

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
GENERAL DIVISION

CITY SIGNAL COMMUNICATIONS	)	
INC.	)	
	)	
Appellant	)	Case No. 423799
	)	
v.	)	Judge Robert T. Glickman
	)	
CITY OF SOUTH EUCLID	)	
	)	
Appellee	)	<b><u>JOURNAL ENTRY</u></b>
	)	

City Signal Communications Inc. brought this administrative appeal due to the City of South Euclid's denial of an application to install fiber optic cable along South Euclid's right-of-way. The appellant wished to install the cable above ground on existing poles, but the city engineer found that said installation would "...irreparably harm the aesthetic environment of the community and is in violation of City Ordinance Section 1327.02..." The Board of Zoning based its decision on the opinion of the city engineer.

In a R.C. 2506 appeal the court must consider the entire record and must appraise all of the evidence as to credibility of witnesses, the probative character of the evidence and the weight to be given it. *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St. 2d 202, 206-207. The court is required to weigh the evidence and determine whether there was substantial evidence to support the agency's decision. *Id* at 207. If the evidence in the record is insufficient to support an administrative agency's

decision, R.C. 2506.04 mandates that the court must reverse the decision, vacate the decision, modify the decision, or remand the case to the agency with instructions. *Id.*

The appellant's first argues that the Board's decision should be reversed because it was not supported by sufficient evidence, that it was arbitrary, capricious and unreasonable, and that South Euclid codified ordinance chapter 1327 is unconstitutional.

The parties concede that the decision to deny appellant's application must be reversed if it was not supported by a preponderance of substantial, reliable and probative evidence. *Consolidated Mgt. Inc. v. City of Cleveland* (1983), 6 Ohio St. 3d 238, 240. In the case at bar, the Board's decision can only stand if such evidence is present in the record of proceedings. There is no such evidence in the record in this case.

The only evidence in the record is that above ground lines already exist along the route proposed by the appellant. There is no evidence in the record that adding one additional line to the utility poles already in existence would have an adverse impact on the community. In fact, the evidence presented by the appellant proves that there would be no such adverse impact. The only evidence to support the appellee's position is the commissioner's and engineer's opinion that the proposed additional above ground cable would have a negative impact on the city. There is no evidentiary basis for such an opinion in the record. A bare allegation with no evidentiary proof cannot meet an evidentiary burden. *State ex rel. Basham v. Consolidation Coal Co.* (1989), 43 Ohio St. 3d 151, 152; *University of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111-112.

The Board's decision was not based on substantial, reliable and probative evidence. Therefore, it cannot stand. The Board's decision is reversed and the City of South Euclid Zoning and Building Standards Board of Appeals is ordered to approve City

Signal's Permit Application. As the decision of the Board was not based on substantial, reliable and probative evidence, the court need not address whether the decision was made in an arbitrary, capricious or unreasonable manner. Further, there is no need to address the constitutionality of South Euclid codified ordinance chapter 1327.

The appellant also argues that R.C. 4939 preempts S. Euclid Ordinance Chapter 1327. The appellee claims that R.C. 4939 interferes with the home rule authority granted to it under Section 3, Article XVIII of the Ohio Constitution. The Supreme Court has determined a three-part test to find whether a state law preempts a local ordinance. In order for a state law to preempt a local ordinance, the court must find that:

1. The local ordinance is an adoption of police power;
2. The state law is a general law; and
3. The local ordinance conflicts with the state law.

*Ohio Ass'n of Private Detective Agencies v. North Olmsted* (1992), 65 Ohio St. 3d 242.

Considering the language of Chapter 1327, one must conclude that the law is an adoption of police power. It is also obvious that Chapter 1327 conflicts with R.C. 4939. The only thing left to be determined is if R.C. 4939 is a general law of the State of Ohio. A general law is one that promotes statewide uniformity. R.C. 4939 is just such a law. R.C. 4939 created a statewide scheme to ensure quality telecommunications and safeguard the consumers. This court concurs with the holding of the Cuyahoga County Court of Common Pleas in *Payphone Association, et al*, and holds that R.C. 4939 is a general law of the State of Ohio. As such, in this case, R.C. 4939 preempts S. Euclid Chapter Ordinance 1327.

The appellee has also challenged the constitutionality of R.C. 4939. R.C. 4939 is constitutional absent a showing that the statute and a provision of the constitution are incompatible beyond a reasonable doubt. This court does not find that to be the case, and holds that R.C. 4939 conforms to the Constitution.

The court will not address the other assignments of error raised in the appellant's brief or the further arguments raised in the appellee's brief as they are moot given the court's ruling.

The appellee denied the appellant their permit without any evidence in the record to support the position that the installation of the cable would adversely affect the aesthetics of the community. As there is no evidence in the record to support the Board's decision, that decision to deny the appellant's permit is vacated. The City of S. Euclid Zoning and Building Standards Board of Appeals are ordered to approve the appellant's permit application immediately.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge, Court of Common  
Pleas