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U.S. DISTRICT
SOUTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TELECORP REALTY, L.L.C.,	)	
	)	
Plaintiff,	)	Civil No. 4-01-CV-10369
	)	
vs.	)	
	)	
BOARD OF ADJUSTMENT OF STORY COUNTY,	)	ORDER
	)	
	)	
Defendant.	)	

This case involves a decision by the Board of Adjustment of Story County ("the Board") to deny Telecorp Realty, L.L.C. ("Telecorp") a permit to build a tower to provide wireless phone service. Now before the Court is plaintiff's motion for expedited relief pursuant to 47 U.S.C. section 332(c)(7)(B)(v). This statute is part of the Telecommunications Act of 1996 ("TCA") and addresses mobile, or wireless, telephone services. The Act imposes limitations on a State or local government body when it regulates "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. §332(c)(7)(B)(i). Subsection (ii)(v) addresses a hearing for expedited relief, and states in part:

> (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.

47 U.S.C. § 332(c)(7)(B)(ii)(v).

Telecorp was adversely affected by the regulatory decision of the Board denying the permit, and made a timely request pursuant to section 332(c)(7)(B)(ii)(v) seeking an expedited

hearing and decision. Telecorp filed an initial brief on the merits of its motion for expedited relief on September 17, 2001. The Board filed a resistance brief on October 5, 2001, and Telecorp filed a reply brief on October 9, 2001. A hearing was held October 19, 2001. The matter is fully submitted.

I. BACKGROUND

Telecorp applied for a conditional use permit to construct a tower in Story County, Iowa. The Story County Planning and Zoning Commission ("the Commission") reviewed Telecorp's application, and the matter then went to the Board for a decision. Hearings were held before the Commission on March 19, 2001 and before the Board on April 4 and May 2, 2001. At its second hearing, the Board voted to deny Telecorp's application and issued a final written decision on May 18, 2001. Telecorp requested the Board reconsider its decision. The Board denied that request at its June 6, 2001 meeting. Telecorp then filed its complaint with this Court on June 15, 2001, including the request for expedited relief under 47 U.S.C. section 332(c)(7)(B)(ii)(v) now at issue.[1]

A. Telecorp's Application

Telecorp sent its application for a conditional use permit, number 5-01, to the Story County Planning and Zoning Commission on February 23, 2001. *See* Record at 155. Telecorp sought to install a 240 foot lattice-type tower and communications facility at 4397 Grant Avenue

[1] Count I of Telecorp's complaint alleges violations of 47 U.S.C. section 332(c)(7)(B); count II is an action for certiorari as Telecorp alleges the Board violated its rights under the Constitution of the State of Iowa; and Count III alleges a violation of 42 U.S.C. §§ 1983 and 1988. Count III was bifurcated by Chief Magistrate Judge Ross Walters on July 30, 2001. At this juncture, it is only necessary to address this matter under the federal statute at issue.

in Ames, Iowa to service customers of AT&T Wireless. *Id.* The property was to be leased, and the lease agreement was included with the application. *See* Record at 159-165. Professionally prepared site survey documents detailing the proposed tower and surrounding facility were attached to the application. *See* Record (final 9 oversized, unnumbered pages of the record).

In its application, Telecorp addressed the "development criteria"[2] it would be required to meet to obtain a conditional use permit from the Board. *See* Record at 158. Telecorp stated the tower would be compatible with the character of the surrounding land as it was in an A-1, Agricultural zoning district. *Id.* Telecorp further stated there would be a suitable transition between the tower and other buildings, as the tower was to be located in the vicinity of unused farm buildings and set back from the road; additionally, the application indicated that the facility would be unmanned and would not affect traffic or parking and loading. *Id.* Telecorp stated no signs would be located on the property, and that adequate lighting to comply with Federal Aviation Administration regulations would be installed. *Id.* Finally in its application, Telecorp asserted that there were no environmental concerns with the tower, and that it would be operated in a manner to safeguard environmental and visual resources. *Id.*

B. Hearings

Defendant was required to provide this Court with a written record. 47 U.S.C. § 332(c)(7)(B)(iii). As a part of the required record, defendant submitted audio tapes and a transcript of portions of the relevant hearings Telecorp had before the Board and Commission. Portions of the tapes are inaudible, and were not transcribed. The Court is not aware of any

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[2] The criteria Telecorp had to meet in order for it to attain a conditional use permit from the Board are found in Chapter 23 of the Ames County Zoning Ordinance, and will be addressed later in this Order.

requirement that a transcript of the hearings had to be a part of the record provided by the Board, nor is the Court aware of any Iowa law requiring the Board to transcribe its meetings. The Court, however, has considered the transcript as a part of the record. The transcripts were submitted as a separate document from the consecutively paginated record.

The Commission held a hearing on March 19, 2001, and subsequently issued a report. At the hearing, Telecorp representatives described in detail the importance of locating the tower and facility at the proposed site in order to provide the proper coverage to AT&T Wireless' customers. They also observed that several other towers already existed in the surrounding area. *See* Transcript at 3 (March Hearing). The Commission's report, *see* Record at 7-14, noted the area surrounding the proposed site was 92.70% agricultural, and only 3.90% residential. *Id.* at 8. It went on to identify three concerns with Telecorp's application. First, it found the tower had "the potential to be visually obtrusive;" second, that eleven towers already existed within 5-6 miles of the proposed site and therefore it questioned the demonstrated need for the tower sought by Telecorp's application; and third, that the County's Development Plan called for the area to eventually become a low-density residential development to accommodate minimum-one acre lots. *Id.* at 13-14. Despite these stated concerns, the Commission made no recommendation to the Board. *See* Record at 2.

The Board held a hearing on April 4, 2001. An engineer for Telecorp, Jon Palmersheim, commented about the proposed tower and facility. *See* Transcript at 6-8. (April Hearing). He explained the tower with reference to the survey maps Telecorp provided in its application, and elaborated on some of the technical requirements of the tower. Palmersheim also discussed how the location Telecorp requested was important to close a gap in AT&T Wireless' coverage to the

area. He further opined that the tower would accommodate other providers so that fewer towers would have be required in the future. *Id.*

Two representatives of groups developing surrounding land for residential dwellings asserted the relevant land was going to become much less agricultural within the next 7 - 10 years as a result of their housing developments, and thus opposed the Board granting Telecorp a permit for the tower. *Id.* at 9-11. One citizen whose property was near the proposed tower spoke in opposition, and four opposition letters from citizens were introduced into the record. *Id.* at 11-14; *see* Record at 133-142. Members of the Board also discussed the application on the merits, but continued the matter to the next meeting as only three members of the five-member board were present. *See* Transcript (April Hearing) at 14-21.

When the hearing continued on May 2, 2001, Telecorp provided the Board with additional information regarding the gap in AT&T Wireless' coverage and the need for the tower and facility at the applied for location. *See* Transcript (May Hearing) at 2-4. Telecorp explained its tower would allow for collocation by other providers of cellular or wireless phone service, *id.* at 5, and Palmersheim again detailed many of the technical aspects of the tower and facility. *Id.* at 6. Three neighbors of the property spoke in opposition of the proposed Telecorp tower, along with a representative of one of the groups proposing residential development in the area. *Id.* at 6-11. Toward the end of the hearing, Allen May, Telecorp's representative, modified Telecorp's application so that it was then requesting a shorter monopole tower without required lighting. *Id.* at 18. The Board, however, then voted to deny Telecorp's application. *Id.* at 30.

On June 6, 2001 Telecorp requested the Board reconsider its decision denying the permit, but did not request that the record be re-opened. *See* Transcript at 2 (June Hearing). The Board declined reconsideration of its decision. *Id.* at 6.

C. The Board's Written Decision

The Board's decision noted that the Story County Zoning Ordinance allows for conditional use permits for towers, and described the tower Telecorp was requesting. *See* Record at 1. It then stated that the subject property is zoned A-1, Agricultural, and that the surrounding area is 3.90% residential and 92.70% agricultural. *Id.* at 1-2. The Board went on, however, to state:

> 5. The subject parcel is designated as Agricultural/Residential (A/R), on the adopted CDP [County Development Plan]. The CDP states: *A/R areas are intended to preserve the rural character of the area, preserve the character of adjacent development and be compatible with adjacent land uses. A/R areas are intended to accommodate low-density residential development, and will contribute toward meeting the projected housing demand.*

Id. at 2. The Board also noted the Commission made no recommendation regarding Telecorp's application. *Id.*

In its decision, the Board outlined the criteria required by Story County's zoning ordinance, chapter 23, for granting conditional use permits. These criteria are listed in two categories: "site development criteria" and "development impacts." *See* Record at 2-6. The site development criteria are compatibility, transition, traffic, parking and loading, signs and lighting, and environmental protection. Each of these criteria were defined by the Board in its decision. *See* Record at 2-4. The development impacts include: whether the health, safety and general welfare of persons residing or working in adjoining or surrounding property would be adequately

safeguarded; whether light and air to surrounding properties would be impaired by the tower; whether congestion in the roads would be unduly increased or if the hazard from fire, flood or other similar dangers would be increased; whether property values would be diminished or impaired; whether the tower was not in accord with the intent, purpose and spirit of the Zoning Ordinance or Land Use Policies. *See* Record at 4-6.

The Board determined that all but one site development criteria was met by Telecorp's proposal. The Board found that Telecorp's tower did not meet the compatibility site development criteria. Compatibility was defined by the Board as follows:

> The proposed buildings or use shall be constructed, arranged and operated so as to be compatible with the character of the zoning district and immediate vicinity, and not to interfere with the development and use of adjacent property in accordance with the applicable district regulations. The proposed development shall not be unsightly, obnoxious nor offensive in appearance to abutting or nearby properties.

Id. at 2. The Board offered the following explanation for its decision that Telecorp's tower was not compatible:

> [S]urrounding land uses are [currently] predominantly agricultural. Such a tower is permitted in an A-1 district through the Conditional Use Permit process. The A-1 zoning limits the development potential of the surrounding area. However, the County Development Plan designation for the area calls for low density (minimum one acre lots), Agricultural/ Residential land use in the future. The City of Ames' policies currently do not encourage new development in the area.
>
> Due to the diminishing agricultural character and planned low-density residential use of the area the tower may interfere with existing development or land uses. Based on this finding, the Board concludes this criterion has not been met.

Id. at 3.

In its decision, the Board determined that all but one development impact had been met. It concluded that the tower would not be in accord with the intent, purpose and spirit of Story County's Zoning Ordinance or Land Use Policy. It stated:

> The property is currently zoned A-1, Agricultural, and is designated by the CDP as Agricultural/Residential (A/R). Future residential use is planned for the area by Story County, though these plans contradict with those of the City of Ames. This may have a limiting effect on residential development in the area in the future due to the multi-jurisdictional planning area shared by the County and the City of Ames within two miles of the City's corporate limits. Nonetheless, substantial residential use already exists within one mile of the proposed site, and some additional residential development is likely to occur there. Due to the diminishing agricultural character of the area and the planned residential use of the area, this criterion has not been met.

Id. at 6.[3]

II. APPLICABLE LAW & DISCUSSION

"Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review." *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2nd Cir. 1999) (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)). However, the TCA has transformed that standard so that the decision by the Board in this case to deny Telecorp a permit must be supported by "substantial evidence contained in a

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[3] Additional documents worthy of note in the record now before this Court include: reports from the staff of the Story County Planning and Zoning Commission, Record at 7-30; additional maps of the proposed tower site besides the survey document, *Id.* at 30-31, 105-106, 113-114; minutes of the hearing meetings, *Id.* at 37-86; along with a letter and an affidavit from appraisers indicating property values generally are not adversely affected by towers like the one proposed by Telecorp. *Id.* at 115-122. The Court notes that the map on page 31 of the Record shows twelve towers stand within an approximately five mile radius of Telecorp's proposed site. *Id.* at 31.

written record." *See* 47 U.S.C. § 332(c)(7)(B)(iii).

"Substantial evidence is not 'a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *See Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 408 (3rd Cir. 1999) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (other quotation omitted)). The record is to be viewed in its entirety, and the Court is to take into account evidence unfavorable to the agency's decision. *Id.* (citation omitted). This is not a general appeal of the Board's decision. The question is whether the Board's decision was supported by substantial evidence, as this is the evidentiary burden specified in the TCA. *See Omnipoint*, 181 F.3d at 408 n.5 (citing *Aegerter v. City of Delafield*, 174 F.3d 886, 888-89 (7th Cir. 1999) and *Cellular Telephone*, 166 F.3d at 494-97 (both applying the substantial evidence standard without regard to state law evidentiary burdens)). "Once a permit application is denied the burden falls on the local government to show it had valid legal and factual reasons for its denial." *See United States Cellular Corp. v. City of Ankeny*, Civil No. 4-98-CV-80434 (S.D. Iowa February 22, 1999) (J. Wolle) (citing 47 U.S.C. § 332(c)(7)(B)(iii) and *Sprint Spectrum L.P. v. Town of Easton*, 982 F.Supp. 47, 49 (D. Mass. 1997) (finding that TCA shifts burden of proof)); *see also APT Minneapolis, Inc. v. City of Maplewood*, 1998 WL 634224 at *4 (D.Minn. 1998) (stating "[t]he City bears the burden of proving that its decision was supported by substantial evidence").

In this case, Telecorp was required to show its application met the criteria established by the Story County Zoning Ordinance for the Board to issue it a permit. The Board's decision indicates that Telecorp failed to meet two of those criteria. However, the Board's explanations of how Telecorp failed to meet each of the criteria makes clear the Board denied the application

based on a singular underlying premise: that there was *potential* for future residential housing development in the area.[4] The Board emphasized at the beginning of its decision that the piece of land on which Telecorp wanted to build its tower was included in an area designated in 1993 in the County Development Plan to become A/R, agricultural-residential. The Board then essentially relied on this possibility as the reason for denying Telecorp a permit.

The Board's written decision, however, did not explain how the possibility of residential growth in the area led to its conclusion that Telecorp's tower would not be in conformity with such future use. The Board stated that the tower "*may* have a limiting effect on residential development in the area," *see* Record at 6, and that it "*may* interfere with existing development or land uses." *see* Record at 3. These statements in the decision are speculative.

Beyond the decision, the record provides no evidence or other explanation of how Telecorp's tower would not be in conformity with residential growth in the area. At the hearing, representatives of groups attempting to develop the relevant land area opposed the tower, and discussed how it was their expectation that the area was going to become more residential in the next 7-10 years, *see* Transcript at 9-11 (April Hearing), but the representative's comments did not materially address how such a tower would be incompatible with residential growth. Chuck Winkleback, one of the developers' representatives, stated that if Telecorp's tower were

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[4] The Court recognizes that the developers who testified at the hearing spoke in a manner that made it appear that residential growth in the relevant area was an absolute certainty in the next 7-10 years, and the County Development Plan which was seven years old contemplated the area would become designated A/R, allowing for residential development. However, the decision itself shows that the one-mile area around the site is less than 4% residential, and the City of Ames *current* policy did not encourage new development in the area. *See* Record at 2-3. Further, the Planning and Zoning Housing Director for the City of Ames declined involvement in the matter before the Board, *see* Transcript at 2 (April Hearing), indicative that the City still is not interested in supporting residential growth for the area. Therefore, because of the conflicting record, the Court will refer to future residential growth in the area as potential.

permitted it would "chew up real estate for future development." *Id.* at 10. He also stated that there is a "hesitancy of [sic] people to want to see [towers]." *Id.* The other developer representative, Bob Friedrich, was asked by a board member, "Do you have any other empirical evidence or reports from the past or anything even anecdotal that you can provide for the record . . . [as] support [for] your position on [the area becoming more residential and how Telecorp's tower would not be compatible]?" *Id.* at 11. In response, Friedrich told a brief story about negative aesthetic impacts from electrical lines in another development, and tried to analogize this experience with cellular phone towers; but he gave no direct testimony regarding cellular phone towers and their inability to be compatible with residential neighborhoods.

Consistent with the Board's decision, this Court finds that the record contains evidence that the relevant area may become more residential in nature than its current 4% residential status. However, this finding alone is not sufficient to conclude that Telecorp's application failed to satisfy the criteria of Story County's zoning ordinance. The TCA contemplates, and the vast use of cellular and wireless technology dictates, that "towers must be built in *some* residential neighborhoods to [have their service] reach those areas." *See* Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 STAN. ENVT'L L.J. 373, 384 (May 2000). When a State or local government entity makes a decision to prevent a cellular or wireless tower from being built in a residential area, it must support its decision with substantial evidence. The possibility of residential growth alone does not amount to anything more than mere speculation that the tower would not meet the applicable criteria under such circumstances. *See Smart SMR of New York, Inc. v. Zoning Comm'n of the Town of Stratford*, 995 F.Supp. 52, 57-58 (D.Conn 1998) (zoning commission's general disfavor

of wireless towers in residential areas is insufficient to serve as substantial evidence); and *Sprint Spectrum, L.P. v. Mills*, 65 F.Supp.2d 148, 154 (vague, generalized and unsubstantiated reasons for a governmental body's denial of a cellular tower permit application is not substantial evidence).

The record in this case simply does not contain substantial evidence that Telecorp's tower would be incompatible with any potential future residential growth, nor does it contain evidence that the existence of such a tower in light of potential residential growth makes the issuance of a permit not in accord with Story County's ordinance or policy.[5] The only evidence

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[5] At the hearing, counsel for the Board relied on *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1997) as a "very significant case." Counsel asserted that the zoning board in *Winston-Salem* had denied a cell tower permit application because such a tower would not have been in conformity with a plan for future development, the "Vision 2005" plan, and that the Fourth Circuit Court of Appeals had upheld the Board's decision. It was implied that *Winston-Salem* provided this Court with persuasive precedent for it to hold that the existence of the Story County Development Plan in this case, and its prediction that the relevant area would become more residential, was enough to constitute substantial evidence to uphold the Board's decision. This Court disagrees.

In *Winston-Salem*, the zoning board had determined that the proposed tower would not "be in harmony with the area in which it is to be located and in general conformity with Vision 2005." *Id.* at 311. Specifically, the record showed that the tower was to be placed on a piece of property that included the "James Hanes House (Hanes House), which was built in 1932 and is on the study list for the National Register of Historic Places (National Register)." *Id.* at 310. The area where the tower was to be placed was described, by the applicant for the permit, "as a neighborhood of excellent quality of life and . . . tranquility." *Id.* Appearing in the record was evidence about how the tower would affect not only the neighborhood homes, but the Hanes House, including "that the condition and quality of the Hanes House's surrounding property is as important as the physical structure of the house itself in determining whether the Hanes House eventually secures a place on the National Register." *Id.* at 316. The Board decided the area as it currently existed, and as it was predicted to exist by the 2005 plan, would not be in harmony with the proposed tower. *Id.* The Court determined that substantial evidence supported the decision. The substantial evidence was not the mere existence of a plan to make the area more residential, but rather was based on the current residential and historical character of the neighborhood, viewed in conjunction with the plan for the future, and a finding that the tower could not work in harmony.

The record in this case simply does not contain substantial evidence demonstrating how both the current and future character of the area, as described by the County Development Plan, are not compatible with the tower proposed by Telecorp.

in the record addressing whether these criteria would be met was provided by Telecorp. It presented evidence from appraisers indicating that the land value in areas surrounding towers, in residential and non-residential settings, is not affected by towers such as the one proposed by Telecorp. *See* Record at 115-121. This is the only credible, non-speculative evidence the Court can find in the record that addresses whether Telecorp's proposed tower is compatible with potential future residential growth, and whether the tower would be inconsistent with Story County's ordinance or policy in light of such residential growth. This evidence supports Telecorp's application.

In this instance it appears that the Board assumed Telecorp's tower would be better placed in an area that does not have a possibility of becoming residential. Such an assumption, however, is insufficient to serve as substantial evidence to support the conclusion that Telecorp's application for a permit did not meet the Story County law criteria.

As the Court has found for Telecorp on its substantial evidence argument, it is unnecessary to address the alternative arguments that the Board's decision was a prohibition on wireless service or discriminatory against Telecorp under the TCA.

III. CONCLUSION

Injunctions are a proper form of relief under section 332(c)(7)(B)(v) and the Board in this case has not suggested that any purpose would be served by remand. *See Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 410 (3rd Cir. 1999) (citing *Cellular Telephone Co. v. Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999)). The Court finds it appropriate to grant an injunction against the Board's May 18, 2001 decision to deny Telecorp a permit. The Board is ordered to grant Telecorp's application for a conditional use permit, number 5-01, to construct a 190 foot monopole tower, including accompanying equipment located next to the tower in an area of 2500 square feet, at 4397 Grant Avenue in Ames, Iowa to service customers of AT&T Wireless.

IT IS SO ORDERED.

Dated this 20th day of November, 2001.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT