No. 29177 ***American Tower Corporation v. Common Council of the City of Beckley***

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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McGraw, Chief Justice, dissenting:

I dissent because I feel the majority's interpretation of the statute leaves the general public without a voice on a matter of public concern. I think that the majority has read the statue in question too narrowly. The full statute reads that a board of zoning appeals shall:

> (1) Hear and determine appeals from and review any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of any ordinance or rule and regulation adopted pursuant to sections thirty-nine through forty-nine of this article;
>
> (2) Permit and authorize exceptions to the district rules and regulations only in the classes of cases or in particular situations, as specified in the ordinance;
>
> (3) Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance; and
>
> (4) Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.
>
> In exercising its powers and authority, the board of zoning appeals may reverse or affirm, in whole or in part, or may modify the order, requirement, decision or determination appealed from, as in its opinion ought to be done in the premises, and to this end shall have all the powers and authority of the official or board from whom or which the appeal is taken.

W. Va. Code § 8-24-55(3) (1969). While it is true that the Board of Zoning Appeals shall "decide" matters under this statute, nothing in this section states that the determinations of the Board may not be made subject to review by the Common Council as a whole. Also, the code provides that:

> As a part of the zoning ordinance, the governing body of the municipality or the county court shall create a board of zoning appeals consisting of five members to be appointed by the governing body of the municipality or by the county court, as the case may be.

W. Va. Code § 8-24-51 (1969). This provision is also consistent with the notion that the governing body of the municipality may review decisions of a board of zoning appeals.

But of greater concern to me is that the majority opinion ignores the real world impact of this technical decision. In realty, a board of zoning appeals is made up of appointed officials; the members of the board never have to run for office or otherwise answer to the public for their decisions, as the members of a city council must do. Also, the relative positions of the adversaries at board hearing are usually extremely unequal. Quite often you will have on one side a well funded, corporate actor with paid, professional help who seeks to "bend" the rules a little; on the other side you usually have a number of concerned neighbors, with little or no professional help, who must volunteer their time and sometimes miss work just to attend a meeting. Giving the final say to the board of zoning appeals stacks the deck against the public that much more, by reducing the steps an applicant must take, and removing the oversight of a publicly elected body.

Finally, the majority opinion is largely silent on an interest of great public importance. The question of the location of communication towers presents an especially thorny issue for cities all over the

country, and a perfect illustration of the above-described scenario of the special interest versus the average citizen. While there is no doubt the public needs and wants access to wireless communication services, it is equally clear that nobody wants towers to spring up from every building or hillside. Communications companies or tower companies, on the other hand, have a rational and reasonable goal of improving their service, which is often directly at odds with the aesthetic values of the public. If a city council has no oversight of a board of zoning appeals, then I fear the public will have little or no voice in this debate.

My research shows that we currently have no uniform way of dealing with this issue in our state. And this is not just a state issue, but is a problem all over the country, one which Congress attempted to address with the Federal Telecommunications Act of 1996. The Act discuses the authority of local authorities to control the placement of towers, but sets limits on that authority:

> (7) Preservation of local zoning authority
>
> (A) General authority
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> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
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> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly

> filed with such government or instrumentality, taking into account the nature and scope of such request.
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> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
>
> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. 332(c)(7)(1996). Commentators from all sides have weighed in on this topic.[1] The Supreme Court of New Jersey attempted to rein in the mushrooming growth of communication towers in a recent opinion, *see*, *Smart SMR, Inc. v. Borough of Fair Lawn Board of Adjustment*, 152 N.J. 309, 704 A.2d 1271 (1998), but with mixed success. [2]

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[1]For a good overview, but one slanted heavily in favor of the phone companies, see Kevin M. O'Neill, Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?, 40 Wm. & Mary L. Rev. 975 (1999). See also Dean J. Donatelli, Locating Cellular Telephone Facilities: How Should Communities Answer When Cellular Telephone Companies Call?, 27 RUTGERS L.J. 447, 458 (1996)

[2]For a discussion of this case and its impact, and a good discussion of the overall issue see, Robert M. Porcelli, The New Jersey Supreme Court Changes the Landscape and Future of Land Use Law, 31 Rutgers L.J. 591 (2000).

The point of my discussion, is that the placement of communication towers is a growing issue of public concern. In the absence of citizen-driven action by the Legislature, I feel this issue is best left under the control of elected, not appointed, officials at the local level. Because I feel that the Beckley ordinance is not a "ordinance provision which is inconsistent or in conflict with" state law, W. Va. Code §8-1-6 (1969), and because I think this opinion, by taking decision making authority away from elected representatives will invite future problems with communication towers, I must respectfully dissent.