

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NE COLORADO CELLULAR, Inc.,)
a Colorado corporation,)
)
Plaintiff,)
)
V.)
)
VILLAGE OF DONIPHAN,)
NEBRASKA,)
)
Defendant.)
_____)

4:10CV3059

MEMORANDUM AND ORDER

Plaintiff NE Colorado Cellular, Inc., d/b/a/ Viaero Wireless (“Viaero”) filed this suit against the Village of Doniphan, Nebraska seeking relief for alleged violations of the federal Telecommunications Act (“TCA”) and federal and state due process violations. ([Filing 1.](#)) Viaero contends that Doniphan’s denial of Viaero’s application for a Conditional Use Permit for the construction of a telecommunications tower violated the TCA and Viaero’s due process rights.

Viaero has filed a motion for summary judgment arguing that the Doniphan Board of Trustees’ denial of its CUP application violated § 332(c)(7)(B)(iii) of the TCA because the Board’s decision was not in writing or supported by substantial evidence contained in a written record. ([Filing 21.](#)) Therefore, according to Viaero, this court should grant its request for injunctive relief and order Doniphan to approve its CUP application. For the reasons set forth below, Viaero’s motion for summary judgment will be granted and injunctive relief will be awarded.

BACKGROUND

Viaero is licensed by the Federal Communications Commission to provide Commercial Mobile Radio Service (“CMRS”) in parts of Nebraska, including the Village of Doniphan, Nebraska. ([Filing 23-1 at CM/ECF p. 1.](#)) CMRS operates through the sending and receiving of signals transmitted between a mobile device, such as a cell phone, and antennae mounted on towers, poles, or other structures. (*Id.*) In 2009, Viaero obtained an option to purchase land in the Village of Doniphan for use as a site for a telecommunications tower. ([Id. at CM/ECF p. 2.](#)) That site is zoned I-2 (or “Industrial”), a zoning classification eligible for the placement of a telecommunications tower after application for and receipt of a Conditional Use Permit (“CUP”), which must be issued by Doniphan’s Board of Trustees. (*Id.*)

On January 22, 2009, Viaero filed a CUP application with the Clerk of the Village of Doniphan for the purpose of constructing an 80-foot telecommunications tower and related structures on the site. ([Filing 23-2 at CM/ECF pp. 1-11.](#)) During its regular monthly meeting on February 8, 2010, the Doniphan Board of Trustees considered and held a public hearing to receive public comment on Viaero’s CUP application. ([Filing 23-1 at CM/ECF pp. 2-3.](#)) A Viaero representative attended the meeting and made a Power Point presentation to the Board in support of Viaero’s CUP application. (*Id.*) The representative also answered questions posed to him from both the Board and various citizens attending the meeting. (*Id.*) No motion was made to approve the application and no action was taken to approve or deny the application at that meeting. ([Id. at CM/ECF p. 3.](#)) With respect to the CUP application, the February 8, 2010 meeting minutes only state:

The Public Hearing to receive public comment on a conditional use permit application from Viaero Wireless to construct a wireless communication tower in the 200/300 block of North First Street opened at 8:00 p.m. Chris Riha, Site Acquisition Manager with Viaero Wireless gave a power point presentation detailing plans for the tower, and its

location. He also addressed common concerns with this type of structure and answered questions. There were several residents and property owners of the Village who were present for the discussion. The 80 foot self supporting lattice tower would be located to the north and east of White Farms Trucking and is needed in order to improve cell phone coverage for customers in the Doniphan area. The tower would be surrounded by a chain link fence housing a back up generator, a buried 1,000 gallon propane tank and an aggregate building to store the electronic equipment. The Board heard numerous concerns and comments from members of the public in opposition to the tower's location, which is near a residential district. The overall feeling from the public was that the tower needed to be moved away from the housing area to a more suitable location. After a lengthy discussion the Public Hearing closed at 9:36 p.m. Chairman Treat then called for a motion to approve the Conditional Use Permit application from Viaero Wireless to construct a wireless communication tower in the 200/300 block of North First Street. No such motion was made, therefore no action was taken by the Board and the Conditional Use Permit was not approved.

[\(Filing 24-3 at CM/ECF p. 2.\)](#)

Viaero's CUP application was again considered by the Doniphan Board of Trustees at a meeting held on March 8, 2010. No additional testimony on Viaero's application was taken by the Board at that meeting. However, one of the trustees made a motion to deny the application. That motion was seconded and passed unanimously. There was no discussion by the Board of any reason for denying the application. The Board's minutes for its March 8, 2010 meeting say only, "[a] motion was then made by Jenkins, seconded by Haile to deny the Conditional Use Permit Application from Viaero Wireless. Motion carried unanimously." (*Id.* at CM/ECF p. 3.)

DISCUSSION

The TCA requires that “[a]ny 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.” [47 U.S.C. § 332\(c\)\(7\)\(B\)\(iii\)](#) (emphasis added). In [USOC of Greater Iowa, Inc. v. City of Bellevue, Nebraska, 279 F. Supp.2d 1080, 1084-85 \(2003\)](#), a case with facts similar to those presented here, I concluded that in order for a decision by a local government denying a request to place, construct or modify personal wireless facilities to be “in writing” for purposes of this section of the TCA, it must: “(1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.” [Id. at 1084-85](#) (2003) (quoting [New Par v. City of Saginaw, 301 F.3d 390, 395-96 \(6th Cir. 2002\)](#)). The Doniphan Board of Trustees’ decision denying Viaero’s CUP application is insufficient under this standard.

The decision to deny Viaero’s application is only noted in the minutes of the March 8, 2010 Board meeting. As was the case in *USOC of Greater Iowa*, these meeting minutes merely reflect that the application was unanimously denied. The minutes do not contain stated reasons for the denial or an explanation of how the decision was reached. Defendant argues that the combination of the meeting minutes from the March 8, 2010 meeting and the February 8, 2010 meeting satisfy the “in writing” requirement. The court disagrees. While the February 8, 2010 minutes give some general indication as to what evidence was presented at the hearing, there is no explanation as to why the Board ultimately denied the application.

Defendant urges the court to reconsider its decision in *USOC of Greater Iowa* and find that any decision that is “in writing,” including a decision reflected in written meeting minutes, should be held to satisfy the “in writing” requirement contemplated

by the TCA. The court declines to do so. As I concluded in *USOC of Greater Iowa*, “permitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board’s rationale.” [*USOC of Greater Iowa*, 279 F. Supp.2d at 1084](#) (quoting [*Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 \(1st Cir. 2001\)](#)). This reasoning remains sound. Without a decision adequately explaining the reasons for the denial, it is difficult, if not impossible, for a reviewing court to evaluate the evidence in the record supporting the reasons for the denial.

Further, even assuming that the “in writing” requirement was satisfied, the Board’s decision would nevertheless violate the TCA because it is not “supported by substantial evidence contained in a written record.” [47 U.S.C. § 332\(c\)\(7\)\(B\)\(iii\)](#). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” [*USOC of Greater Iowa*, 279 F. Supp.2d at 1085](#) (quoting [*Mississippi Transp. Inc. v. NLRB*, 33 F.3d 972, 977 \(8th Cir. 1994\)](#)).

Under the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong. If the Board’s findings are supported by some substantial level of evidence (but less than a preponderance) on the record as a whole (contrary evidence may not simply be ignored on review) so that a reasonable fact-finder could reach the same conclusion as did the Board, the Board’s decision must be affirmed. We will not reject the Board’s decision as unsupported by substantial evidence because there exists the possibility of drawing two inconsistent conclusions for the evidence.

[*Sprint Spectrum, L.P. v. Platte County, Missouri*, 578 F.3d 727, 733 \(8th Cir. 2009\)](#) (quoting [*USCOC of Greater Iowa v. Zoning Bd. Of Adjustment*, 465 F.3d 817, 821 \(8th Cir. 2006\)](#)).

Defendant contends that substantial evidence supporting Defendant’s decision

is contained in the minutes from the Board meeting held on February 8, 2010. In particular, Defendant points to the minutes' reference to numerous public concerns and comments in opposition to the tower's proposed location, which is near a residential district. With respect to these "public concerns," the meeting minutes only state that "[t]he overall feeling from the public was that the tower needed to be moved away from the housing area to a more suitable location." ([Filing 24-3 at CM/ECF p. 2.](#)) While public concerns can, in some instances, serve as substantial evidence, layperson residents' generalized comments about aesthetics and property values are insufficient and, from the record presented here, there is no way of determining what the precise citizen concerns were. See [USOC of Greater Iowa, 279 F. Supp.2d at 1086](#) (finding that generalized property value concerns by laypersons are insubstantial); [Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 496 \(2d Cir. 1999\)](#) (finding that "generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence" for denying a permit); [Omnipoint Corp. v. Zoning Hearing Bd., 181 F.3d 403, 409 \(3d Cir. 1999\)](#) (concluding that generalized concerns about property values and visual impact does not constitute substantial evidence). Moreover, there is no evidence that Viaero's CUP application was denied based on the public comments referenced in the meeting minutes. There simply is no substantial evidence in a written record to support the Board's decision.

Having concluded that Defendant violated 47 U.S.C. § 332(c)(7)(B)(iii) by failing to issue a written decision supported by substantial evidence, the question now becomes what remedy should be awarded. In [USCOC of Greater Iowa](#), I concluded that injunctive relief requiring the defendant to issue the requested conditional use permit was appropriate. While I stated in that case that remand may be the proper remedy where the record reflects that the decision maker had a legitimate concern that was not addressed or not adequately addressed, this is not such a situation. [USOC of Greater Iowa, 279 F. Supp.2d at 1088](#). Here, the Board failed to provide any explanation whatsoever as to why Viaero's application was denied. Remanding the case would simply provide Defendant with an opportunity to find post-hoc evidence

to support its decision to deny the CUP application.

Finally, it should be noted that Defendant filed a motion for partial summary judgment ([filing 28](#)) in this case arguing that Viaero's due process claims should be dismissed. Because the court has ruled in favor of Viaero on its TCA claims, it need not, and will not, address the due process claims. See *USOC of Greater Iowa*, 279 F. Supp.2d at 1088. Accordingly, Defendant's motion for partial summary judgment will be denied as moot.

IT IS ORDERED:

1. Plaintiff's motion for summary judgment ([filing 21](#)) is granted;
2. The March 8, 2010 decision of the Doniphan Board of Trustees denying Plaintiff's application for a Conditional Use Permit is vacated;
3. Defendant shall issue such permits, licenses and orders as are needed to construct Plaintiff's telecommunications tower (and related structures) at the subject property, which is located in the 200/300 block of North First Street, Doniphan, Nebraska, legally described as Pt. W1/2 SE1/4 5-9-9 & Pt. Lot 1, 3-D Ammunition Sub. Pt. Lot 2, Doniphan Railroad 3rd Sub.;
4. Defendant is hereby directed to issue the Conditional Use Permit sought by Plaintiff without further delay or obstacle to Plaintiff and, in any event, no later than fourteen (14) days of judgment in this action;
5. This court shall retain jurisdiction of this action for the limited purpose of enforcing its judgment and only until such permits, licenses and orders as are needed to construct Plaintiff's telecommunications tower

have been issued;

6. Defendant's motion for partial summary judgment ([filing 28](#)) is denied;
7. Judgment will be entered by separate document.

December 22, 2010.

BY THE COURT:

Richard G. Kopf

United States District Judge

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