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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NEW CINGULAR WIRELESS PCS, a/k/a AT&T, PETITIONER BELOW/APPELLANT	:	C.A. NO. 392, 2012
v.	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY
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	:	C.A. NO. S11A-06-010 THG

AMENDED ANSWERING BRIEF OF APPELLEES, SUSSEX COUNTY BOARD OF ADJUSTMENT, SEA PINES VILLAGE CONDOMINIUM ASSOCIATION OF OWNERS, GARY BOGOSSIAN, JOHN HOEFFERLE, BARBARA MCNALLY, FRED MCNALLY, AND DAVID GERK TO OPENING BRIEF OF APPELLANT, NEW CINGULAR WIRELESS PCS, A/K/A AT&T

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NATURE OF THE PROCEEDINGS

On February 9, 2011, an application ("the Application") for a "special use exception to erect a 100-foot tall telecommunication tower on commercially zoned property within 500 feet of residentially zoned property" was filed with the Board of Adjustment ("the Board") on behalf of "AT&T".[1] On March 21, 2011, the Board conducted a well-attended and extremely contested public hearing lasting well over five hours. On April 18, 2011, the five Board Members voted unanimously to deny the special use exception. The extensive and articulate Written Decision of the Board issued on May 26, 2011 was consistent with the Board's oral deliberations and identified three mutually exclusive requirements for approval of the special use exception that AT&T failed to satisfy. (A78-80)[2] AT&T filed its Petition for Writ of Certiorari in the Superior Court on June 22, 2011. (A1-2) On June 18, 2012, the Superior Court issued its decision affirming the Board's denial of the AT&T application. (AOB Ex. A) AT&T filed its Notice of Appeal to the Supreme Court on July 16, 2012 and its Opening Brief on August 30, 2012. This is Appellees' Answering Brief.[3]

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[1] "AT&T" was listed as the sole Applicant on the application submitted to the Board. Appellees are unaware of amendment to the application to substitute New Cingular Wireless as an Applicant. Therefore, Appellees shall identify the Appellant as "AT&T" herein.

[2] Appellant's Appendix contains the entire record of the Board of Adjustment and Superior Court proceedings. Accordingly, references to those proceedings, herein are (A___). References to Appellant's Opening Brief are (AOB___), references to Appellant's Opening Brief Exhibits are (AOB Ex___).

[3] Sea Pines Village Condominium Association of Owners, Gary Bogossian, John Hoefferle, Barbara McNally, Fred McNally, David Gerk and Sussex County Board of Adjustment are jointly filing this Answering Brief.

SUMMARY OF ARGUMENT

A. Appellees deny Appellant's Summary of Argument set forth on page 2 of the Appellant's Opening Brief. Specifically, it is denied that:

(1) The Board's decision should be reversed because the Board found that that 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.

B. Appellees rely upon the following legal propositions:

(1) The Superior Court's Memorandum Opinion And The Board Of Adjustment's Decision Should Be Affirmed For Reason That The Board Found That The Proposed Tower Would Adversely Affect Neighboring Properties And The Superior Court Neither Abused Its Limited Judicial Discretion Nor Erred As A Matter Of Law By Applying An Incorrect Standard.

(2) The Board's Decision Was Neither Arbitrary Nor Capricious And Was Supported By Substantial Evidence And The Superior Court's Decision To Affirm The Board's Decision Was Not An Abuse Of Judicial Discretion.

STATEMENT OF FACTS

The use of land for a cellular communications tower within 500 feet of a residential property is not a permitted zoning use in Sussex County. An applicant must acquire a special use exception from the Sussex County Board of Adjustment and prove compliance with each of the technical requirements of Sussex Code Section 115-194.2. (A428) The Applicant must also convince the Board that the use will not substantially affect adversely the uses of adjacent and neighboring property. SUSSEX COUNTY CODE § 115-210. (A427) AT&T's application proposes a 100-foot tall cellular tower and supporting electronic facilities upon lands occupied by the Pep-Up gasoline and propane company within Sussex County's jurisdiction, proximate to the Bethany Beach Town limits and immediately adjacent to the forty six unit Sea Pines Village residential community.[4]

The Public Hearing

The Board's public hearing on March 21, 2011 lasted in excess of five hours and the transcript thereof consists of approximately 240 pages of text. The extensive evidence consisting of over 1,400 pages of documents, transcripts and video exhibits presented by the Applicant and numerous opponents was highly controverted and conflicting, particularly concerning the extent of substantial adverse affect that the proposed 100-foot tall tower and electronic

[4]The "first round" of hearings concerning the identical tower resulted in the Superior Court's reversal of the Board's original September 21, 2009 decision for reasons that proper notice was not issued by the Board. *Sea Pines Vill. Condo. Ass'n of Owners v. Bd. of Adjustment of Sussex County*, 2010 WL 8250842 (Del. Super. Oct. 28, 2010) (Brief Exhibit A).

facilities would have on immediately neighboring properties. Uncontested aspects of the proposed use were first explained by AT&T witnesses: that the tower was designed to accommodate at least two other carriers; that the land area is in excess of one acre and that lights would be provided on the tower at fifty feet intervals. At issue, therefore, was whether AT&T could meet its burden of proof concerning the three specific requirements of the Sussex County Code for the granting of the special use exception application: the impossibility of location or co-location elsewhere within a two mile radius; the need for the cellular tower and base electronic facilities at that location; and whether the proposed tower would not substantially affect adversely the use of neighboring properties. SUSSEX COUNTY CODE § 115-194.2D and § 115.210. (A427-428).

AT&T's first witness, Tom Zolna, a "site location" employee, identified a "search ring" for thirty-three potential locations, stating only that the proposed site was, in his opinion, the "best site" for the tower. (A7-8) Zolna provided little or no detail about other possible locations except two other potential locations - the Town of Bethany Beach water tower and the Sea Colony condominium complex. (A7-8) His testimony concerning the Town of Bethany Beach water tower location conflicts with the public hearing testimony of the Town's Mayor and January 31, 2011 correspondence of the Town Manager, unconditionally stating that the Town was ... "told that AT&T had no desire to use the Bethany Beach water tower for a facility." (A44;592) Zolna did not explain why numerous other possible feasible sites were not appropriate. When asked by the Board whether nearby

Sea Colony buildings were high enough for an antenna location, Zolna replied that "... the Sea Colony buildings would have worked but Sea Colony was not interested in working with us ..." leaving an open question as to whether AT&T's undocumented financial offers were simply not satisfactory to Sea Colony or any other potential landowner or cellular facility owner within the two-mile radius area. (A8)

Particularly damaging to Mr. Zolna's credibility and testimony was correspondence addressed to the Board dated January 31, 2011 from Bethany Beach Town Mayor Cliff Graviet, which stated:

> I have been asked by local community leaders to write to you and tell you of a conversation that I had with Tom Zolna, Velocitel employee working on behalf of AT&T, in regards to the installation of a cell antenna in Bethany Beach. On May 5, 2010, I contacted Mr. Zolna and asked him if his company and AT&T, in light of issues with the proposed installation of tower and AT&T cell antenna immediately adjacent to the Sea Pines community, would consider installing an antenna on the stand pipe at the Bethany Beach Water Plant. Without hesitation, Mr. Zolna told me no. The Town of Bethany Beach has received no further communication since from Velocitel, AT&T or any of its representatives regarding this issue. (A592)

Another AT&T employee, Brock Riffel, introduced "propagation software" maps purportedly depicting areas of reliable and unreliable cellular service, maps which Riffel prepared himself and from which he alone determines the quality of cellular service. Although Riffel opined that each possible co-location facility of other cellular companies within a two-mile radius would not provide any new reliable service to AT&T's "objective area", he admitted a lack of specific knowledge about the impossibility of co-locating on those towers:

> I'm not privy to exactly what all of our competitors do. However, my opinion or my assumption would be that they're on relatively many of the same facilities that we are on. And they're also probably are not on many of the facilities

> that Tom mentioned earlier, that we tried to go on; such as Sea Colony. I believe probably AT&T's major competitor in this area is on the South Bethany water tank. I believe they're on the Northern Sussex Shores water tank. And then like I said before, I would assume they're probably on similar existing structures that AT&T's on today as well. (A11-12)

Neither Riffel nor any AT&T witness testified that AT&T had been warned or sanctioned by the FCC for not providing reliable service in their present Bethany coverage areas. (A12) Riffel did not identify the cellular providers operating the three Bethany area cellular towers possibly available for co-location and whether AT&T had performed an analysis of the coverage potential if co-location were acquired on those towers. (A10-13) Riffel concluded his testimony by admitting that he did not know whether AT&T could or could not locate an antenna upon the South Bethany water tower - a viable alternative site - where Verizon has a functioning antenna. (A13)

AT&T's structural engineer, Mario Calabretta, discussed the imposing size of the 100 foot tall monopole designed to service three to five other cellular carriers, the 20 foot by 11.5 foot equipment shelters and the 6 foot chain-link fence enclosing the area. (A13-16) Calabretta stated that the southern property line is 71 feet from the center of the 100-foot tall pole, but declined to admit that if the tower fully collapsed, it would fall twenty-nine feet into the Sea Pines Village properties. (A14; 23; 60-61) In regard to tower safety and structural integrity, Calabretta conceded that:

> ..."the eventualities that we can predict, like wind, portions of the structure can be upgraded or over-designed to basically put, what we would call, a theoretical break point for example, where something like that would bend over, but again, only in the situation where wind and ice

> might be a factor. We couldn't design for every eventuality. (A61)

Calabretta's responses to Board Members' questions and opponents' safety concerns about seismic events, storms and hurricanes and ice loads were simply that the tower was "built to national code" and that the code takes into consideration "likely forces." (A15; 61)

AT&T's two real estate appraisal witnesses opined that the proposal presented no evidence of value impairment and that the proposed structures would have "no adverse impact" on surrounding property values. (A16-22; 17) Leland Trice testified that he based his opinion on "matched pair" residential units within a 2,000 foot radius of the proposed site, the closest of which unit is over 1,080 feet from the proposed site. Five matched pairs referenced in Trice's report are high rise condominium units in the Sea Colony oceanfront complex, distantly located 1,170 feet, 1,082 feet, 1,155 feet, 1,283 feet, and 1,650 feet from the proposed site. (A280-285) Trice offered no evidence that the "matched pair" units had a direct or indirect view of the temporary tower. None of the units was proximate to the AT&T site. Trice admitted he did not even know the actual height of the temporary tower. (A16-17) Trice had "limited success" in developing any other matched pairs in Sussex County and admitted difficulty determining the affect on Sea Pines Village values. (A292)

William McCain, briefly discussed limited "national and international" research on the topic of communication towers, but admitted that "there's actually much more information provided on high

voltage transmission lines." (A18)[5] McCain's testimony focused on locations significantly outside of the Bethany Beach and Delaware markets. No matched pair analysis was performed within Sea Pines Village or for any location reasonably proximate to Bethany Beach. McCain's report clearly indicates that there was limited sale data available for valuation comparison. (A222) Additionally, McCain's report adds this notation indicating the difficulty of objective appraisal analysis:

> ... The impact on real estate values, as a result of communications towers, is a very site specific issue, and not easily quantified. Moreover, any measurable impact will differ from one individual property to another ... Similar to the results found in the review of national research, nominal to no adverse impacts have been found. When detrimental value effects were found for individual matched pairs, the impact was usually small, almost always less than -5% to -10%. In some instances, the properties that have a significant view of a communications tower sold for more than the control properties. (A222)

AT&T's one lay witness was Brian Pepper, CEO of Pep-Up, Inc. (a related corporation to Pepper & Steiner with whom AT&T negotiated a tower lease). Pepper neither identified AT&T as his cellular carrier nor described in any detail the cellular communications problems he experienced. He did state that he is the chief operating officer of Pep-Up at the proposed site, that he "runs fuel trucks all over the shore" and that he hauls "hazardous materials" in very dangerous situations. (A22) Pepper's statements concerning his hazardous hauling activities support the Board's written conclusions that potentially hazardous conditions exist at the location. (A78-80) Of

[5] McCain did not submit copies of any "national studies" to which he made reference.

the nine letters submitted to the Board characterized as being "in support" of the application, just four persons addressed dropped AT&T calls, without any reference to the specific area of dropped calls or to the nature of the difficulty. (A404-420) None of the letters indicated that the writers resided in close proximity to the proposed site.

Opponents' Evidence

Opponents first submitted compelling photos which depicted: the temporary and proposed tower immediately adjacent to Sea Pines Village; the Pep-Up gasoline and propane tanks at the tower location; and that 3 units within Sea Pines Village and the propane and gas tanks at the Pep-Up station are within the 100 foot tower's fall zone. (A26-27; 429-436) Actual and "photo-shopped" photos of before and after erection of the existing temporary tower and proposed tower depicted substantial adverse visual affects. (A429-436)

Expert testimony concerning AT&T's questionable need for a tower at the proposed site, possible co-location opportunities and alternative cellular technology was presented by Dr. Jeremy Raines, a radio frequency antenna and electromagnetics engineer.[6] (A28-34; Raines Report A457-484) A summary of Dr. Raines' testimony and written analysis states:

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[6] Curricula Vitae of Jeremy K. Raines, Ph.D., P.E. at pages 14-16 of Raines report, Dr. Raines has a Bachelor's Degree in electrical engineering and a Ph.D. in electromagnetics from the Massachusetts Institute of Technology and Master's Degree in applied physics from Harvard University. Dr. Raines has routinely performed extensive cellular design work for the past thirty years, including antenna analysis, radio wave interference detection, design of intelligent signal boosters, and critical examination of a number of antennas used by AT&T in other locations. (A470-472)

> After reviewing the Applicant's current network, alleged need, the proposed site and the alternatives including both existing structures and alternative technologies, I believe the following:
> (1) There is no federal requirement the Applicant must improve its coverage and it is not apparent that there is a gap in coverage. Also, I believe even if there is a gap in coverage that the Applicant can accomplish the "desired coverage" utilizing its current infrastructure, i.e. using its current antennae locations and varying characteristics such as the power.
> (2) There are a significant number of existing nearby structures that serve as equally good if not preferable locations to place antennas from a coverage perspective. Several of these structures, e.g., utility poles, are required under federal law to be made available to the applicant if it chose to utilize the location.
> (3) Well known disadvantages of cell towers suggest a policy of prudent avoidance should be pursued and as such the proposed location is neither necessary nor desirable for placement of a cell tower.
> (4) To the extent the applicant must demonstrate a need for the tower at the particular location, lack of feasible alternatives and/or lack of negative effect the application materials are deficient of such showings and further the specifics of the site, the applicants network, and the available alternatives sites and other known technologies suggest in fact the opposite to be the case. (A461-462)

Dr. Raines testified that there is no federal requirement that AT&T must improve its coverage at the Bethany site. (A29) Dr. Raines discredited AT&T's argument that a record of dropped calls equates to unreliable service. Refuting AT&T's testimony regarding thirty dropped calls during an unspecified time period as depicted on their complaint map, Dr. Raines opined that it was:

> a very tiny percentage ... wireless communication just has dropped calls. It's one of the things that happens … Even a well robustly designed system will experience dropped calls, and it can be for the most surprising reasons ... you'll never have a zero risk wireless communication systems. (A32-33)

Raines also criticized AT&T's use of the prediction tools described by Brock Riffel:

> Well, in the context of the presentation this evening, it's a computer model, computer based model used to forecast signal strength. And if the signal's strong enough, you call it reliable. If the signal is weaker, you call it not reliable. And - but it's just a tool. It's a computer generated model, and it's based on assumptions and approximations. And just because it creates elegant display, it doesn't mean that it's either precise or accurate. You should always question those. In particular, for radio wave propagation at the short wavelengths, there's a wide margin of uncertainly, simply because the number of obstacles are imponderable. They're countless. (A33) ... To the best my knowledge and experience, these computer models of very complicated geometries and phenomena have a wide margin of uncertainty with them. They just are not deterministic. It's not that there's an exact equation that you can solve using a computer. We haven't reached that stage and probably never will. (A33) ... The computations seem unsupported by comprehensive measurements. I disagree with the conclusion, and I question the accuracy of the computations. And we've just finished discussing that. There's just a wide swath of uncertainty associated with these prediction models even though they generate impressive graphic displays. (A33) With that margin of error, there may in fact actually be no lack of signal coverage. And so, I would suggest to AT&T that they come and make some extensive measurements to verify or not verify that the signal's lacking in the area where they reported. Just anecdotal reports of dropped calls would not convince me. (A34)

Dr. Raines' testimony included a detailed description of alternative cellular technologies and the viable option of placement of cellular antennas atop roadside utility poles, which Federal Communications regulations require utility companies to make available to cellular providers. Raines described the existing utility pole cellular antennae and equipment on Route One in Bethany which were depicted in photos in his report:

> Well, these work like any other cellular tower. It's just that the platform happens to be a utility pole. The antennas you see on top there are the same kind of antennas, and cables run down the utility pole, and they go into a radio shack with the same electronic gear that you would find at the base of a cellular tower. So that's how they work. It's simple a different platform that's

> available, courtesy of the power utilities. The expense involved involves some sort of leasing arrangement with the utilities, and that has to be negotiated. But the utilities are required by law to make the poles available. And to the best of my knowledge, that law also stipulates that the poles must be made available at a reasonable cost. (A29-30) (Photos - A482-483)

Despite AT&T's unsubstantiated arguments to the contrary, Dr. Raines testified that the utility pole top cellular antenna on Route 1, as depicted, was in compliance with Federal law and could not be in violation of state or local restrictions. (A62-63) Submitted into the record to support Dr. Raines' opinion was an article entitled *Pole Attachments and the Telecommunications Act of 1996*, which commences with the statement:

> Cable television companies and telecommunication carriers have a federal right of access to utility poles, ducts, conduits or right-of-ways. (A551-572; 551)

Dr. Raines reviewed AT&T's competitor T-Mobile's cellular coverage map which indicated no gaps in coverage in the same area as AT&T's purported "unreliable coverage." (A549) Raines confirmed that T-Mobile's signal is generated from two of the three possible tower locations described by AT&T's witness Riffel - the South Bethany water tower and the Fenwick site - and that T-Mobile has "excellent coverage" in the Bethany area. Co-location on the same T-Mobile towers would provide AT&T with similar excellent coverage. (A34) In conclusion, Dr. Raines stated that there are many alternative tower locations within a short distance of the proposed site and that new and emergent technologies are an alternative to construction of additional towers. (A33-34) Raines' report listed twelve disadvantages and adverse affects that cellular towers have on nearby properties:

noise from power generators and maintenance activities; roosting and nesting platform for birds; lightning attractor; light pollution from tower lighting; proliferation of other towers once precedent is established; fall radius; electromagnetic radiation from multiple high power transmit antennas; attractive nuisance to children and vagrants; traffic due to maintenance activity; disruption from initial construction; auxiliary structures such as signs and fences; and fire hazard from fuel storage for generators and high power electrical. (A484)

Randall Handy, a General Certified Appraiser and a Delaware residential and commercial real estate broker who has been performing commercial appraisals and brokering real estate for approximately thirty-five years testified that the construction of the proposed cell tower will result in a significant reduction in market value for all residential properties within a 500 foot radius of the site. (A35-37) Handy initially confirmed what AT&T's experts had stated: that matched pairs comparisons could not be adequately utilized because of a lack of sales data. (A35) Handy's report described four "comparable sales" within Sea Pines Village within a period of fourteen months; all comparable sales occurring after the original AT&T application in 2009. (A35; 487-500) Handy's professional appraisal opinion was that:

> Given a situation where you have a choice, one; to buy or rent a property in close proximity to a hundred-foot monopole cell tower, or buy or rent a property not in close proximity to the same cell tower. Common sense dictates that a reasonable man would choose the second option... In the case of the Sea Pines Village condominium, I estimate a loss in value of between 50 and 100,000 thousand dollars or more in real money. And that's a very important issue, obviously, to the owner. So the final conclusion I arrived at is based on my (indiscernible) analysis and over thirty-

> five years of experience, it's my professional opinion that the reduction of the - that the construction of the proposed hundred-foot high monopole cell tower will result in a significant, I repeat; a significant reduction in market value for all residential properties within that five hundred foot radius. And in the case Sea Pines Condominium - Sea Pines Village condominium that units will be negatively impacted most probably in the range of fifteen to thirty percent of the market value that would have been before the cell tower was proposed. (A36)

Glenn Piper, a residential appraiser with eighteen years of experience exclusively in Sussex County between Lewes and Fenwick Island, also described that an accurate "matched pair" analysis of the effect of the cellular tower on nearby residential units was difficult. (A39) Piper testified that he had studied five sales and had studied professional reports indicating that cell towers have a significant impact on property values such that the closer the tower, the greater impact. Based upon his studies, a … "ten to twenty percent reduction of value is likely for the subject units, depending upon their degree of visibility within the community." (A40)

Vicki York, a Bethany Beach realtor for sixteen years with a sales record of over four hundred sales from both buyers and sellers in the area, testified that she has been involved in six to eight sales in Sea Pines Village and was "quite familiar with the community." York stated how the community would be substantially negatively impacted by the proposed tower. (A40-41)

> That's the first thing that you're going to see is that tower looming over you ... if you look over in this particular building, you're going to also have the tower looming over a swimming pool ... Going back to my scenario, I would think that these two, three, maybe even four buildings here would probably see a decrease in value anywhere from probably twenty to fifty percent, because based on the buyers that I'm working with they're creating a first impression as soon as they pull up to a place. And

> if they see that tower, sometimes they won't even get out of the car because they don't want to look at it ... And I've worked with all types of buyers (indiscernible) insurance company, and they don't even want to be near high tension powers or they don't want to be near an electrical substation. (A41)

David Gerk, owner of Sea Pines Unit 14 and a mechanical engineer stated his expert opinion that the antennas on the utility pole platform (that Dr. Raines previously described) presently existing on Route One utility poles would not create any structural integrity problems if placed upon existing wooden telephone poles. (A41) Gerk described substantial adverse impacts the existing temporary tower and the proposed tower will cause upon Sea Pines Village properties and upon owners' enjoyment and use of their property: that the tower will dominate views of property owners from their units, common areas and the community pool; that residential units would be crushed and persons injured if the tower were to fall; that the specific tower location immediately adjacent to the Pepper & Steiner stormwater management pond has precarious and unsolid ground; that within the 100 foot fall area there exist numerous gasoline tanks and propane tanks and that well-known industry standards addressing fall zones for similar vertical structures require at least 100 to 125 percent of the height of the structure. (A42) Gerk testified in his home-ownership capacity that potential renters who had expressed interest in renting his unit declined to rent when informed of the location of the temporary tower. (A41-44) Only a complete reading of Gerk's testimony to the Board will convey his credible and persuasive evidence of the substantial adverse affect presented by the AT&T application. However, Gerk's conclusory remarks are worth repeating:

> First, AT&T does not have a gap in coverage, Second, even if there was a gap, there is no federal law or any other requirement on AT&T to improve its service. Third, there is a virtually limitless number of existing structures on preferable locations to place antennas, which AT&T is required to pursue and has failed to do so. (A43)

Next, Bethany Beach Mayor Tony McClenny and five other Bethany councilpersons stated that they oppose the cell tower at the proposed Pep-Up location which is too close to residences and that the Town was told that AT&T had ... "no desire to use the Bethany Beach water tower for a facility." (A44)(Opposing letter also submitted at A439)

Gary Bogossian, President of the Sea Pines Village Association testified in his capacity as a Sea Pines Village unit owner and as a Delaware, Pennsylvania and New Jersey registered architect with over thirty years of experience in commercial design and planning. Bogossian made reference to other engineering disasters which were the result of human technological error combined with natural events: 2007 Minneapolis Bridge collapse; Hyatt Regency walkway collapse in 1981; 2010 Deep Water Horizon Drilling platform explosion; and the 2011 earthquake and tsunami in Japan. (A46) Bogossian testified that the proposed location of the tower and accessory building creates a "precarious subsurface soil and foundation condition" due to the proximity to the stormwater retention pond which is filled to capacity many times each year. (A45) Bogossian indicated to the Board that if the tower were to collapse:

> ... To the south here, it will actually crush at least the end unit. And if there's anybody in there, it'll crush them too ... If it falls to the west, towards Route One, it will crush part of the store, anybody that's in the store or someone who's sitting in the drive through ... If it goes to the north, it will crush the propane tank that's sitting, possibly causing an explosion or a fire … And to

> the east, let's not forget about that, it will drop into the pond, potentially causing displacement flooding. So the tower would push all the water out of the pond, and there would be active electrical dangers and hazardous ground water contamination that would be very difficult to abate. (A46)

As the Association's President, Bogossian testified that a ten to thirty percent reduction in resale value was likely to have a substantial negative affect on rentals and sales of Sea Pines units and that:

> This tower will forever negatively alter our peaceful idyllic setting and change the perception of life and vacations at Sea Pines Village for all time. The damage that this will cause for so many people, some in life altering ways, far outweighs the financial benefit to a few; the owner and AT&T. (A46-47)

Greg Cox, a realtor and recent purchaser of a Sea Pines unit, testified that property values will be negatively affected by the proposed use.

> There are five currently for sale, and I can tell you from experience when people find out there's going to be a cell tower right outside their doors, they will not sell ... [A]nd I would only add as a realtor, that I had shown that property on at least two occasions prior to purchasing it, and, of course, when people walk out on what is our balcony, off our master bedroom, the first thing they saw was that temporary tower, and ***it was an issue***. (A48, emphasis added)

John Himmelberg, President of the Bethany Beach Landowners Association, representing over 700 members, urged the Board to deny the application and submitted BBLA's letter in opposition, which further states: ... "there is not any other tower in Sussex County which is located so proximately near a residential area"..."cell towers are highly objectionable when placed near homes" ... and that ..."we believe there is near universal opposition to AT&T's proposal." (A49-50; 444)

Three videotapes of recent cellular tower fires and collapses were played proving that serious cellular tower accidents and catastrophes do occur. (A48-50) (Synopsis and website reference to youtube.com A594)(Video Ex. I; A1401) Additionally, opponents' documentary evidence included numerous photographs and reports of collapses and hazardous incidents relating to cellular and communication towers, newspaper articles and accounts of the adverse affect of cellular towers on neighboring properties and articles describing alternative methods of providing cellular service. (A533-547; 594-602)

Don Betts, owner of Sea Pines Village Unit 15, stated that rental weeks of his unit have decreased which he attributes to the tower's presence. (A50) Alexander Smyth, owner of Unit 41, Sea Pines Village, a Verizon cellular customer, stated his call coverage is "great" in Bethany because of the Verizon antennas on the South Bethany water tower and the Sussex Shores tower. Opponents allege these towers are potential co-location sites for AT&T. Smyth and many other witnesses stated the obvious financial reason for AT&T's application:

> AT&T wants to put this cell phone tower up at this location because it's the cheapest alternative for them … when they put it up, they will then be able to get other companies to piggyback on their cell tower ... it's a good deal for them. (A51)

Numerous Sea Pines Village owners and owners of property proximate to the proposed tower testified concerning: the substantial adverse affect the temporary tower has caused to their property values and to them personally; the adequacy and reliability of AT&T's cellular service before the erection of the temporary tower; viable alternative

methods of providing cellular service and aesthetic, hazard and safety concerns about the proposed tower. (A51-57)

Forty-two persons were in attendance in opposition to the application. Additionally, the opposition record included: seventy-eight opposing letters mailed to the Board; three hundred eighty opposing letters submitted before the meeting, one hundred eighty-two opposition letters submitted at the meeting, and approximately six hundred fifty e-mail petitions in opposition to the application. (A603-771; 79-1386)

The Board's Deliberation, Vote On April 18, 2011 And Written Decision

At the April 18, 2011 meeting, Board Members thoroughly discussed the merits of the opponents' evidence prior to the Board's vote, specifically referencing: safety concerns of fire at other cellular facilities; the danger of tower lightning strikes at a cellular tower site proximate to a gasoline station; adverse economic effects on property values; alternative methods of producing cellular service and the failure of AT&T to provide convincing evidence of the Town of Bethany's alleged denial of cellular antenna space to AT&T. (A67-78) Thereafter, Board Member John Mills motioned to deny the application, adding rationale that:

> ...the opposition argued a stronger case that it would have an adverse effect with the cell tower there, more specifically because of the example they showed, the fires in the towers ... You know, that there are alternative methods to providing service ... what we've heard is the current tower has an adverse effect, and the fact that you shouldn't use a cell phone at a gas pump. (A73)

Board Members Ronald McCabe and Brent Workman both mentioned that the proposed use would alter the central character of the neighborhood

in their deliberations. McCabe articulated that he felt the opposition provided very good reasoning for the adverse effect the proposal would have on real estate and rentals, that AT&T can use electric poles for cellular transmission, and that the site is ... "just not the proper place for a monopole in my opinion." (A74)

Board Member Jeffrey Hudson stated:

> ... after all the testimony and reviewing all the information we have, the final answer to the question we have to ask ourselves is will it affect adversely the uses of adjacent neighboring properties ... and I believe when you become a property owner in the vicinity - and it was evident by the opposition, that in their minds they feel that it will adversely affect their property. And I agree with them. (A75-76)

The Board's Chairman, Dale Callaway, stated that he did ... "not feel it is compatible to the neighbors and neighboring property" ... "[a]nd I do not feel that all possible sites available to the company have been exhausted at this time." (A76) Callaway also expressed his concern about the safety hazard of simply using cellular phones near gas tanks. (A76) Thereafter, the Board voted five (5) to zero (0) to deny the application. (A76)

On May 26, 2011, the Board issued its Written Decision containing ten relevant findings of fact and articulate rationale for its denial of the Application. (A78-80)

ARGUMENT

I. IN DENYING AT&T'S APPLICATION FOR A SPECIAL USE EXCEPTION FOR A CELL TOWER, THE BOARD APPLIED THE PROPER STANDARD IN ITS DECISION AND ITS DECISION SHOULD BE AFFIRMED.

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

Answer: No.

B. Standard Of Review: This Court Examines A Decision Of The Board Of Adjustment And The Superior Court To Determine If It Is Free From Legal Error And Whether It Is Supported By Substantial Evidence.

When reviewing the decision of the Superior Court, which has reviewed a decision of a Board of Adjustment, the review will be limited "to correcting errors of law and determining whether substantial evidence exists to support the Board's findings of fact." *Rehoboth Art League, Inc. v. Bd. of Adjustment of the Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010); *Janaman v. New Castle Co. Bd. Of Adjustment*, 364 A.2d 1241, 1242-43 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977)

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a decision. *Cingular Pennsylvania v. Sussex County Bd. Of Adjustment*, 2007 WL 152548, *4 (Del. Super. Jan. 19, 2007) (Brief Exhibit B); *Holowka v. New Castle County Bd. Of Adjustment*, 2003 WL 21001026 *3 (Del. Super. April 15, 2003) (Brief Exhibit C). An appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Id.* In conducting its review of the record, the appellate

court will consider the record in the "light most favorable to the prevailing party." *Holowka* at *4. The Court should not substitute its judgment for that of the Board. *Id.*

C. Merits of Argument: The Board's Decision Should Be Affirmed Because the Board Used the Proper Legal Standard Required by Sussex County Code.

An applicant for a special use exception must demonstrate that the cell tower will not "substantially affect adversely the uses of adjacent and neighboring properties". SUSSEX COUNTY CODE § 115-210 (AOB Ex.P) (A427) The applicant bears the burden to demonstrate that this standard has been met. *Rollins Broad. Of Del., Inc. v. Hollingsworth*, 248 A.2d 143 (Del. 1968) AT&T contends that the Board's determination that the proposed cell tower would "affect adversely the uses of adjacent and neighboring properties" was an error because the Code's language includes the words "*substantially* affect adversely". (AOB 19) The evidence presented by expert witnesses and adjacent property owners affected by the cell tower, however, clearly proved that the uses of neighboring and adjacent properties were substantially affected adversely.

AT&T argues that the word "substantially" creates a higher standard than simply "adversely affects;" an argument that conflicts with the long-held definition of the word "substantial":

> Of real worth, and importance; of considerable value; valuable; . . . Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable; . . . Something worthwhile as distinguished from something without value or merely nominal

BLACK'S LAW DICTIONARY, 1597, (4th ed. 1968) (Brief Exhibit D). Based on this definition, the word "substantially", when added to the phrase

"affects adversely", indicates that any adverse affect to neighboring and adjacent properties must be actual, existing, and real and must not be imaginary. This definition is consistent with the definition of "substantial evidence" which has been defined by this Court as "more than a scintilla but less than a preponderance ..." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)

AT&T's claim that the Board's decision is legally incorrect due to the failure to include the word "substantially" in its findings must fail. In multiple Delaware cases where a decision of the Board regarding a special use exception has been appealed to the Superior Court, the Court itself has focused on whether the proposed use would adversely affect the uses of neighboring and adjacent properties.

In *Projector v. Bd. of Adjustment of Sussex County*, the Superior Court thoroughly discussed the "adverse impact on surrounding properties" caused by a proposed daycare facility and held that the applicant had a burden "to produce substantial evidence that the proposed use will not 'affect adversely' neighboring properties." 1986 WL 11540 at *3 (Del. Super. Sept. 26, 1986) (*citing* Rollins *Broadcasting* at 145) (Brief Exhibit E). The *Projector* decision reversed the Board's approval of the special use exception holding that substantial evidence existed that the daycare center would have an adverse affect on neighboring properties. The Court in *Projector* referenced the "substantially affect adversely" standard and based its decision on the evidence proving "adversely affect." *Id* at *3-4. The reason for this holding is clear; the "substantially affect adversely" standard and "adversely affect" standard mean the same thing.

Likewise, the Superior Court used the "adversely affect" terminology in *Gutierrez v. Sussex County Board of Adjustment* where an applicant sought a special use exception for the placement of a mobile home. 2010 WL 2854293 (Del. Super. July 16, 2010) (Brief Exhibit F). In deciding the *Gutierrez* application, the Board did not specifically discuss the pertinent Sussex County Code requirements for granting the application. Nonetheless, the Superior Court held that the Board properly addressed the question of the "adverse effects on surrounding uses" and that the Board "considered the right question." *Id.* at 3. In fact, the Court held that:

> Implicit in the Board's decision is the finding that the Applicants had not met the burden of showing no adverse effect if the property was subdivided and the mobile home was retained on a lot less than five acres. The Court concludes that because the Board applied the correct burden of proof and addressed the appropriate question, albeit without mention of the Regulations, its decision does not warrant reversal. *Id.* at *4.

If a Board fails to base its opinion on findings required by statute, the Court shall review the record to determine whether evidence exists upon which required findings could have been based. *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962).

Courts have used the "adversely affect" language in these cases because that standard is interchangeable with the "substantially affect adversely" standard.[7] So long as the adverse affect is real and existing, which the evidence in the present case clearly proves, the application should be denied.

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[7] The Court also used the "adverse affect" standard in *Cingular Pennsylvania LLC* and in *Ludema v. Callaway*, 2005 WL 1953046 (Del. Super.) (Brief Exhibit G).

II. THE SUPERIOR COURT PROPERLY DETERMINED THAT THE BOARD'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NEITHER ARBITRARY NOR CAPRICIOUS.

A. Question Presented: Is The Board's Decision That AT&T Did Not Meet Its Burden Of Proof Supported By Substantial Evidence.

Answer: Yes.

The Board reasonably determined that AT&T had not met its requisite burden of proof. Substantial evidence to support its oral and written decision exists in the Board's record.

B. Standard of Review: This Court Examines A Decision Of The Board And The Superior Court To Determine If It Is Free From Legal Error And Whether It Is Supported By Substantial Evidence.

An appellate court must give great deference to the Board, requiring only evidence from which an agency could fairly and reasonably reach the conclusion that it did. The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings, but merely determines if the evidence is legally adequate to support the agency's factual findings. 29 Del. C. § 10142(d) Application of this standard requires the Superior and Supreme Court to consider the entire record to determine whether, on the basis of all the testimony and exhibits before the Board, it could fairly and reasonably have reached the conclusion it did. The burden of the persuasion is on the party seeking to overturn a decision of the Board to show that the decision was "arbitrary and unreasonable." If the Board's decision is "fairly debatable" then there has been no abuse of discretion. *Janaman* at 1242; *Mackes v. Board of Adjustment of Town of Fenwick Island,* 2007 WL 441954 (Del. Super. Feb. 8, 2007) (Brief Exhibit H).

C. <u>Merits of Argument</u>: The Superior Court's Decision To Affirm The Board's Denial Of AT&T's Application Is Supported By Substantial Evidence In The Record Of The Public Hearing.

The Board's Written Decision dated May 16, 2011 is perhaps one of the most extensive and complete set of findings that the Board has ever issued. There is substantial evidence in the record to support each of the Board's findings. The Board addressed each of the criteria required by the Sussex County Code, and summarized the facts presented by both AT&T and opponents. The Court below properly determined that the Board performed its function to weigh testimony and that AT&T had not met its burden of proving that the proposed tower would not substantially affect adversely the use of adjacent and neighboring properties. (AOB Ex. A at 22) On appeal to this Court, AT&T has failed to meet its burden of persuasion that both the Board of Adjustment and the Superior Court were arbitrary and unreasonable in their decision making. *Mellow v. Board of Adjustment of New Castle County,* 565 A.2d 947, 955 (Del. Super. Ct. 1988)

D. AT&T Failed To Prove Requisite Elements Of Sussex County Code § 115-194.2D.

Even assuming, *in arguendo,* that the Board erred by using an incorrect standard to determine substantial adverse affect, AT&T failed to prove its burden of evidence concerning two of the mandatory requirements of Sussex County Code § 115-194.2D: 1) that existing structures within a two-mile radius of the proposed location are not available for co-location and 2) that the Applicant substantiate the need for the proposed tower. Opponents' expert witnesses and laypersons provided comprehensive and considerable technological

testimony refuting AT&T's testimony and maps purporting to display areas of unreliable service. Dr. Raines testified that AT&T does not need the proposed tower because it does not experience a gap in coverage. (A29) Raines discussed potential manipulation of AT&T's prediction equipment and maps that would distort AT&T's perceived need for the tower in the proposed location. (A33) Both Raines and Engineer David Gerk credibly and expertly testified that alternative tower locations and alternative technology would adequately provide cellular coverage to AT&T customers in the suspect Bethany coverage area. (A28-34; 62-63; 41-44) In addition to their expert testimony, articles submitted into the Board's record describe alternative cellular technologies. (A454-484; 579-581)

The Superior Court's decision articulately and correctly summarized Dr. Raines testimony as follows:

> Jeremy Raines testified as a consulting engineer specializing in electromagnetics, antennas, radio frequency propagation and related topics. Mr. Raines stated the FCC does not require AT&T to improve its coverage. Mr. Raines also testified that there were numerous other types of alternative technologies that AT&T could use in lieu of the proposed tower and cited femtocells, a directional antenna system, signal boosters, and placing antennas on utility poles as examples. Mr. Raines stated that there were a number of general hazards associated with the proposed tower, to wit, the generators on site, as well as general maintenance, will cause noise. Mr. Raines noted that the proposed tower is taller than the surrounding trees and that tall structures attract lightening. The site contains fuel storage, which is clearly a fire hazard in the event of a lightning strike. Mr. Raines also testified that he believed AT&T's claim that it does not have adequate coverage in the area to be unsubstantiated and noted the number of coverage complaints were extremely small when compared to the total volume of calls. Additionally, AT&T did not compare the area at issue to any other area with coverage gaps; as a result, there was no frame of reference for the testimony regarding poor coverage. Mr. Raines told the Board propagation tools are inherently unreliable due

> to the number of unforeseen physical obstacles in any given area. Mr. Raines observed that Mr. Riffel did not testify to the reliability of AT&T's prediction tool. Finally, Mr. Raines testified that there are many alternative sites available for AT&T, especially given the different types of technology than AT&T could utilize. (AOB Ex. A at 6-7)

Thereafter, the Superior Court properly determined that AT&T's argument that the Board's decision is contrary to the evidence was without merit, and stated that:

> The Board concluded, after summarizing the evidence presented by the opposition, that AT&T had not proven a need for the tower at the proposed location and cited the evidenced that supported its conclusion. Although the Board did not summarize AT&T's evidence on the issue of a need for a tower at the proposed location, the evidence is on record before the Court. The Board is not required to inventory all the evidence presented at a hearing in its decision. The Board also found AT&T had not eliminated existing structures in a two-mile radius as potential sites and cited its reasons for so holding. (AOB Ex. A at 19)

In so ruling, the Superior Court correctly performed its "sole function" to determine whether substantial evidence exists on the record to support the Board's findings of fact and to correct errors of law. When substantial evidence exists, the Appellate Court may not reweigh the evidence and substitute its own judgment for that of the Board. See *Janaman*.

E. The Superior Court And The Board Correctly Determined That AT&T Failed To Prove The Proposed Cellular Facilities Would Not Substantially Adversely Affect Neighboring Properties.

An Applicant for a special use exception carries the heavy burden of demonstrating that the proposed use will not substantially adversely affect neighboring properties. See *Rollins Broadcasting of Delaware, Inc.*; SUSSEX COUNTY CODE § 115-210. AT&T presented appraisal testimony from two witnesses who clearly admitted difficulty in

obtaining an accurate comparative analysis for the Sea Pines Village area and the neighborhood proximate to the proposed site. (A16-22) Nevertheless, AT&T's appraiser William McCain admitted that similar towers could negatively affect property values by a factor of 5-10%. (A222) Opponents contend that such loss is clearly a substantial adverse affect on neighboring properties. Opponents' appraisal witnesses Handy and Piper and real estate professionals York and Cox provided convincing and credible testimony regarding the substantial adverse affect of the existing temporary tower and proposed 100-foot tower on neighboring and adjacent properties values and uses. (A35-41; 47-48) Opponents' witnesses' experience and qualifications comply with the general rule for qualification of experts or non-experts on observation of property values - that the witness "... shows such knowledge of the values of comparable property in the vicinity as renders him able, in the determination of the trial judge, to form an intelligent and helpful judgment on the subject, together with an adequate knowledge of property to be valued ..." J.E. Macy, *Competency of Witnesses to Give Expert or Opinion Testimony as to Value of Real Property*, 159 A.L.R. 7, at 64 (1946) (Brief Exhibit I).

Although AT&T contends that the Board should have disregarded opponents' experts' valuation evidence, no recognized caselaw or treatise precludes the testimony of real estate agents or brokers or laypersons, provided they possess credible familiarity with the subject property and sales and rental market. By reason of ownership, adjacent owners are presumed to have a special knowledge as to their property values and how those values would be adversely affected by

the proposed AT&T cellular tower construction. In *State of Delaware v. .015 Acres of Land More or Less, in New Castle County,* the Superior Court determined in a condemnation proceeding that even a leaseholder of land is competent to testify as to value of land. 164 A.2d 591 (Del. Super. Ct. 1960). There was sufficient evidence in the record for the Board to accept the opponents' testimony concerning adverse impacts of AT&T's proposal on property sales and rental values and to not be persuaded by AT&T's witnesses.

The determination of adverse affect extends beyond analysis of sales and rental values. Diminution of enjoyment of Sea Pines Village properties by owners and renters as a result of the unsightly temporary tower and proposed tower, as displayed in opponents' photos and photo-shopped exhibits, reasonably constitutes a substantial adverse affect. The record is complete with compelling statements from unit owners as to how the shorter temporary tower has already substantially affected adversely the views from their units, common areas and pool.(A41-57)(Letters and Petitions A438-445; 603-637; 642-1368) AT&T's Opening Brief repeatedly attempts to discredit testimony from objectors based upon aesthetics, suggesting that such comments are of no weight. (AOB 26-31) The Courts, however, have taken an altogether different view. In assessing the visual impact of a proposed tower, the Board is entitled to make an aesthetic judgment without justifying that judgment by reference to an economic or other quantifiable impact. In *Southwestern Bell Mobile Systems, Inc. v. Todd,* a majority of the objections at a public hearing concerned the visual impact of a proposed cellular tower and specifically objected

that a proposed cellular tower was not appropriate for the particular location. 244 F.3d 51 (1st Cir. 2001). The Court determined that Southwestern Bell's tower would be four times the height of surrounding structures and that the proposed tower was of a different magnitude than anything else in the vicinity. The proposed location had no trees, would be visible at all times of year, and would be seen frequently by a large percentage of area residents. The First Circuit Court concluded that reasonable minds would find the opposition testimony to such an imposing structure adequate evidence to support a denial of the application. *Id.*[8]

A recent Delaware Superior Court decision addressing an almost identical cellular tower application determined that Delaware law permits property owners to give their opinion as to the value of their property and to testify concerning the negative effect on their property values. See *Cingular Pennsylvania LLC.* Community opposition may provide sufficient justification for a Board's denial of an application, particularly where the objection rationally relates to public health, safety and welfare and has evidentiary support. *Id.* In upholding the Sussex County Board's denial of Cingular Wireless of Pennsylvania's application, the Court stated that an administrative agency is not required to believe any witness, even an expert. Non-experts may offer reliable and substantial evidence. Therefore, it is

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[8] See also, *Aegerter v. City of Delafield,* 174 F.3d 886, 891 (7th Cir. 1999), in which the Court held that "Nothing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and … aesthetic harmony is a prominent goal underlying almost every such code."

perfectly acceptable for the Board to consider complaints by individual property owners as to the appropriateness of the tower location, even if those comments are grounded in aesthetics. *Id.*

Accordingly, the Board was entitled to consider the opinion of laypersons opposed to AT&T's application. As stated in the Board's Written Decision in Section 10, it was:

> ...impossible for the Board to disregard the large number of individuals opposing the tower, most 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. (A78-79)

Although AT&T attempts to characterize the foregoing rationale as evidence of a popularity contest, such attempt fails to diminish the veracity and significance of opponents' evidence. The Board would have acted arbitrarily, capriciously and unreasonably if it had disregarded such substantial opposition evidence. See *Mellow; Cingular Pennsylvania LLC.*

F. Risks Of Hazard And Proximity To Structures Creates Substantial Adverse Affect On Neighboring Properties.

The Sussex County Board of Adjustment and the Superior Court have previously recognized that the placement of a cellular tower proximate to residential neighbors and a dangerous section of roadway would create an even more dangerous condition. *Cingular Pennsylvania LLC.* Such expressed rationale by the Board for a denial of the application has been upheld as sufficient evidence of "substantial adverse affect." *Id.* Opponents' to AT&T's application submitted videotapes of collapsing towers, newspaper and website articles regarding cellular

tower hazards, tower vandalism, lightning strikes and testimony regarding the proximity of the existing temporary and proposed towers to the Pep-Up gasoline and propane tanks. (Video Tapes Exhibit 5I; Transcript of Video Tapes A48-49; Articles A440-443; 533-547; 595-601; 603-640) Although AT&T disparages such testimony in its Opening Brief, AT&T's primary evidence to refute opponents' evidence was simply that cellular towers are built to "national standards." (A58-59) Board Members reasonably articulated their concern about the safety issues raised by opponents. (A78-80) The Superior Court correctly determined that the homeowners' testimony as to the negative affect on quality of life issues may be properly relied upon by the Board in denying the application. (AOB Ex. A at 25)

The Court below clearly and carefully analyzed the significant volume of conflicting evidence in affirming the Board's denial of the AT&T application finding that:

> Accordingly, the Board's finding that AT&T had not documented the fact that another existing structure within a two mile radius was not available is supported by substantial evidence in the record. (AOB Ex. A at 22) ... In response, the opposition presented reports from appraisers as well as testimony from surrounding landowners purporting to illustrate a negative impact, reflected not only in depressed property values but also in the owners' general quality of life.(AOB Ex. A at 23)... The Board was not remiss in accepting the common sense approach advocated by many of the witnesses; that is, the presence of the proposed tower would have a significant negative impact on neighboring property values particularly in a depressed market.(AOB Ex. A at 24) ... Although "few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence on which the Board could base its denial", in this case the opposition consisted of many nearby property owners who testified to specific aesthetic, visual, and safety concerns that went unrebutted by AT&T, save for a general averment that the proposed tower would be built subject to national code requirements. Under the unique circumstances presented, the homeowners' testimony

> as to the quality-of-life issues may serve as evidence of a negative effect on neighboring property use. The Board may properly rely upon such evidence in denying an application for a special exception. (AOB Ex. A at 24-25)

To the extent that AT&T challenges the factual findings of the Board and the Superior Court's affirmation of the Board's decision, there is clearly sufficient evidence in the Board's extensive record to support those decisions.

Conclusion

The Board's extensive record clearly supports the Board's determination that AT&T did not prove that the proposed use would not substantially affect adversely the uses of adjacent and neighboring properties. Even assuming, *in arguendo*, that the Board erred in determining the "substantial adverse affect" issue, there exists significant and substantial evidence in the Board's record to support the Board's decision that AT&T had failed to prove each of the other requisite elements for approval of a special use exception: impossibility of co-location and need for an additional tower. AT&T's failure to prove any one of these requisite elements required the Board to deny the Application. The Superior Court neither erred as a matter of law in affirming the Board's decision nor abused its discretion in determining that AT&T had not met its burden of proving each specific requirement for the granting of the special use exception. For the reasons set forth herein, the Superior Court's decision to affirm the denial of AT&T's application by the Board of Adjustment should be affirmed.

Dated: 10/9/12

Respectfully Submitted,

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