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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 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 REPLY BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal from a decision by the Sussex County Board of Adjustment (the "Board") denying a special exemption request for a cellular tower (the "Tower") made by Appellant, New Cingular Wireless PCS ("AT&T"). Specifically, AT&T alleges that the Board erred in two crucial ways.

First, the Board failed to apply the proper standard to the request because it did not find that the proposed Tower would "substantially affect adversely" neighboring properties as required by the applicable Sussex County Code provision. Instead, the Board only found that the Tower would "affect adversely" the neighboring properties, omitting any finding of a *substantial* adverse effect. The failure to apply the proper standard constitutes legal error and is grounds for reversal.

In addition, the Board's decision (the "Decision") is simply not supported by *substantial* evidence. Ordinarily, it is difficult to obtain a reversal of an administrative decision for lack of support by "substantial evidence," as this standard is a relatively low threshold. However, in this case, under these facts, if the substantial evidence standard is to mean anything, the Board must be reversed. As demonstrated in AT&T's Opening Brief, and as further demonstrated herein, the Board's Decision is not only unsupported by substantial evidence, but it is contrary to the evidence or otherwise rests upon unsubstantiated or inadequate evidence.

This is AT&T's Reply Brief.

ARGUMENT

I. THE WORD "SUBSTANTIALLY" MEANS SOMETHING AND WAS INCLUDED IN THE APPLICABLE CODE PROVISION FOR A REASON; THE BOARD'S DECISION IS WRONG AS A MATTER OF LAW BECAUSE THE BOARD FAILED TO MAKE THE FINDING REQUIRED BY THE CODE AND WOULD READ THE WORD OUT OF THE CODE PROVISION.

It is axiomatic that a statute is to be interpreted according to its plain and ordinary meaning. *See, e.g., Chase Alexa, LLC v. Kent County Levy Court,* 991 A.2d 1148, 1151 (Del. 2010); *Eliason v. Englehart,* 733 A.2d 944, 946 (Del. 1999) ("If a statute is unambiguous, . . . the plain meaning of the statutory language controls"); *New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1082 (Del.Super. 1995) ("a court is required to give words of a statute or regulation their ordinary meaning") (citations omitted); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* §6 Ordinary-Meaning Canon (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation"). Moreover, every word in a statute is presumed to be included for a reason, and should not be rendered surplusage. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (citations omitted); *see also* Scalia & Garner, *supra*, §26 Surplusage Canon. These legal principles are controlling, and demonstrate why the Board's Decision in this case is in error and must be reversed.

Here, Sussex County Council instructed the Board that a special exception should be granted unless the request would "substantially affect adversely" the use of neighboring properties. *Sussex County Code* §115-210. Not any adverse effect will do, it must be substantial. Sussex County Council reasons that it would always be

possible to conjure up some small adverse effect and so required the effect to be substantial. By requiring a finding that effects be substantial, Council was weighing the needs of neighboring property owners against the needs of the public for cell phone service. The plain meaning is clear. There must be a substantial adverse effect in order for a request to be denied.

In its Decision, though, the Board never found that the proposed cell tower would "substantially" affect adversely neighboring properties. Rather, the Board merely concluded that there would be adverse effects. Because the Board failed to apply the correct standard, as put in place by Sussex County Council, the Board's Decision is in error and should be reversed. *See, i.e., Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Del. 1999) (text available in Westlaw, 1999 WL 624114) (Ex. A) (board failed to apply correct legal standard, decision reversed); *Gilman v. Kent County Dep't of Planning*, 2000 WL 305341 (Del. Super.) (Ex. B)(same); *Bauscher v. City of Newark Bd. of Adjustment*, 2002 WL 183935 (Del.Super.) (Ex. C)(same); *Hanley v. City of Wilmington Zoning Bd. of Adjustment*, 2000 WL 1211173 (Del.Super.) (Ex. D) (same).

In its Answering Brief, the Board offers two rationales for its failure: (1) that the word "substantially" here only means that the adverse effect must be "actual, existing and real . . . not imaginary" (Ans.Br. at 23); and (2) that prior Superior Court decisions have not required the adverse effects to be "substantial." Ans.Br. at 23-24. Neither rationale has merit.

As to the Board's first rationale, it simply doesn't make sense and completely ignores context. The Board would have the word "substantially" mean "real" and "not imaginary," so that the phrase "substantially affect adversely" would mean that the adverse effects must be "real" as compared to not real. But, such an interpretation doesn't make sense given the rest of the sentence. If the word "substantially" was simply an instruction to the Board that the effects must be "real" and "not imaginary," then there would be no need to include the word "substantially" because in order for the Board to find adverse effects, those effects must be real - otherwise they don't exist. Thus, the Board would render the word "substantially" surplusage, which, of course, is not to be done. *Oceanport, supra*. Indeed, the Board concedes this very point when it notes in its Answering Brief that: "the 'adversely affect' language . . . is interchangeable with the 'substantially affect adversely' standard." Ans.Br. at 24. The Board's position, then, not only ignores plain meaning, but also violates a second important rule of statutory construction regarding surplusage.

Moreover, the Board conveniently cherry picks meanings from the very definition of "substantial" that it cites in its brief. Under the definition it cites, the very first meaning listed is "of real worth, and importance of considerable value." Ans.Br. at 22. Context matters, of course, and if one assumes that "substantially" means "of real worth" or "considerable value," then the inclusion of the word "substantially" in the applicable County Code provision makes perfect

sense and fits with the obvious and plain meaning of what Sussex County Council intended. The adverse effect must be considerable.

The Board's other rationale regarding the meaning of the word "substantially" is to claim that no reviewing Court has ever applied the phrase "substantially affect adversely" in the way mandated by the language or otherwise considered the question presented by this appeal. That no Court has ever discussed the phrase, or the effect of the word "substantially," though, is of no moment. The issue has apparently never been raised before. In prior cases, the Board itself may have applied the substantially standard in its underlying decision, and so it was not an issue. But regardless of whether the issue was raised or not in previous Court decisions has no bearing here. The Board must apply the standard required by the Sussex County Council when determining whether or not to grant a special exception. Here it did not.

As a final note, even if the County Code provision contained any ambiguity, which it does not, then established canons of construction hold that that the provision should be interpreted in favor of AT&T. *See Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010); *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d at 1152; *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

In sum, plain meaning mandates that the Board find any adverse effects be "substantial," which the Board failed to do. Accordingly, the Board's Decision must be reversed.

II. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS NEITHER FAIR, REASONABLE, NOR EVEN "FAIRLY DEBATABLE."

Neither party disputes that a decision of an administrative board, such as the Board, will be upheld where it is supported by substantial evidence. Op.Br. at 21; Ans.Br. at 25. Nor does either party dispute that a Board decision will be upheld if it is "fairly debatable." As the Board put it in its Answering Brief, a reviewing court will "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." Ans.Br. at 25 (emphasis added). However, the parties disagree as to whether the Board has met this admittedly lenient standard.

With all due respect to the Board, its Decision is neither "fair" nor "reasonable." Indeed, the Decision is one of those relatively rare instances where a decision is not even "fairly debatable." Rather, this is a case where the Board bowed to public pressure and, in rendering the decision that a crowded room of opponents wanted, relied upon evidence which was demonstrated to be untrue, is contrary to law, or is otherwise lacking in any meaningful foundation. AT&T respectfully submits that if the Board's Decision can be upheld here, based on the flimsy and questionable "evidence" before the Board, then no administrative decision need ever be reversed again for lack of substantial evidence.

AT&T outlined in detail in its Opening Brief the many problems and deficiencies with the Board's recitation and "findings" in its Decision. In its Answering Brief, the Board attempts to counter some of AT&T's points and defend some of its "findings," but this attempt

fails and the Board otherwise fails to address important evidence which is contrary to the Board's position. AT&T will address each of the Board's points below:

1. **There Is A Need For A Tower**. AT&T presented extensive evidence concerning the need for the tower, demonstrating the gap in coverage and that co-location on other towers would not solve the problem. Op.Br. at 5-6. Nevertheless, the Board claims AT&T did not meet its burden. The Board anchors this claim upon the discredited testimony of an engineer who, with no actual knowledge of the model used by AT&T, testified that AT&T's coverage model was flawed (indeed, according to the expert all such models used by the industry are flawed), that the model could not be relied upon, and that other towers could be used. Ans.Br. at 26-28.

Of course, this witness had no access to AT&T's data or model, and the uninformed "testimony" concerning other towers was shown to be untrue. Op.Br. at 21-24. With respect to AT&T's computer network modeling, this engineer would have the Board (and this Court) believe that AT&T's computer modeling and design - the same modeling used to design AT&T's entire network and its guide to investing hundreds of millions of dollars - is wholly unreliable and should be ignored. Such an assertion, made by someone admittedly not familiar with the precise program involved, (A32-33), is simply too incredulous to form a basis for the Board's Decision. In fact, taken literally, the assertion means that AT&T (and its competitors) can never demonstrate a need for a tower at any location since their predictive tools cannot be relied upon.

The opponent's engineer was equally misinformed as to his other suggestions (directional antennae, femtocells, etc.) as already demonstrated in AT&T's Opening Brief. Op.Br. at 11-12 and 23. In sum, AT&T met its burden concerning the need for a tower at the location proposed, and it was neither "fair" nor "reasonable" for the Board to conclude otherwise, particularly as the "evidence" apparently relied upon by the Board was shown to be false or otherwise based upon incorrect assumptions.

2. **The Evidence Presented By the Tower's Opponents Regarding Value Was Flawed And Insubstantial.** Although the Board claims that opponents presented substantial evidence to support the Board's findings regarding an adverse effect on value (Ans.Br. at 26-34), the Board ignores relevant caselaw and otherwise ignores the arguments made by AT&T. Instead the Board simply asserts that the testimony of opponents supports its Decision.[1] The testimony does not.

To begin, AT&T notes that the Board makes no attempt in its Answering Brief to defend (and indeed does not mention) the realtor surveys presented by two of the real estate agents proffered to the Board by the Tower's opponents. Presumably this silence concedes that such surveys provide no basis for the Board's Decision.

Despite this concession, though, the Board still argues that the testimony of the realtors and nearby residents was sufficient and "substantial" enough such that the Board could base its Decision upon that testimony. Not so.

[1] In summarizing the valuation evidence presented, the Answering Brief refers to "substantial adverse affect" on several occasions. *See, e.g.*, Ans.Br. at 29. However, the Board's Decision makes no such statement.

As to the realtors themselves, when an expert provides an opinion, he or she must back up the opinion and provide the data and evidence upon which it is based. *See Perry v. Berkely*, 996 A.23d 1262, 1270 (Del. 2010) (citing D.R.E. 702(1) and finding that "[i]f an expert's proposed testimony is not based upon sufficient facts or data, the expert must be disqualified"); *see also Sycamore Farms, Inc. v. Barnes Elec., Inc.*, 2011 WL 5316776, *1 (Del. Super) (Ex. E) (finding that an expert may testify if such testimony "is based upon sufficient facts or data and is the product of reliable principles and methods [applied] reliably to the facts of the case"). AT&T has already explained the many deficiencies associated with the two realtors who testified for opponents, including the "surveys." *See* Op.Br. at 13-14 and 25-30. To sum up briefly, Mr. Piper testified that the Landmark report concerning another project, called Southhampton, was not a "matched pairs" analysis, and made no attempt to control for other factors which may have affected the sales price. Op.Br. at 26. As to Mr. Handy's report, all four of his comparables sold *after* the existing tower was constructed, and Handy offers no hard evidence as to how or why those properties were affected by the Tower. Op.Br. at 27-28. Unsupported speculation is still unsupported speculation, whether by an expert or lay person.

As to the testimony of the lay individuals regarding their property values, one must look a bit more closely at their testimony and what is permitted by Delaware law. Delaware law permits a property owner to testify as to the value of their property, but, to the extent a property owner wants to base the opinion on comparable

properties or other data, the property owner must establish familiarity with the comparable properties. *See Eastern Shore Natural Gas Co. v. Glasgow Shopping Center Corp.*, 2007 WL 3112476, *2 (Del.Super.) (Ex. F); *PJ King Enterprises, LLC v. Ruello*, 2008 WL 4120040, *2 (Del.Super.) (Ex. G) ("[t]he record owner rule does not extend to lay testimony beyond the owner's opinion as to the value of the land"). Here, of course, the testifying property owners were not testifying as to the value of their properties.

Rather, the testifying property owners were offering their opinion as to the effects of the nearby tower. While AT&T appreciates the sentiments and good faith of the local residents who testified, the fact remains that they offered no evidence concerning actual diminution in value. There was no evidence of any lost sales. There was no evidence that sales prices were reduced due to the tower. There was no evidence as to any actual diminution in value. With one modest exception,[2] there was no evidence that the existing tower had any effect on rentals or rental rates. Indeed, an online guestbook for the community contained a complaint from one renter about the adjoining gas station, but made no mention of the existing temporary tower. A238. In short, the testifying property owners simply made the unsubstantiated claim that the tower would affect their property value. In the absence of data or evidence, and in the absence of any attempt to quantify the diminution, such testimony cannot constitute

[2] One resident testified that his rentals for 2011 were down to two from six or seven. A50. However, this reduction could be due to any number of factors, including the time of year (the hearing was in March), the economy, market fluctuations, etc.

evidence of loss in value, let alone evidence that the proposed tower would "substantially affect adversely" the neighboring properties.

That the opponents could offer no hard data, though, is not surprising. Mr. McCain, one of AT&T's expert appraisers, summed up the situation in his report nicely when he observed:

> Over time, however, we become accustomed to changes in our surroundings and features such as utility structures tend to go unnoticed by passers-by. . . [o]n a subjective level, it seems that many people believe that communications towers will negatively influence residential real estate values. On an objective level, our statistical analysis of actual regional market data indicates that communications towers do not have a detrimental influence on residential property values.

A223. The point is that what seems like a dramatic change at the time quickly fades into the background, just as the cacophony of existing utility poles, street lights, and other indicia of an urban setting (much of which is present in Bethany Beach) fade into the background of everyday life. This conclusion was echoed by one of the Board members during the Board's discussion of the request:

> [p]ersonally, I'm not convinced that seeing a cell tower from where you live is going to adversely affect the use of your property. No different than what a utility pole or a water tower or fire sirens or all things that, you know, have changed the way we live and so forth.

A69.

Beyond the issue of value, the Board also claims its Decision is supported by the diminution in enjoyment testified to by opponents, as well as aesthetic considerations. As to diminution in enjoyment, if one only needed to have a few residents testify as to their own personal loss of enjoyment, then no tower ever need be constructed near a residential community. There was, however, no testimony that

the tower actually interfered with the use of the property in any way. Complaints about flashing lights are unfounded, as the tower has no flashing lights. Complaints about noise are similarly unfounded. In fact, the only objective evidence, the online guestbook mentioned above, indicates that renters aren't complaining about the temporary tower but they are complaining about the adjacent gas station.

Finally, the Board claims that it is allowed to take aesthetics into account, and cites two federal cases from other Circuits. Both cases, though, are readily distinguishable. In *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.2d 51 (1st Cir. 2001), the applicable local code provision included a requirement that the proposed tower have "minimal visual impact," and the zoning board in that case rejected the application on that ground as well as the fact that the applicant had not met other criteria. Similarly, in *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999), the applicable code provision included a requirement that "the City will ensure that the structures are aesthetically acceptable for the affected neighborhoods." Sussex County, of course, has no such requirement and in the absence of a showing that the proposed tower will "substantially affect adversely" neighboring properties, the special exception is to be granted.

3. **Risk Of Casualty Is Not A Basis Upon Which To Deny The Special Exception**. In an effort to stir emotion, opponents presented evidence showing a cell tower on fire, claiming that risk of casualty provided a basis to deny the application. Ans.Br. at 33. The Court below scoffed at this notion (A1512-13) and, a video of a dis-similar

tower on fire is simply not evidence that the proposed tower would "substantially affect adversely" neighboring properties. If so, no tower could ever be built near residential property - construction that is *not* prohibited by Sussex County Council.

More to the point, Sussex County Council established certain criteria with which any tower must comply, including, for example, a setback requirement based on the height of the proposed tower. *Sussex County Code* § 115-194.2. AT&T's proposed tower will not only be built to comply with all modern safety standards, it will actually exceed the setback requirements established by Sussex County Council. If Sussex County Council had thought towers not safe enough to construct near residential zones, it certainly could have either prohibited any such construction, or increased the setback requirements even more. It did not, and that should put an end to inflammatory video evidence. If opponents still feel strongly about this, their remedy is to lobby Sussex County Council for a change to the County Code, not to present inflammatory evidence to the Board. Nor should the Board be allowed to rely on a video of a tower on fire, and other emotional evidence and testimony, to deny an otherwise conforming application that meets all the requirements of the Sussex County Code.

CONCLUSION

Cell phones and smart phones are an everyday part of life in the twenty-first century, but with them comes the need for cell towers. AT&T is trying to meet the demand for cell capacity. After exhaustive studies and efforts, it found a location that met all of the necessary criteria and was available. It was granted the necessary approvals by the Board in 2009, but then denied the same approvals in 2011, when nearby local residents showed up *en masse* at the Board hearing to oppose the application. AT&T does not question the integrity or good faith of the residents, but, at the same time, it needs the proposed site in order to satisfy customer demand. Indeed, that demand has only grown since AT&T first began this process in 2005.

During the course of the second hearing before the Board, AT&T provided substantial evidence concerning the need for the tower, the lack of any alternatives, and the safety of the tower. Not surprisingly, adjoining property owners weren't satisfied. However, the evidence they presented was flimsy at best. Their engineer was simply wrong in his testimony. Their "appraisers" didn't offer appraisals, but inadmissible "surveys" and unsubstantiated opinions of value. Complaints about "flashing" lights (which don't flash), noise (which only happens if there is a power failure), potential casualty, and other issues, no matter how honest or heartfelt, simply don't amount to substantial evidence that the proposed tower will "substantially affect adversely" the neighboring properties. AT&T met its burden and should have received the requested special exception.

The Board here made two errors. First, the Board did not apply the proper standard required by Sussex County Council - that the special exception be granted unless it would "substantially affect adversely" the neighboring properties. Had the Board considered this standard, it would have had no choice but to grant the exception, given the evidence presented.

Even if the Board had applied the correct standard, and its Decision had used the phrase "substantially affect adversely," the Board's Decision would still be subject to reversal for lack of support by substantial evidence. The Board accepted demonstrably untrue or misleading testimony of the opponents' engineer and appraisers, and otherwise ignored the testimony of AT&T's witnesses. This was not a careful winnowing and sifting of the evidence. This was not a "fair" and "reasonable" result. The Board's Decision, when viewed through the totality of the evidence, cannot be characterized as "fairly debatable."

AT&T prays that the Decision of the Board be reversed and that it be granted the requested special exception.

Respectfully Submitted,

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