UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AT&T WIRELESS PCS, LLC, d/b/a AT&T Wireless and MCF COMMUNICATIONS, INC.,	
Plaintiffs,	
v.	CA 03-421-S
TOWN OF CHARLESTOWN, RHODE ISLAND; ZONING BOARD OF REVIEW OF THE TOWN OF CHARLESTOWN, RHODE ISLAND; and MICHAEL RZEWUSKI, RONALD CROSSON, MILTON KRANTZ, RAYMOND DRECZKO, and RICHARD HORSTMANN, Members and Associate Members of the Zoning Board of Review of the Town of Charlestown, Rhode Island,	
Defendants.	

DECISION AND ORDER

WILLIAM E. SMITH, United States District Judge.

On or about May 30, 2003, AT&T Wireless PCS, LLC ("AT&T") and MCF Communications, Inc. ("MCF" and, together with AT&T, "Plaintiffs") filed an application with the Zoning Board of Review of the Town of Charlestown (the "Zoning Board" and, together with the other named defendants, "Defendants") for permission to erect a telecommunications tower in Charlestown, Rhode Island. At the conclusion of a hearing held on August 19, 2003, the Zoning Board unanimously voted to deny the application. Thereafter, on September 17, 2003, AT&T filed a complaint seeking judicial review

of its application in this Court. A motion to dismiss, as well as cross-motions for summary judgment, were then filed by the parties. Magistrate Judge Martin subsequently issued a Report and Recommendation, see AT&T Wireless PCS, LLC, v. Town of Charlestown, C.A. No. 03-421-S (D.R.I. March 2, 2005) (Report and Recommendation of M.J. Martin) (hereinafter "R&R"),[1] recommending that: (1) Plaintiffs' motion for summary judgment should be granted to the extent it seeks a judgment that the Zoning Board's written decision does not meet the requirements of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iii); (2) the appropriate remedy for this failure to issue a proper written decision is remand; (3) Defendants' motion for summary judgment should be granted to the extent it seeks a judgment that Defendants did not (a) effectively prohibit Plaintiffs from providing wireless service, in contravention of 47 U.S.C. § 332(c)(7)(B)(i)(II), or (b) unlawfully discriminate against Plaintiffs in denying Plaintiffs' application, in contravention of 47 U.S.C. § 332(c)(7)(B)(i)(I); (4) Defendants' motion for summary judgment should be granted to the extent it seeks a judgment that Defendants did not unreasonably delay in acting upon Plaintiffs' application, in contravention of 47 U.S.C. § 332(c)(7)(B)(ii); (5) Defendants' motion for summary judgment should be denied to the extent it seeks a declaration that

[1] AT&T is now known as New Cingular Wireless PCS, LLC. This Court will continue to refer to the entity as AT&T so as to be consistent with the R&R.

Plaintiffs violated the notice provisions of R.I. Gen. Laws § 45-24-69.1; (6) Defendants' motion for summary judgment should be denied to the extent it seeks (a) a judgment that Plaintiffs were not entitled to seek a writ of certiori, pursuant to R.I. Gen. Laws § 8-1-2, and (b) reversal of the Zoning Board's denial, pursuant to R.I. Gen. Laws § 45-24-69; and (7) Defendant's motion to dismiss should be denied because an actual controversy remains in this matter.

Plaintiffs have filed objections to the R&R. Following a hearing and de novo review, see Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc., 99 F. Supp. 2d 174, 176 (D.R.I. 2000), this Court adopts the R&R of Judge Martin with the following clarifications and revisions.

Plaintiffs do not object to the remand of their application to the Zoning Board, but seek clarification as to its scope. Accordingly, this Court orders that remand will be solely to allow Plaintiffs to satisfy the five prerequisites for issuance of a Special Use Permit under the Charleston Zoning Ordinance, with which Plaintiffs have previously failed to comply, see R&R at 23-24, and that further denial of the application may only be based on Plaintiffs' failure to satisfy these requirements.[2] Furthermore,

[2] Following review of the record in this case, the Court agrees with Judge Martin that "the record does not appear to support the denial of Plaintiffs' application on any basis other than Plaintiffs' failure to satisfy the prerequisites for issuance of the Special Use Permit." R&R at 25 n.21. Defendants' counsel agreed at oral argument that this should be the only ground for further denial. (Tr. at 31-

the Court orders the Zoning Board to issue its written decision on this matter (assuming no delay caused by Plaintiffs) within sixty days of the issuance of this Order. The written decision should comply fully with the requirements of 47 U.S.C. § 332(c)(7)(B)(iii).

As to Judge Martin's recommendation that Defendants' should be granted summary judgment on Plaintiffs' effective prohibition claim, this Court does not agree that there is no question of fact remaining on this issue. While it is true that the burden on Plaintiffs to prove this claim is heavy, see Town of Amherst v. Omnipoint Communications Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999) ("[T]he burden for the carrier invoking this provision is a heavy one: to 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.") (emphasis in original), there is sufficient evidence in the record to support the conclusion that Plaintiffs could carry their burden at trial. As Judge Martin noted, "there are statements by some Board members in the record which appear to reflect a hostility towards Plaintiffs' application that extends beyond the failure of Plaintiffs to satisfy the Zoning Ordinance's prerequisites." R&R at 29-30 (citing to record). "[T]hese statements suggest that even if Plaintiffs had complied with all

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32.)

the requirements of the Zoning Ordinance the Board would not have approved Plaintiffs' application." Id. at 30. Nevertheless, Judge Martin felt that the combination of Plaintiffs' heavy burden and the fact of Plaintiffs' "multiple failures to comply with the prerequisites for issuance of a Special Use Permit," R&R at 30, entitled Defendants to summary judgment. This Court, however, concludes that the statements alluded to above preclude entering such an order. Compare Town of Amherst, 173 F.3d at 14 (stating that a "zoning authority['s] announce[ment] that no towers will ever be allowed" could satisfy the effective prohibition standard), with R&R at 30 n.28 (quoting Zoning Board member) ("I'd like to go back to using an operator on the phone. To me that was the best coverage we had. Today we have nothing but aggravation. You can't sell this to me.").

Finally, as recognized by Judge Martin, the recommendations as to the remaining issues raised by Defendants' summary judgment motion become moot in light of this Court's rulings herein. See R&R at 25 n.22 ("Although . . . the court's conclusion that . . . the matter be remanded to the Board renders Defendants' Motion for Summary Judgment moot, in the interest of completeness (and the possibility that the recommendation as to Plaintiffs' Motion for Summary Judgment may not be accepted), the court proceeds to consider Defendants' Motion for Summary Judgment.").

For the foregoing reasons, the Court hereby ORDERS as follows:

1. The Report and Recommendation of Magistrate Judge Martin is ADOPTED subject to the following clarifications and revisions;

2. Plaintiffs' application to construct a telecommunications tower is remanded to the Zoning Board with instructions to issue a written decision on the matter, in accordance with 47 U.S.C. § 332(c)(7)(B)(iii), within sixty days of this Order;

3. The only ground for further denial of Plaintiffs' application is failure on the part of Plaintiff to satisfy the five prerequisites for issuance of a Special Use Permit under the Charleston Zoning Ordinance, with which Plaintiffs have previously failed to comply;

4. Defendants' Motion for Summary Judgment on Plaintiffs' effective prohibition claim is DENIED; and

5. The remainder of the issues raised by Defendants' Motion for Summary Judgment are MOOT.

IT IS SO ORDERED.

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William E. Smith
United States District Judge
Date: