in Paragraph 8 of its Decision are nothing more than speculation and cannot form the basis for denial.

I. The Board's Speculative Concerns Regarding the Location of the Proposed Tower Near a Gas Station and the Possibility of the Proposed Tower Falling are Arbitrary and Capricious, Illogical and are Not Supported by Substantial Evidence.

In Paragraph 9, the Board's speculation went even further:

> [t]he Board expressed significant concern with the fact that the tower was located on the same property as gasoline pumps and gasoline storage. The Board noted the possible catastrophic results in the event of a lightening [sic] strike with gasoline storage tanks and pumps located within close proximity, as well as the well-known but informal "warning" that using cell phones near gas pumps was dangerous. The Board also found persuasive the video evidence submitted by opponents showing fires taking place on cellular towers, and again noted the danger of having the cell tower on the same property as gasoline storage.

A79; Dec. ¶ 9. The testimony regarding a potential fire is completely unsupported by any evidence in the record. The question is not whether a tower *may* suffer a casualty, the question is one of "substantial" adverse impacts. Moreover, even a cursory review of the site plan reveals that there is a distance of at least 130 feet between the tower and the nearest gas pump and a building located between the pumps and the tower. A1579-1583. Thus, the "well known but 'informal' warning" about using cell phones near gas pumps simply has no application here and there is no evidence to support the Board's concerns about fire. Mr. Calabretta also explained that the video of a tower collapsing was a rare occurrence caused by welding done on older towers to retrofit them to today's technology - in other words, something that is not a concern with the Proposed Tower. A60-61. In sum, the Board's concerns in Paragraph 9 are unsupported by *any* evidence and do not provide a basis to deny the special use exception.

J. The Weight Given to Uncorroborated Lay Testimony Regarding the Potential Adverse Effects of the Proposed Tower is Arbitrary, Capricious and Contrary to Law.

Finally, in the last paragraph of its Decision, the Board made its most telling statement:

> [i]n addition to the individuals appearing and testifying in opposition, the Board received more than 65 letters in opposition, as well as a petition opposing the Application signed by more than 300 persons. Although the ordinances regarding special use exceptions do not make provision for any specific number of individuals claiming to be adversely affected, **it was impossible for the Board to disregard the large number of individuals opposing the tower**, most [but admittedly not all] of whom live nearby and who believed the tower would adversely affect in some fashion the use of their own properties. As a result of the significant and substantial evidence presented and submitted in opposition to the application, the Board found that the Applicant had not met its burden of proving that the proposed use would not affect adversely the uses of adjacent and neighboring properties.

A79; Dec. ¶ 10 (emphasis added). Here, then, the Board makes a crucial admission when it concedes that "it was impossible for the Board to disregard the large number of individuals opposing the tower." This statement alone provides a basis for reversal, as it is the Board's job to weigh the evidence and make a decision based on the evidence, not bow to pressure it may feel from a large crowd of opponents. As Delaware Courts have observed on several occasions:

> [t]he [Board] is a quasi-judicial agency and as such it must act with impartiality, as a neutral arbiter and not as an advocate for one position or another. Granted, it also has the obligation to protect the public interest, but this cannot be carried out at the expense of a fair proceeding for all involved.

Mackes v. Bd. of Adjustment of Town of Fenwick Island, 2007 WL 441954, *8 (Del.Super.) (Ex. M). While one understands the near-universal "not in my backyard" mentality of most homeowners, if the statutory standard is to mean "simply that a neighbor does not like a change in the contour of his neighborhood, the standard seldom, if ever, could be met." *Beatty v. New Castle Co. Bd. of Adjustment*, 2000 WL 972660, *5 (Del.Super.) (Ex. N).

CONCLUSION

In sum, then, the Board's Decision fails on many levels. The Board failed to apply the proper standard of "substantially affect adversely" and made no finding of "substantiality." Moreover, the Board ignored evidence presented by AT&T, accepted evidence contradicted by the facts (such as Dr. Raines' testimony), and otherwise made findings not supported by substantial evidence.

AT&T appreciates that the opposition of nearby residents was heartfelt and sincere, but whether sincere or not, mere opposition and unsubstantiated opinions cannot form the basis for the Board's Decision. The evidence offered by opponents must still be substantial. "Polls" of realtors are not an accepted means of valuation. Unsupported claims by property owners that property values will be hurt are insubstantial. Complaints about flashing lights that won't flash, noise from equipment in an enclosed facility, and other generalized claims about risks from casualty simply aren't a basis to deny a permit for a tower which complies with all the requirements of the Code. It just isn't "cricket."

Dated: August 30, 2012

Respectfully Submitted,

SAUL EWING LLP

Richard A. Forsten, Esq. (#2543)
Whitney W. Deeney, Esq. (#5155)
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899-1266
Tel: (302) 421-6800
Attorneys for Petitioner-Below, Appellant New Cingular Wireless PCS a/k/a AT&T