

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO. Z-13-02 : HEARING DATE: February 26, 2015

APPLICATION OF:  
New Cingular Wireless PCS, LLC  
d/b/a AT&T Mobility

PROPERTY:  
182 Level Road  
Lower Providence Township  
Collegeville, PA 19426  
Parcel No. 43-00-07240-007

**OPINION, DECISION AND ORDER OF THE  
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

On or about August 2, 2013 the applicant, Cingular Wireless PCS, LLC d/b/a AT&T Mobility (hereinafter "Applicant") mailed an application requesting numerous variances from the Lower Providence Township Zoning Ordinance in connection with the installation of a wireless telecommunications facility in the R-1 Residential District. Initially the Applicant sought variances from: 1) the use limitations of Sections 143-32 and 143-250 (B)(3), 2) antenna size under Section 143-250.C(3), 3) height variance under Section 143-250.E(2) and 4) the setback requirements of Section 143-250 (E)(3)(b). As per its application, the Applicant proposed to install on residential property what is commonly referred to as a "cell tower" consisting of a 130 foot high monopole, which, after the installation of twelve (12) eight (8) foot panel antennas and lightning rod, would rise to 136 feet. An equipment shelter would be located at the base of the tower. The entire 75'x75' tower compound would be set back fifty five (55) feet from the property line and surrounded by an eight foot (8) chain link-barbed wire fence.

On or about October 3, 2013 Applicant initiated what became a series of continuance requests which included a waiver of the time requirements under the Municipalities Planning

Code until on or about January 21, 2015 when the Applicant requested that the Application be scheduled for the next available hearing. At the hearing on February 26, 2015 Applicant orally amended its application abandoning its request for a height and antenna size variance.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on February 26, 2015 at the Lower Providence Township Building. The following Board members were present: Chairman Thomas A. Borai, Vice Chairwoman Kathie A. Eskie, Member Joyce D. Cluley, and Member Gail Hager. Also present were Solicitor Keith McLennan, Esq., Zoning/Code Enforcement Officer Michael Mrozinski and the Court Reporter.

#### **FINDINGS OF FACT**

1. The Applicant is the Cingular Wireless PCS, LLC d/b/a AT&T Mobility.
2. The Applicant is the tenant/lessee of the subject property located at 182 Level Road, Collegeville, PA 19426 (hereinafter the "Property"). The parcel number is 43-00-07240-00-7.
3. The Property owner is William Unangst.
4. The applicable zoning district is R-1, residential district.
5. The Applicant was represented by Nicholas A. Cuce, Jr., Esquire.
6. The lot size is 285,318 square feet.
7. The present use of the Property is residential including a garage.
8. John Good, Site Acquisition Consultant; Brock Riffel, Radio Frequency Engineer, and Petros Tsoukalas a Professional Engineer were witnesses in support of the application.
9. The following exhibits were included at the hearing:

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9. The following exhibits were included at the hearing:

By the Board:

B-1 Advertisement

B-2 Proof of Publication

By the Applicant:

A-1 Application Filed at Z 13-02

A-2 Executed Lease

A-3 Lower Providence Township Zoning Map

A-4 Aerial photograph with Search Ring

A-5 Curriculum vitae of Brock Riffel

A-6 Federal Communications Commission ("FCC") License Issued to  
New Cingular Wireless PCS, LLC

A-7 Propagation Plan of Existing Coverage

A-8 Propagation Plan of Proposed Coverage

A-9 Electro Magnetic Emissions Report Prepared by dBm Engineering  
Dated February 23, 2015

A-10 Non-Interference Memorandum from Applicant

A-11 FAA Determination Dated February 17, 2015/ FAA Notice Criteria  
Tool/ TOWAIR Determination

A-12 Curriculum Vitae of Petros Tsoukalas, P.E.

A-13 Site Plan Prepared by Master Consulting Dated June 26, 2013 Last  
Revised February 26, 2015

A-14 Photo Simulations Prepared by Master Consulting Dated February  
26, 2015

10. The Property abuts Evansburg State Park.
11. The Applicant proposes to install a wireless telecommunications facility on the Property which would consist of a 100' monopole to be housed within a 75' by 75' fence compound.
12. The proposed monopole would have twelve panel style antennas attached at the top, each measuring 4' in height.
13. The Applicant states that the facility will fill gaps in coverage, though there have been no complaints about that carrier's coverage in the identified area.
14. There was adverse public comment regarding this application.
15. There is no unnecessary hardship requiring the grant of a variance.
16. There are no unique physical characteristics of the property which require the proposed telecommunications facility.

### **DISCUSSION**

The Applicant has requested a variance from the use limitations of Section 143-32 and 250 (B)(3) prohibiting communications towers in the R-1 residential district. Additionally, the Applicant asked the Board to waive the two hundred fifty (250) foot setback requirements of Section 143-250 (E)(3)(b) of the Lower Providence Township Zoning Ordinance.

Differing standards apply to use and dimensional variances. Generally, a variance requires the applicant to show that unnecessary hardship will result if a variance is denied, and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) (citing Allegheny West Civic Council, Inc. v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997)). The quantum of proof required to establish unnecessary hardship in the case of a dimensional variance is, however, lesser than when a use variance is sought. Id. at 258-59.

Regardless of the type of variance sought, the reasons for granting a variance must be *substantial, serious, and compelling*. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998) (italics supplied). Pursuant to the Municipalities Planning Code the following must be found in order for the Board to grant the requested variance:

(1) That there are unique circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the applicant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. 53 P.S. § 10910.2.

Finally, like any variance request an applicant seeking to install a cell tower must satisfy the foregoing variance standards. Those standards are not supplanted by the Federal Telecommunications Act. *APT Pittsburgh LP v. Lower Yoder Township*, 11 F. Supp.2d 664 (W.D. Pa. 2000).

## **1. Hardship**

The legislative intent behind Lower Providence Township's regulation of communications equipment, antennas and towers is to accommodate the need for communications antennas while regulating their location and number in the Township. The courts have consistently held that in zoning cases the goal is to give meaning and effect to the legislative construct. *Cellco P'hip v. N. Annville Twp. Zoning Hearing Bd.*, 939 A.2d 430, 437 (Pa. Commw. Ct. 2007).

The Applicant asserted that the area depicted by its search ring was the only viable place where the tower location would fill in the areas of poor cell phone service. At the hearing, Applicant introduced an existing signal coverage map and a proposed signal coverage map with the installation of the tower as evidence, but neither of these maps provided any additional data, such as drive tests measuring signal strength and call failure rates. The key element in evaluating a variance request is whether the denial of that variance would create a "hardship." In the instant case in order for a hardship to exist the Applicant must establish a "need" to vary the zoning ordinance's regulation of the location and number of towers in the Township. To establish that need the Applicant must demonstrate a "significant gap" in service. *Omnipoint Communications Enterps. v. Zoning Hearing Bd. Of Easttown Township*, 189 F.Supp.2d 258, 263–65 (E.D.Pa.2002). To establish "significant gap" the Courts have asked at least two sub-questions: 1. Is the quality of cellular service so poor as to rise to the level of a significant gap? *See Cellular Tel. Co. v. Zoning Bd. of Adjustment of Harrington Park*, 90 F.Supp.2d 557, 565 (D.N.J.2000) (analyzing percentage of dropped calls); and 2. How large an area is the gap or how many users are affected by the gap? *See Ho-Ho-Kus*, 197 F.3d at 70 n. 2. (noting whether the 'gap' in service merely covers a small residential cul-de-sac or whether it straddles a significant commuter highway or commuter railway makes a big difference). See also, *American Cellular*, 203 F.Supp.2d 383, 389 (E.D.Pa.2002). *New Cingular Wireless PCS, LLC v. Zoning Hearing*



*Bd.* 2009 WL 3127756 (E.D.Pa. 2009).

Here, all Applicant has provided is a “Reliable Coverage Map” for AT&T and no other carriers. This coverage map does not state how the Applicant qualified the pixelated propagation map, nor did the Applicant precisely define reliability and unreliability. Instead the Applicant presented mere conclusions without any factual basis supporting those conclusions. In fact, the Applicant’s radio frequency expert testified that calls could be carried without dropping along the roadway in the purported unreliable area. In *Liberty Towers, LLC v. Zoning Hearing Bd. of Falls Twp., Bucks Cnty., Pa.*, No. CIV.A. 10-7149, 2011 WL 6091081 (E.D. Pa. Dec. 6, 2011), the Court of Common Pleas of Bucks County held that because the Applicant failed to provide any data quantifying the rate of dropped calls or call failures, the Applicant had not established that the quality of service was sufficiently poor to constitute a significant gap. Further, the Court sought additional data gathered through testing of the area such as drive tests measuring signal strength or call failure rates. Finding none, it determined that there were no unique circumstances that required a variance from the prescribed communications equipment ordinances. In effect, there was no data showing the “need” or that placement of the communications equipment in this specific area would increase the quality of service.

The same result is mandated here. Numerous residents of the alleged deficient service area testified that AT&T was their mobile phone service provider and they experienced no problems with their service in the “low quality” service coverage map. Without proving that the service was poor or demonstrating call drop failure rates in buildings or vehicles, no significant gap in coverage was established. As the Commonwealth Court held in *Township of East Caln v. Zoning Hearing Board of East Caln Township*, 915 A.2d 1249 (2007), absent proof of a significant gap or that a substantial burden attends all compliant uses of the property there is no hardship associated with the Property as distinguished from the Applicant.

## **2. Reasonable Use of the Property**

As stated, the Township Supervisors determined that cell towers were an anathema to R-1 residential districts. Under section 143-32, R-1 districts were intended to allow for the development of single family dwellings only. The desire was to provide for the safe and efficient circulation of vehicles and pedestrians while preserving the natural amenities of the site. The erection of a one hundred (100) foot cell tower on a residential lot within 55 feet of an adjoining park or ball field clearly was not intended for the R-1 district. In fact, it was specifically excluded from R-1 by Section 143-250(B)(3). There is nothing about the Property that requires the granting of a variance in order for it to be reasonably used, it has already been put to reasonable use.

## **3. Essential Character of the Neighborhood**

Presumably the Applicant contends that the erection of a cell tower will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare. Judging from the testimony of those who reside in the search ring, the installation of the tower flies in the face of all of the referenced conditions.

Those testifying expressed concern that property values would diminish, the tower would constitute an attractive nuisance and the safety of residents would be compromised both by the electromagnetic waves emanating therefrom and its location near a school and ball field that would be impacted by the tower toppling or a collapse. Applicant's representatives testified that the tower was designed to bend a third of the way up and not crack in the event of a structural failure. However, Applicant admitted that there would be no wiring of the tower for extra stability, and could not definitively state that the tower would not fully break and fall. Applicant also offered testimony that radiation and radio frequency signals impacting human exposure

were 120 times below the FCC limit, but could not offer any expert testimony as to what that would mean for surrounding residents other than offering anecdotal evidence that cell phone towers were located on top of the Children's Hospital in Philadelphia. In Northeast Pennsylvania SMSA Ltd. Partnership v. Scott Tp. Zoning Hearing Bd., 18 A.3d 1272 (Pa. Cmwlth. 2011), the Commonwealth Court found for the residents where Verizon failed to demonstrate that there would be no adverse impact on the residents' property values or ability to develop their properties. Moreover, the neighbors demonstrated their properties were within the fall radius of the tower should the tower ever collapse. "Verizon was the party with the burden of proof, and it did not offer any expert evidence of its own to show that Neighbors' property values would not be impacted or that their ability to develop their properties in the future would not be negatively impacted." *Id.* at 1276. Here, Applicant bore the burden of proof to show that the surrounding residents would not be impacted by the proposed cell tower. That burden was not carried.

Whether it was the industrialization of the residential neighborhood with a tower that could support many antennae from different carriers, the threatened approach to an existing airplane landing strip, negative impact upon surrounding property values, risk to the safety of the residents with increased electromagnetic waves or tower failure, it cannot be said that the tower is consistent with the essential character of the neighborhood. In *Cellco P'ship v. N. Annville Twp. Zoning Hearing Bd.* the Commonwealth Court rejected a wireless company's request to locate a wireless communications tower in the township's rural residential zoning district. There the Commonwealth Court upheld a zoning board's determination that a cell phone tower was not a compatible use in a district intended for low-density residential development and farming, much like the R-1 District at issue here. The Court determined that while the zoning ordinance did not allow the company to locate its tower exactly where it wanted, the ordinance allowed cell phone towers elsewhere.

Further, the precedent that would be set by granting the variance would emasculate the intent and purpose of the zoning ordinance paving the way for communications towers in every park in the Township. In short, the tower adds little value to the community it is seeking to encroach.

#### **4. Least Modification of the Ordinance**

What is more, the proposed tower and the variances requested therewith do not represent the least modification possible of the regulation at issue. The ordinance is clear, communications towers are permitted in the industrial overlay, industrial, general commercial, highway commercial, Ridge Pike Business, limited industrial and industrial park districts. Towers are also permitted by special exception on municipality owned property. Nowhere in Lower Providence does such a tower exist in the R-1 residential district. Granting a variance from set back and use requirements, particularly where the need has not been established, would permit the proverbial "camel to stick his nose far into the tent." Not only would the flood gates be flung open for the installation of more towers in the R-1 Residential District but the Applicant already acknowledged that it would permit up to 4 antenna arrays on the tower at issue converting the depiction of the tower and its single antenna array in Exhibit 14 to a multi-headed Lernaean Hydra or Medusa. The minimization of adverse visual effects of these towers is a primary concern that Section 143-250 sought to address.

It is safe to say that by providing several zoning districts for the erection of cell towers and excluding them from residential districts the Board of Supervisors intended to preserve the natural amenities of the residential district, protect against non-residential uses, foster tranquility and enhance the safety of the residents. Installation of a cell tower among single family dwellings next to parkland with a proposed fifty five (55) foot setback placing it in close proximity to recreational fields is inconsistent with those intentions.

Finally, the Applicant failed to satisfy all of the conditions of the communications tower ordinance articulated by Section 143-250 (C ), (D) & (E).

#### **5. Hardship, Reasonable Use, Character and Minimal Impact**

Had the Applicant proved that a significant gap in coverage exists, installation of the tower is not the only solution and its impact is not minimal or consistent with the character of the neighborhood. Applicant stated during the hearing that there were no other alternatives to provide reliable service in their customer's homes. However, one resident testified during the hearing that AT&T offers a product called "MicroCell." A MicroCell is a device the size of an internet modem/router offered by AT&T to its customers. The Applicant's expert acknowledged that this device was available for use in the search ring. The device, easily installed by the customer in their home boosts AT&T's cell phone signal. Certainly the use a device like this would be reasonable, have a minimal impact and preserve the character of the neighborhood.

Finally, if we were to assume that a significant gap in coverage existed, that alone is not enough. The Applicant must also show that the proposed facility is "the least intrusive on the values that the denial sought to serve." Omnipoint Communications Enterprises v. Zoning Hearing Board of Easttown Township, 331 F.3d 386, 398 (3<sup>rd</sup> Cir. 2003). The Applicant must make a good faith effort to find less intrusive alternatives, such as less sensitive sites, alternative system designs, alternative tower designs, and placement of antennas on existing structures. Id. As noted above the MicroCell is a less intrusive alternative as would location of a tower in a non-residential district. In response to the Township's initial opposition to the tower the Applicant sought to place the tower in Evansburg State Park. Not surprisingly, the Commonwealth rejected that notion for the same reasons the Board here is troubled, to wit: such towers are prohibited on state park land and to date no carrier has convinced the Commonwealth that there is a compelling reason to allow them now.

### **CONCLUSIONS OF LAW**

1. The applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will not impose an unnecessary hardship on the Applicant.
3. The physical circumstances of the Property are not unique such that they support the finding of a hardship.
4. The requested relief is not necessary to enable the Applicant's reasonable use of the Property, does not represent the minimum that will afford relief, and does not represent the least modification possible of the regulation at issue
5. The proposed telecommunications facility will alter the essential character of the neighborhood in which the Property is located, raises safety, property value and community planning issues.

Accordingly, the Board finds that the application for a variance from Section 143-32 and 143-250 (B)(3) and Section 143-250 (E)(3)(b) of the Lower Providence Township Zoning Ordinance is denied.

### **DECISION**

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is as follows:

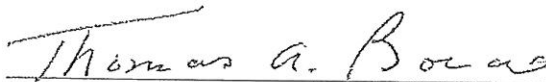
The application for a variance from Section 143-250 (B)(3) and Section 143-250 (E)(3)(b) of the Lower Providence Township Zoning Ordinance is denied.

Dated: April 10, 2015

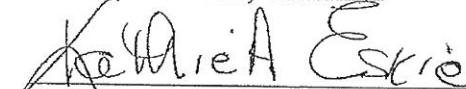
### ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.

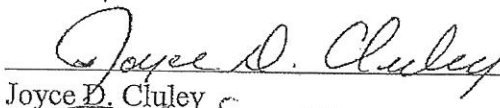
#### LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD



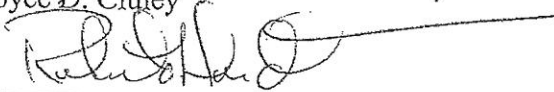
Thomas A. Borai, Chairman



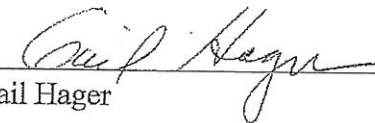
Kathie A. Eskie, Vice Chairwoman



Joyce D. Chuley



Robert G. Hardt



Gail Hager

### NOTICE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.