

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

TOWER VENTURES, INC., :
Plaintiff, :
 :
v. : CA 03-086S
 :
TOWN OF CUMBERLAND and :
CUMBERLAND ZONING BOARD OF REVIEW, :
Defendants. :

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

This is an action for judicial review of a zoning board's decision to deny permission for the construction of a telecommunications tower. See 47 U.S.C. § 332(c)(7)(B)(v) (2004) (providing a federal cause of action to a person adversely affected by a state or local decision that violates the Telecommunications Act of 1996 ("TCA")). Before the court is Plaintiff's Motion for Summary Judgment (Document #20) ("Motion for Summary Judgment" or "Motion"). The Motion has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). For the reasons stated below, I recommend that the Motion be denied in part and granted in part.

Facts

Plaintiff Tower Ventures, Inc. ("Plaintiff"), is engaged in the business of identifying and acquiring appropriate sites for the development of wireless telecommunications facilities. See Joint Stipulation of Undisputed Facts (Document #22) ("JSUF") ¶¶ 1, 4. Its business also includes the construction of such facilities for use by wireless telecommunications providers, including providers of wireless telephone services. See id. ¶ 4. Plaintiff identified an area in the Town of Cumberland, Rhode

Island (the "Town"), where there is a substantial lack of coverage for several wireless providers, including Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and AT&T Wireless. See JSUF ¶ 7. The area is around Route 120 and Route 114, which are heavily traveled thoroughfares. See id. ¶ 8. Both Verizon Wireless and AT&T Wireless have significant coverage gaps in this area. See id.

Plaintiff identified a parcel of land in the Town located at 20 Mayflower Drive as a location which would fill these gaps in wireless coverage. See id. The 20 Mayflower Drive property is within a zoning district where among the permitted uses are "wireless transmitting and receiving antennae." Id. ¶ 9 (quoting id., Attachment ("Att.") A (Town of Cumberland Rhode Island Zoning Ordinance ("Zoning Ordinance") at 23). The maximum height allowed by the Zoning Ordinance in the zoning district in which 20 Mayflower Drive is located is 35 feet. See id. ¶ 10. However, the Zoning Ordinance permits the Cumberland Zoning Board of Review (the "Board") to grant variances from the height limitation if the petitioner can demonstrate an inability to co-locate on existing facilities. See id. ¶ 11.

In June of 2002, Plaintiff and Verizon Wireless (the "petitioners") applied to the Board for a height variance to allow a tower with a height of 170 feet. See id. ¶ 12. The Zoning Board commenced its hearing on the application in July, 2002, and concluded its hearings on December 11, 2002. See id. During the course of the hearings the application was amended so that it also sought relief from a frontage requirement in the Zoning Ordinance.¹ See id.

¹ The property at 20 Mayflower Drive has 40 feet of frontage, see Site Plan (C-1), and the minimum frontage for property in that zoning district is 250 feet, see Joint Stipulation of Undisputed Facts ("JSUF"), Attachment ("Att.") A (Town of Cumberland Rhode Island Zoning Ordinance) at 30 (stating that minimum frontage for property

At the hearings, the petitioners introduced radio frequency evidence of Verizon Wireless's significant gap in coverage and its need for a tower in excess of the 35 foot maximum height allowed by the Zoning Ordinance. See JSUF ¶ 13. Petitioners also presented testimony from Mark DeStefano, Plaintiff's site development manager, and David Tivnan, a real estate consultant for Verizon Wireless, regarding efforts to identify and locate sites for wireless telecommunications facilities to provide service in the area of the coverage gap. See id. ¶ 14; see also Transcript of 7/10/02 hearing ("Tr. of 7/10/02") at 11, 50. This testimony demonstrated that Verizon Wireless, other wireless carriers, and Plaintiff "had been engaged in efforts to secure sites for wireless facilities to serve this area for several years and that there were no other sites which were available either within Cumberland or in adjacent municipalities which would provide adequate coverage for the gaps." JSUF ¶ 14. Petitioners also presented testimony and evidence of a balloon test, showing locations from which the proposed tower would or would not be visible at the proposed height of 170 feet. See id. ¶ 15.

Petitioners' request for a height and frontage variance was opposed by the owners of property abutting 20 Mayflower Drive and other neighbors. See id. ¶ 16. There was evidence from a real estate expert presented by petitioners that the proposed tower would not have an adverse effect on property values. See id. ¶ 17. The opponents of the tower presented rebuttal testimony on this issue from a real estate appraiser. See id.

On December 11, 2002, the Board voted to deny the relief requested. See id. ¶ 18 (citing id., Att. D (Decision)). Although there was conflicting evidence on this issue, the

zoned A-1 is 250 feet). The vote to allow the application to be amended occurred at the September 12, 2002, hearing. See Transcript of 9/12/02 Hearing ("Tr. of 9/12/02") at 14-17.

decision of the Board was not based on any possible effect of the facility on real estate values. See JSUF ¶ 17.

Travel

Plaintiff appealed the decision of the Board by filing the instant complaint on March 12, 2003. See Complaint and Request for Expedited Hearing and Decision Pursuant to 47 U.S.C. § 332(C)(7)(B)(v) (Document #1) ("Complaint"). On May 7, 2003, the clerk entered default against the Town and the Board ("Defendants") "for their failure to plead or otherwise defend in this action." Application to Clerk for Entry of Default against Defendants (Document #6). There was no further action in the matter until September 9, 2003, when District Judge William E. Smith issued an order for Plaintiff to show cause why the case should not be dismissed for lack of prosecution. See Show Cause Order (Document #7). Plaintiff filed its response to the Show Cause Order on September 24, 2003. See Plaintiff's Response to Order to Show Cause (Document #8). The response recited that the parties had been in communication with each other "in an effort to expedite the processing of this matter," id. at 1, that they were going to file a Joint Motion Regarding Scheduling, see id., that they had agreed upon a Joint Stipulation of Facts which would be filed with Plaintiff's Motion for Summary Judgment, see id. at 2, and that Defendants would file a Motion to Remove Default on or about September 26, 2003, see id.

On October 2, 2003, Defendants filed their Assented-To Motion to Remove Default (Document #9) ("Motion to Remove Default"). See Motion to Remove Default. The Joint Motion Regarding Scheduling (Document #10) ("Joint Motion") was filed the same date. See Joint Motion. Judge Smith granted the Motion to Remove Default on October 8, 2003. See Document #11 at 2.

Plaintiff filed an assented-to motion on November 21, 2003, to revise the schedule set forth in the court's Pretrial Order of October 24, 2003 (the "Pretrial Order"), by changing the deadline

for the filing of Plaintiff's dispositive motions from November 21 to December 5, 2003. See Assented-To Motion to Revise Schedule (Document #15). The stated ground for this motion was that the Administrative Record, which was to have been filed by Defendants on November 7, would not be filed until November 21, 2003. See id.

On December 23, 2003, Plaintiff again moved to revise the schedule set forth in the court's Pretrial Order. See Assented-To Motion to Revise Schedule (Document #18). Plaintiff sought a further extension to January 17, 2004, of the time for filing of Plaintiff's dispositive motions. See id. The basis for this request was that "Defendants anticipate taking final action on January 7, 2004, on a settlement proposal developed during a settlement conference conducted by Judge Martin." Id. at 1. Judge Smith granted this request for a further extension on December 29, 2003. See Document #19 at 2.

Plaintiff's Motion for Summary Judgment was filed on January 16, 2004. See Motion. On February 12, 2004. Defendant's [sic] Objection to Plaintiff's Motion for Summary Judgment (Document #23) ("Objection") was filed. See Objection.

The court conducted hearings on the Motion on March 2 and March 5, 2004. Thereafter, the court took the matter under advisement.

Law

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting Fed. R. Civ. P. 56(c)); accord ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the

point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law.’” Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)(quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence “in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party.” Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996)). “[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage.” Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). Furthermore, “[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper.” Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)(citation and internal quotation marks omitted).

The non-moving party, however, may not rest merely upon the allegations or denials in its pleading, but must set forth specific facts showing that a genuine issue of material fact exists as to each issue upon which it would bear the ultimate burden of proof at trial. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting enough competent evidence to

enable a finding favorable to the nonmoving party." ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002)(quoting LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993)) (alteration in original)(internal quotation marks omitted).

Discussion

Plaintiff seeks summary judgment on all counts of the Complaint. See Motion. The court addresses them seriatim.

Count I

Plaintiff alleges in Count I that the Board's "vote to deny a height variance is not 'in writing' and is therefore in violation of the 1996 Act, and is invalid." Complaint ¶ 13 (quoting 47 U.S.C. § 332(c)(7)(B)(iii)).² Presumably, Plaintiff means to allege that the "decision" is not in writing, see 47 U.S.C. § 332(c)(7)(B)(iii), as there is no requirement that the "vote" be in writing, see 47 U.S.C. § 332.

Assuming that Plaintiff is alleging in Count I that the decision is not in writing, this allegation must be rejected. A copy of the Decision is attached to the JSUF. See JSUF, Att. D. It is typed, single spaced, and two pages in length. The Decision lists five reasons for the denial of Plaintiff's application.³ Therefore, I find that the Decision rendered by

² U.S.C. § 332(c)(7)(B)(iii) provides: "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."

³ The reasons stated by the Board for denying Plaintiff's request for a variance were:

- a. The property has 40 feet of frontage and is non-conforming by dimension as it presently exists.
- b. That the granting of the petition would be an intensification of use of the property and thus an expansion of a legal non conforming use.
- c. That the granting of the petition would alter the

the Board on December 11, 2002, is "in writing" and that it satisfies the requirement contained in 47 U.S.C. § 332(c)(7)(B).

Additionally, Plaintiff has not submitted or made any argument in support of the Motion as to Count I. This failure precludes a ruling in Plaintiff's favor as to this count. See Putnam Res. v. Pateman, 757 F.Supp. 157, 169 (D.R.I. 1991) (noting that a "claim neither briefed nor argued is waived"); cf. Kelley v. LaForce, 288 F.3d 1, 9 (1st Cir. 2002)(finding issue "waived" where appellants did not challenge district court's finding in their brief); Pratt v. United States, 129 F.3d 54, 62 (1st Cir. 1997)("It is firmly settled in this circuit that arguments not advanced and developed in an appellant's brief are deemed waived.").

Accordingly, for the reasons stated above, the Motion for Summary Judgment should be denied as to Count I. I so recommend.

general characteristics of the neighborhood.

- d. That the granting of approval of a 170 foot tower in a zone where the maximum frontage of 110 feet based upon the testimony would not be the least relief necessary under the Ordinance.
- e. That due to the fact the property presently is non conforming by dimension, but still has a residential home with an accessory building on it, there presently exists a reasonable alternative way to enjoy a legally permitted use of the subject property.

JSUF, Att. D (Decision) at 2.

Reason d is incomprehensible. At the March 5, 2004, hearing, counsel for the Town opined that the reference in reason d to "maximum frontage" should be read as "minimum frontage." However, the minimum frontage for the lot is 250 feet. Thus, the reference to 110 feet remains unclear even if "maximum" is read as "minimum." See Transcript of July 10, 2002, hearing (Tr. of 7/10/02) at 29-30 (noting the 250' frontage requirement); see also Site Plan (Sheet Number C-1)(same); cf. Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 23 (1st Cir. 2002)("It is difficult to know precisely what the board meant by its legal jargon and its apparently purposeful obscurity.").

Count II

Count II of the Complaint alleges that the Board's decision is not supported by substantial evidence. See Complaint ¶ 19.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

The reviewing court must take into account contradictory evidence in the record. But the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001)(quoting Penobscot Air Servs., Ltd. v. Fed. Aviation Admin., 164 F.3d 713, 718 (1st Cir. 1999)).

Plaintiff argues that the Board was required to consider whether the denial of Plaintiff's Application "would result in effective prohibition of wireless services" Plaintiff's Memorandum in Support of Motion for Summary Judgment ("Plaintiff's Mem.") at 9. As support for this proposition, Plaintiff cites two District of Massachusetts cases which have so held, Nextel Communications of Mid-Atlantic, Inc. v. Town of Provincetown, No. Civ.A. 02-11646-DPW, 2003 WL 21497159 (D. Mass. June 26, 2003), and Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396 (D. Mass. 2002). See Plaintiff's Mem. at 9. In Town of Provincetown, the court concluded that because the zoning board "did not fully consider the possibility that enforcement of [the zoning by-law] might violate the TCA, its decision was not based on substantial evidence." Town of Provincetown, 2003 WL 21497159, at *8. Similarly, in Town of Wayland, the court faulted the local zoning board for finding that "Nextel can comply with the current dimensional requirements and still be able to provide 'some wireless coverage,'" Town of Wayland, 231 F.Supp.2d at 407 (quoting decision of zoning board of appeals), without

considering "whether Nextel would be able to provide sufficient coverage to close the significant gap in coverage," Town of Wayland, 231 F.Supp.2d at 407. In finding that the board's decision was not supported by substantial evidence, the court held that although the board's statement of the reasons for the denial "may be a correct statement of the general law in Massachusetts regarding variances, it is not controlling in the special case of wireless communications facilities." Id. at 406.

Plaintiff here notes that the reasons given by the Board "focus on traditional Rhode Island zoning issues: would the relief intensify a use and expand a legal nonconforming use; is the requested relief ... the least relief necessary; and, if the relief is denied, would that prevent the property from being used in a legally permitted manner."⁴ Plaintiff's Mem. at 9 (citing Rhode Island Zoning Enabling Act, §§ 45-24-39 and 45-24-40, and Zoning Ordinance, §§ 2-8 and 9-8(b)). Because "the Board's written decision did not give any consideration to the effective prohibition provisions of the Telecommunications Act," Plaintiff's Mem. at 10, Plaintiff asserts that the Board's decision is not supported by substantial evidence, id. at 6.

The proposition that a zoning board's decision cannot be deemed to be supported by substantial evidence if the board fails to consider whether the denial of a requested variance will constitute an effective prohibition, apparently accepted by the courts in Town of Provincetown and Town of Wayland, adds a new element to the definition of substantial evidence. See Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001)(defining substantial evidence). Based on language in two First Circuit opinions, this court has reservations that the additional element will be adopted by the Court of Appeals. In Town of Amherst v. Omnipoint Communications Enterprises, Inc.,

⁴ See n.3 at 7 for the reasons given by the Board.

173 F.3d 9 (1st Cir. 1999), the First Circuit seemingly recognized that a board's decision could be supported by substantial evidence even though it effectively precluded telecommunication towers no matter what the carrier did and, therefore, constituted a ban in effect. See id. at 14 ("If the criteria [set out by the board in its decision] or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will almost certainly exist for the denial. In that event, the regulation is unlawful under the statute's 'effect' provision.") (citation omitted). In Southwestern Bell Mobile Systems v. Todd, 244 F.3d 51 (1st Cir. 2001), the court explained that "[s]ubstantial evidence' review under the TCA does not create a substantive federal limitation upon local land use regulatory power, but is instead 'centrally directed to those rulings that the Board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like.'" Id. at 58 (quoting Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d at 16).

Given this apparent recognition that substantial evidence may exist to support a board's decision even if the effect is to preclude telecommunication towers altogether, see Town of Amherst at 14, and the explicit statement in Todd that substantial evidence review is "centrally directed" to those rulings a board is expected to make under state and local law, Todd, 244 F.3d at 58, the Town of Provincetown and Town of Wayland opinions are not persuasive. In the absence of an explicit statement from the First Circuit that a zoning board's decision cannot be supported by substantial evidence if the board fails to consider whether its decision might violate the TCA, this court declines to follow those courts on this issue.

Even if this court were convinced that the First Circuit would adopt the view of substantial evidence reflected in the

Town of Provincetown and Town of Wayland opinions, the instant case differs from the those cases in a key aspect. Here there is no evidence in the record that any wireless carrier requires a 170 foot tower in order to provide adequate coverage for the gaps in wireless service in the area around Route 120 and Route 114. Indeed, Plaintiff's site development manager, Mark DeStefano, testified at the July 10, 2002, hearing that AT&T Wireless "can live with 150 feet," Tr. of 7/10/02 at 20, and that "Verizon is at 160 feet ... that is their minimum," id. at 20. No other carrier had executed a lease to mount their equipment on the tower, see id. at 21, and there is no evidence that any carrier had indicated that it needed a minimum height of 170 feet in order to provide service in the area of the gaps.

Plaintiff attempted to justify its request for a 170 foot tower at the July, 2002, hearing on the grounds that it was "going for the maximum co-location," id. at 19, and that it wanted "to allow room for additional carriers which we presume will be coming down the road," id. at 20. Mr. DeStefano testified that "there are six major PCS and cellular carriers out there, [and] we would like to build a facility that could accommodate all of them." Id. at 21. The detail plan which Plaintiff submitted to the Board shows the tower with antennas at ten foot intervals beginning at 110 feet and continuing up to 170 feet. See Elevation & Detail Plan (Sheet Number C-2). Presumably, Plaintiff had reason to believe that antennas at the 110, 120, 130, and 140 foot levels would be of sufficient height to meet the requirements of at least one other carrier at each level or it would not have shown antennas at those points on the tower. Given that there are six major carriers, see Tr. of 7/10/02 at 21, and two of them, AT&T Wireless and Verizon

Wireless,⁵ have already leased space at the 150 and 160 foot levels, it is possible that the other four major carriers could be accommodated at the 140, 130, 120, and 110 foot levels.

Since the gaps in coverage could have been adequately addressed by a somewhat lower tower, the court is unable to accept Plaintiff's argument that the Board's decision is not supported by substantial evidence. Three of the five Board members, Mr. Lamontagne, Ms. Connors, and Mr. Bessette, specifically referred to the tower's 170 foot height in voting to deny the variance,⁶ and one member, Mr. Bodell, referred to it at

⁵ Although Mr. DeStefano did not specifically identify by name the "six major PCS and cellular carriers," Tr. of 7/10/02 at 21, it is reasonable to conclude that AT&T Wireless and Verizon Wireless were among them. Plaintiff wanted to build a tower that could accommodate all six major carriers. See Tr. of 7/10/02 at 21. If both AT&T Wireless and Verizon Wireless were not included in the group of six to which Mr. DeStefano referred, the tower would have required at least eight levels of antennas. The Elevation & Detail Plan (Sheet Number C-2) shows the tower with seven levels of antenna.

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MR. LAMONTAGNE: ... The height requirements are just tall [sic]. I mean they're right up there at what, 170 feet, something like that, 175 feet. I personally am not crazy about the idea.

....

MS. CONNORS: ... They're looking for 170 feet. I just -- I can't vote in favor of it, not in a clear conscience.

Tr. of 12/11/02 at 5.

MR. BESSETTE: ... Also, they're looking for a 170-foot tower, and on their plans they're saying they're going to be putting dishes every 10 feet from 110 feet up to 170.

....

... and I mean this is 170 feet. This is a large

Id. at 6-7.

MR. BESSETTE: Also, they're looking for 170 feet, which is the maximum height, and where they could get away with 110 foot

Id. at 9.

least indirectly.⁷ Cf. Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d 9, 15 (1st Cir. 1999) (finding no effective prohibition where carrier "practically admitted that *somewhat* lower towers were technically feasible").

In sum, there is no evidence in the record that any carrier needs to mount antennas at the 170 foot level in order to provide coverage in the areas around Route 120 and Route 114 where there are presently gaps. Rather, the evidence is that a 160 foot tower would be sufficient to enable the two carriers who had committed to leasing space on the tower, AT&T Wireless and Verizon Wireless, to provide adequate coverage for their customers in those areas. There is also reason to believe that other carriers could place their antennas at heights lower than 150 feet and still provide adequate coverage. Given these circumstances, I find that the Board's decision to deny Plaintiff's request for a variance to erect a 170 tower is supported by substantial evidence. Therefore, Plaintiff's Motion should be denied as to Court II, and I so recommend.

Count III

In Count III Plaintiff alleges that the Board's decision has the effect of prohibiting the provision of personal wireless service in portions of Cumberland and the surrounding area, see Complaint ¶ 22, and that, therefore, the decision violates 47 U.S.C. 322(c)(7)(B)(i)(II)⁸ of the TCA, see id. ¶¶ 21-23. "[T]he

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MR. BODELL: I think the aesthetics ... are the biggest issue we have to look at, and I think we definitely have an issue with the characteristics of the tower and the impact on the surrounding area.

Tr. of 12/11/02 at 5.

⁸ 47 U.S.C. § 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any

issue of whether the [zoning board] has prohibited or effectively prohibited the provision of wireless services is determined de novo by the district court." Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002)(citing Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 22 (1st Cir. 2002)("The anti-prohibition, anti-discrimination, and unreasonable delay provisions, 47 U.S.C. § 332(c)(7)(B)(i)-(ii), present questions that a federal district court determines in the first instance without any deference to the board.")).

The First Circuit has stated that "there can be no general rule classifying what is an effective prohibition. It is a case-by-case determination." Second Generation Props., L.P. v. Town of Pelham, 313 F.3d at 630. This court finds the two step approach employed in Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108 (D. Mass. 2000), to be helpful in deciding this issue. To succeed on an effective prohibition claim, Plaintiff must establish two elements. See id. at 118. First, Plaintiff must establish that the Town's zoning policies and decisions result in a significant gap in wireless services within the Town. See id.; Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus, 197 F.3d 64, 70 (3rd Cir. 1999). Second, Plaintiff must "show from language or circumstances not just that *this* application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Town of

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.**

47 U.S.C. § 332(c)(7)(B)(i) (bold added).

Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999); see also Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d at 118.

Finding that Plaintiff has satisfied the first step is relatively easy. Defendant has stipulated that both Verizon Wireless and AT&T Wireless have significant coverage gaps in Cumberland in the areas around Route 120 and Route 114, see JSUF ¶ 8, and that there are no other sites available either within Cumberland or in adjacent municipalities which would provide adequate coverage for the gaps, see id. ¶ 14. Thus, by denying Plaintiff's application Defendants are perpetuating a significant gap in wireless service in Cumberland. The denial of a single application "can run afoul of the TCA if that denial is 'shown to reflect, or represent, an effective prohibition on personal wireless service.'" Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001)(quoting Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d at 14).

Satisfaction of the second step requires Plaintiff to show that it would be futile to submit another application. See Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d at 14. While Plaintiff's burden on this point is "heavy," id., the court finds that the burden has been met. Although there is no evidence any carrier requires a 170 foot tower and that a 160 foot tower would have been adequate for Verizon Wireless and AT&T Wireless, the court concludes that it would be a waste of time for Plaintiff to seek a variance for a 160 foot tower. There is no reason to believe that a mere ten foot reduction in height would assuage the concerns or overcome the objections voiced by the Board members. Three of the five Board members expressed their opposition to any tower being erected at 20 Mayflower

Drive.⁹ A fourth member stated that "we definitely have an issue with the characteristics of the tower and the impact on the surrounding area." Tr. of 12/11/02 at 5. The fifth member stated explicitly that his vote was based on traditional zoning considerations.¹⁰ These objections would prevent the erection of any tower regardless of height. Cf. Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 24-25 (1st Cir. 2002)("[W]e think the only fair inference from the board's words

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MR. LAMONTAGNE: Well, my feelings are the location of this tower is in a kind of an unpleasant area, in my opinion, **because it really doesn't belong there.** The surroundings I don't think are conducive to a tower. I don't agree that the tower would not affect property values as we were told last month.

Tr. of 12/11/02 at 4 (bold added).

Ms: CONNORS: Well, I have to agree. **I think that putting the tower in that residential area is terrible**

Id. at 5 (bold added).

MR. RYAN: Okay, thank you. Well, my feelings are that there's no doubt the tower is needed there, but **it's not needed in this highly densely-populated residential neighborhood** I think if they pay a little money and try a little harder, there's some very good locations up there that's not going to bother a neighborhood or a family that's got their life savings invested in a house.

Id. at 6-7 (bold added).

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MR. BESSETTE:

And the reason I'm denying this: There's 40 feet of frontage which is a non-conforming lot by dimension, and denying this would not be depriving the owner of all beneficial use because he already has a home and accessory building on this site. This would be an expansion of a nonconforming use and clearly is an intensification.

Granting it would alter the general characteristics of the neighborhood.

Tr. of 12/11/02 at 8.

and actions in this case is that ... the board is not prepared to permit construction on Omnipoint's chosen site."); Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999)(observing that a decision which "sets out criteria that no one could meet" would represent an effective prohibition on wireless service).

Moreover, at the March 5, 2004, hearing before this court, counsel for Defendants virtually admitted that it would be a waste of time for Plaintiff to submit an application for a variance to erect a 160 foot tower at the location:

MR KIRBY: **I believe that the Board in all candor would deny this Petition if it went back**, uh, seeking any relief

....

But I think the Board had a concern that any relief beyond 35 feet - and I have to be candid with the court, uh, I mean I sat through these hearings, uh, I believe that any relief that was being sought beyond 35 feet, the Board felt, well, it's ... expansion of a non-conforming use; we're intensifying a non-conforming use; we're putting a tower on a property that already doesn't conform. Additionally, one member of the Board in that decision on that evening, if you read it, talked about losing all beneficial use.

Tape of 3/5/04 hearing.

Thus, the court finds that the decision of Board to deny Plaintiff's application violates the effective prohibition provision of the TCA, see 47 U.S.C. § 322(c)(7)(B)(i)(II), and that Plaintiff is entitled to summary judgment on Court III of the Complaint. Accordingly, I recommend that the Motion be granted as to Count III.

Count IV

Plaintiff alleges in Count IV that Defendants, in denying the application for a variance, acted under color of state law and deprived Plaintiff of rights, privileges, or immunities

secured by the laws of the United States, particularly 47 U.S.C. § 332(c)(7), and that Defendants' action should be set aside and enjoined as a violation of 42 U.S.C. § 1983.¹¹ See Complaint ¶¶ 25-26. Additionally, in the prayer for relief, Plaintiff seeks an award of "reasonable attorney's fees as part of the costs in accordance with 42 U.S.C. § 1988(b)"¹² Id. at 8.

Courts are divided over whether provisions of the TCA are enforceable by means of an action pursuant to 42 U.S.C. § 1983. See Nextel Partners Inc. v. Kingston Township, 286 F.3d 687, 695 n.7 (3rd Cir. 2002)(noting split among district courts); AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1327 n.7 (11th Cir. 2000)(same) vacated pending reh'g en banc, 260 F.3d 1320 (11th Cir. 2001), appeal dismissed per stipulation, 264 F.3d 1314 (11th Cir. 2001); Cellco P'ship v. Town of Grafton, 336 F.Supp.2d 71, 86 (D. Mass. 2004)(noting disagreement among district and circuit courts). The Third and Seventh Circuits have specifically held that an alleged violation of § 332(c)(7)(b) is not enforceable through a § 1983 action. See Nextel Partners Inc. v. Kingston Township, 286 F.3d at 694 ("[W]e

¹¹ 42 U.S.C. § 1983 states in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

¹² 42 U.S.C. § 1988(b) provides that: "In any action or proceeding to enforce a provision of section[] ... 1983 ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs"

hold that the TCA implicitly precludes an action under § 1983 by creating a comprehensive remedial scheme that furnishes private judicial remedies."); Primeco Pers. Communications, Ltd. P'ship v. City of Mequon, 352 F.3d 1147, 1152 (7th Cir. 2003)("[S]ection 1983 remedies are not available in a suit to enforce rights granted by the Telecommunications Act."). The Tenth Circuit has similarly concluded that a claim based on an alleged violation of the TCA is not enforceable by a § 1983 action, although a different section of the TCA, namely 47 U.S.C. § 253, was at issue. See Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266-67 (10th Cir. 2004); id. at 1267 n.6 ("Given that the clear purpose of the TCA is to foster competition in order to benefit the public, it would be difficult to conclude that Congress intended to create a new federal right enforceable through § 1983 in favor of the telecommunications companies.").

The Ninth Circuit has reached the opposite conclusion. See Abrams v. City of Rancho Palos Verdes, 354 F.3d 1094, 1095 (9th Cir. 2004); id. at 1099 ("Thus, we depart from the Third Circuit and hold that Congress did not impliedly foreclose § 1983's remedial provisions."), cert. granted, City of Rancho Palos Verdes v. Abrams, ___ U.S. ___, 125 S.Ct. 26, 159 L.Ed.2d 856 (Sept. 28, 2004). The Eleventh Circuit issued an opinion in 2000 holding that "[b]ecause Congress did not expressly exclude § 1983 remedies from the TCA plaintiff's arsenal, § 1983 actions are not so excluded." AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1330 (11th Cir. 2000). However, this opinion was vacated pending an en banc hearing, see 260 F.3d at 1320 (11th Cir. 2001), and ultimately the appeal was dismissed per a stipulation, see 264 F.3d 1314 (11th Cir. 2001).

Having considered the opinions cited above, this court agrees with the Third, Seventh, and Tenth Circuits that alleged violations of the TCA may not be enforced through a § 1983

action. The reasoning of the Third Circuit in this regard is persuasive:

If a plaintiff alleging a violation of the TCA could assert its claim under § 1983, the remedial scheme of the TCA would be upset. A plaintiff would be freed of the short 30-day limitations period and would instead presumably have four years to commence the action. See 28 U.S.C. § 1658. The court would also presumably be freed of the obligation to hear the claim on an expedited basis. Perhaps most important, attorney's fees would be available. TCA plaintiffs are often large corporations or affiliated entities, whereas TCA defendants are often small, rural municipalities. Such municipalities may have little familiarity with the TCA until they are confronted with a TCA claim, and in land-use matters they may generally rely on attorneys who may likewise know little about the TCA. Allowing TCA plaintiffs to recover attorney's fees from such municipalities might significantly alter the Act's remedial scheme and thus increase the federal burden on local land-use regulation beyond what Congress intended. We are therefore persuaded that the TCA contains a remedial scheme that is sufficiently comprehensive to show that Congress impliedly foreclosed resort to § 1983.

We are aware that a panel of the Eleventh Circuit, in a decision that was later vacated, reached a contrary conclusion,^[13] but we respectfully disagree with the reasoning of that decision. The vacated decision relied on the TCA's savings clause, which provides that the Act is not to be construed "to modify, impair, or supercede Federal, state, or local law unless so provided in such Act or amendments." Pub.L. No. 104-104 § 601(c)(1), 110 Stat. 143 (1996) (reprinted in 47 U.S.C. § 152, historical and statutory notes). However, our holding in this case--that the relevant provision of the TCA does not create a right that is enforceable under § 1983--does not mean that the TCA in any way modified, impaired, or superceded § 1983. We do not hold that enactment of the TCA had any effect on § 1983; we simply hold that the TCA itself did not create a right that can be asserted

¹³ See AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), vacated pending reh'g en banc, 260 F.3d 1320 (11th Cir. 2001), appeal dismissed per stipulation, 264 F.3d 1314 (11th Cir. 2001).

under § 1983 in lieu of the TCA's own remedial scheme.

Nextel Partners Inc. v. Kingston Township, 286 F.3d 687, 695-96 (3rd Cir. 2002)(case citations and footnote omitted). But see Abrams v. City of Rancho Palos Verdes, 354 F.3d 1094, 1099 (9th Cir. 2004)(finding the "Third Circuit's reasoning ... flawed in several respects"), cert. granted, City of Rancho Palos Verdes v. Abrams, ___ U.S. ___, 125 S.Ct. 26, 159 L.Ed.2d 856 (Sept. 28, 2004). Accordingly, as to Count IV, Plaintiff's Motion for Summary Judgment should be denied, and I so recommend.

Remedial Relief

Plaintiff has requested an injunction and order of mandamus annulling the Board's vote to deny a height variance for Plaintiff and directing the Board to issue the requested variance for the subject site. See Complaint at 7-8 (Prayers for Relief). Plaintiff also seeks an injunction and order of mandamus directing the Town, through its agents and officers, to issue a building permit for the subject site. Id. at 8. As there is no evidence that a 170 foot tower is needed, I decline to recommend that the Board's vote denying Plaintiff's request for permission to erect a tower of that height should be annulled. Rather, I recommend the issuance of an order requiring the Board to issue within (30) thirty days the dimensional variance for relief from height regulations and frontage requirements to permit the construction of a 160 foot telecommunications tower and accessory structures at 20 Mayflower Drive, Cumberland, Rhode Island. I also recommend that Defendants be ordered to issue within thirty days the necessary building permit. Defendants may condition the issuance of the variance and permit on Plaintiff's submission of satisfactory plans for construction of a 160 foot tower and accessory structures at the 20 Mayflower Drive location.

Summary

I recommend that Plaintiff's Motion for Summary Judgment be denied as to Count I because the decision of the Board is in

writing and Plaintiff has waived summary judgment on this claim by failing to argue it. As to Count II, I recommend that the Motion be denied because the Board's decision is supported by substantial evidence. Specifically, nowhere in the record is there evidence that a 170 foot telecommunications tower (as opposed to a 160 foot tower) is needed to provide coverage in the area where the gaps exist. As to Count III, I recommend the Motion be granted because Plaintiff has demonstrated that Defendants' actions have the effect of prohibiting personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B). In light of the reasons stated in the Board's Decision and the statements made by individual Board members, it would be a waste of time for Plaintiff to apply for a variance to construct a 160 foot tower at the location. As to Count IV, I recommend that the Motion be denied because there is no viable claim under 42 U.S.C. § 1983. The court's recommendation as to the remedial relief is set forth in the previous section.

Conclusion

I recommend that the Motion for Summary Judgment be denied in part and granted in part. Specifically, I recommend that it be denied as to Counts I, II, and IV and that it be granted as to Count III.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
December 17, 2004