SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0238-16T1

NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS,

Plaintiff-Appellant,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF EAST BRUNSWICK,

Defendant-Respondent.

Argued December 6, 2017 - Decided March 26, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4826-15.

Gregory D. Meese argued the cause for appellant (Price, Meese, Shulman and D'Arminio, PC, attorneys; Gregory D. Meese and Kevin G. Boris, on the brief).

Alexander G. Fisher argued the cause for respondent (Savo, Schalk, Gillespie, O'Grodnick and Fisher, PA, attorneys; Alexander G. Fisher, on the brief).

PER CURIAM

New York SMSA Limited Partnership d/b/a Verizon Wireless (Verizon) appeals from the August 18, 2016 dismissal of its complaint in lieu of prerogative writs. Verizon applied to the East Brunswick Zoning Board (Board) for a variance to construct a 120-foot cellular telecommunications tower to address a signal strength gap affecting about one hundred customers' homes.[1] After a review of alternative sites, Verizon identified a nonconforming plumbing business in a residential neighborhood on which to construct its tower. After six days of testimony, the Board denied Verizon's application. We affirm substantially for the reasons given in Judge James P. Hurley's well-reasoned written opinion of August 18, 2016.

The identified gap was based on weakened signal strength as Verizon increasingly transitions from 3G to 4G. The Board found that its stated goal of signal strength was based only on Verizon's inadequate explanation of its projected goal. Although Verizon presented some evidence of a service gap, its advertised service map showed that it advertises complete 4G coverage in the alleged gap area. An applicant's marketing claims are "akin to a statement against interest." Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 37 (App. Div. 2003).

[1] The coverage gap affects 1968 residents in 694 homes. Verizon had a 32% share of the market which is 222 homes, and the tower will only fill 50% of that gap.

Second, the Board found that Verizon did not fully explore the possibility of constructing on a municipal building outside of a residential area. In addition, the Board determined that Verizon did not sufficiently explain why an alternative technology, a distributive antenna system, would not be suited for East Brunswick.

The Board also found that Verizon did not fairly present the detrimental effect the tower would have on the residential neighborhood, both esthetically and in terms of future use of the property. Verizon conceded that subdividing the property into several residential building lots would in fact be the highest and best use of the property, and that building the proposed tower would likely preclude the proposed site, a non-conforming plumbing business, from being used as conforming residential property in the foreseeable future.

On appeal, Verizon argues principally that the Board's denial was arbitrary, capricious and unreasonable, and also, in violation of the federal Telecommunications Act, 47 U.S.C. § 332(c)(7)(B)(iii), was not based on substantial evidence. "[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was the trial court." Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). Thus, our task

on appeal is limited. See New York SMSA Ltd. Pshp. v. Board of Adjustment, 324 N.J. Super. 149, 165 (App. Div. 1999) (holding that a board's findings must only be supported by substantial evidence in the record).

It is a well-settled principle of land use law that generally "a decision of a zoning board may be set aside only when it is 'arbitrary, capricious or unreasonable.'" Cell S. of N.J. v. Zoning Bd. of Adj. of W. Windsor, 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)). "[P]ublic bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adj. of Wall, 184 N.J. 562, 597 (2005). Therefore, "[t]he proper scope of judicial review is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Ibid.

In addition, "[b]ecause variances should be granted sparingly and with great caution, courts must give greater deference to a variance denial than to a grant." New York SMSA, L.P. v. Bd. of Adj. of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). "[A]n applicant bears a heavy burden in overcoming a denial." Pierce Estates Corp. v. Bridgewater Zoning Bd. of Adj., 303 N.J. Super. 507, 515 (App. Div. 1997) (quoting Nynex Mobile

Communications Co. v. Hazlet Township Zoning Bd. of Adj., 276 N.J. Super. 598, 609 (App. Div. 1994)).

In order to obtain a variance pursuant to N.J.S.A. 40:55D-70(d), an applicant must demonstrate both the positive and negative criteria. Sica v. Board of Adjustment, 127 N.J. 152, 164 (1992). Our Supreme Court has declined to treat wireless telecommunication facilities as inherently beneficial uses. Cell S. of N.J., 172 N.J. at 90-91. Wireless carriers seeking to construct cellular telecommunications towers must therefore satisfy the positive criteria to obtain a use variance under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163, which requires an applicant to prove that there exist "special reasons" to allow departure from zoning regulations. See Id. at 90.

Possession of an FCC license establishes that the proposed use promotes the general welfare, but a provider like Verizon must still "show that the site is particularly suited for the use." Nextel of N.Y., Inc., 361 N.J. Super. at 37. It must not be inconsistent with the town's master plan. N.J.S.A. 40:55D-70(d)(1).

After a thorough review of the testimony presented, Judge Hurley found that the Board's decision was not arbitrary,

capricious or unreasonable and was supported by substantial evidence in the record. We agree and affirm.

Affirmed.