

Saul Ewing Successfully Argues that Cell Tower on a Leased Property is Not a Land Development; Court Rejects Evidence of Impact on Property Values and Finds Unreasonable Discrimination by Township

By Elizabeth U. Witmer, George Asimos, and Jennifer L. Beidel

SUMMARY

A federal judge has overturned the decision of a township zoning board and granted an application to build a cell phone tower on leased property, ruling it was not a “land development” or “subdivision” under the Pennsylvania Municipalities Planning Code.

On September 14, 2012, United States District Judge A. Richard Caputo ordered the Zoning Hearing Board of Hamilton Township to grant Global Tower LLC’s application for special use to erect a 250-foot, three-legged, lattice-type cell tower on leased property in Hamilton Township in Monroe County, Pennsylvania. See *Global Tower, LLC v. Hamilton Township and Zoning Hearing Board of Hamilton Township*, Civ. A. No. 3:CV-10-1705 (M.D. Pa. Sept. 14, 2012). The Court also ordered Defendants to issue all necessary zoning and building permits for the tower.

Global alleged that the Board had unlawfully denied its application to construct the tower in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B), by unreasonably discriminating against Global and denying Global’s application without the support of substantial evidence.

Prior to Global’s application, two similar towers that offered functionally equivalent services were erected under the same zoning ordinance provision. Global argued, and the Court agreed, that the Board’s denial of Global’s application was unreasonably discriminatory. The Court also considered whether Global’s tower was a “land development” or “subdivision” under the Pennsylvania Municipalities Planning Code. Persuaded by recent decisions of the Pennsylvania Supreme Court, the Court held that the lease of land and erection of a cell tower, without more, does not constitute land development or subdivision. The Court distinguished a decision of the Pennsylvania Commonwealth Court – *White v. Twp. of Upper St. Clair*, 799 A.2d 180, 202 (Pa. Cmwlth. 2002). There, the Commonwealth Court found a cell tower on a leased property to be a land development, but emphasized the permanence and impact of the tower in so deciding. The lease for the *White* tower was for a 25-year term that was renewable to 100 years. The tower also required construction of a sizable road and three buildings. In contrast, the Court found that Global’s tower: (1) involved a shorter term lease (5 years, renewable for

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a total of 30 years), and (2) lacked the extensive development required by the construction of the tower in *White*. As a result, the Court found Global's tower was not a land development and was not required to undergo land development approval processes.

The Board also based its denial of the "special use" application on testimony that the tower would effect a diminution in surrounding property values. But the Court found that the objector's appraiser offered no proof that the tower would have any greater negative impact than other permitted uses in the zoning district at issue or than other towers generally.

The Court's ruling may prove beneficial for cell tower companies in a number of ways. First, provided that proposed towers are for short-term lease periods and do not require substantial disturbances of surrounding property, Pennsylvania cell tower applications may no longer need to be subjected to vigorous land development or subdivision standards. Second, special exception or conditional use applications for cell towers erected in zoning districts with other high impact uses may become harder to defeat based on arguments regarding their property value impacts. As long as such impacts are not "abnormal," tower applications should not be denied on this basis.

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