



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT - AGENDA

Meeting Type: Regular Meeting
Meeting Location: **Room 306, McConnell Center** – 61 Locust St., Dover, NH 03820
Meeting Date: **Thursday, November 15, 2018**
Meeting Time: **7:00 pm**

1. ATTENDANCE

2. APPROVAL OF MEETING MINUTES OF OCTOBER 18, 2018

3. HEARINGS

None.

4. OLD BUSINESS

A. Approval of Written Decision on Z18-07

B. Z18-07R, a Motion for Rehearing of Z18-07 by Industrial Tower and Wireless, LLC, where Z18-07 was a variance request by Applicant Industrial Tower and Wireless, LLC and Owners Peter and Susan Rousseau, 200 Henry Law Avenue (Tax Map K, Lot 1), located in the Rural Residential (R-40) Zoning District, to permit the construction of a new, 180-foot tall telecommunications tower on the above referenced property, where the construction of new telecommunications towers is only permitted on 15 parcels specified by the Zoning Ordinance. The request was denied on October 18, 2018.

5. OTHER BUSINESS

6. ADJOURN

Persons with questions or interested in reviewing the meeting materials are invited to visit the Planning Department located in City Hall, open Monday-Thursday from 8:30 am to 5:30 pm and Friday from 8:30 am to 4:00 pm. The meeting materials are also available online at www.dover.nh.gov. Follow us on Twitter @DoverNHPlanning and find us on Facebook at <https://www.facebook.com/DoverNHPlanning>.



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ZONING BOARD OF ADJUSTMENT - MINUTES

Meeting Type: Regular Meeting
Meeting Location: Room 306, McConnell Center – 61 Locust St. Dover, NH 03820
Meeting Date: **Thursday, October 18, 2018**
Meeting Time: **7:00 pm**

1. ATTENDANCE

Members Present: Bob Hall (Vice Chair), Frank Landford, Otis Perry, George Reagan, Anthony Sillitta (Alternate), Rich Onufry (Alternate)

Members Absent: Chris Prior (Chair), Nick Couturier (Alternate)

Staff Present: Elena Piekut (Assistant City Planner, Zoning Administrator)

The Vice Chair called the meeting to order at 7:00 p.m. He introduced the Board and staff present to the audience and explained the process used to hear cases.

2. APPROVAL OF MEETING MINUTES OF SEPTEMBER 20, 2018

Motion: Otis Perry moved to approve the meeting minutes of September 20, 2018 as written. Frank Landford seconded.

Vote: 5 in favor with George Reagan abstaining.

3. HEARINGS

- A. Z18-13 Applicant Charles Robbins and Owner Fred E. & Ruth K. Riley Trust 1991, 64 Littleworth Road (Tax Map G, Lot 2), located in the Rural Restricted Industrial (I-2) Zoning District, request a special exception per Section 170-12.A of the Zoning Ordinance to permit a vehicle refueling and recharging station with an accessory retail store.

Motion: Otis Perry moved to table the case to November 15th. Frank Landford seconded. U/A

- B. Z18-17 Applicant Mark G. Phillips and Owner TSB Properties, LLC, 447 Sixth Street (Tax Map D, Lot 12), located in the Assembly and Office (I-4) Zoning District, request a variance from **Section 170-12.A** to permit open storage, where it is not a permitted use.

This application was withdrawn by the applicant.

- C. Z18-07 Applicant Industrial Tower and Wireless, LLC and Owners Peter and Susan Rousseau, 200 Henry Law Avenue (Tax Map K, Lot 1), located in the Rural Residential (R-40) Zoning District, request a variance from **Section 170-22.C(1)** of the Zoning Ordinance to permit the construction of a new, 180-foot tall telecommunications tower on the above referenced property, where the construction of new telecommunications towers is only permitted on 15 parcels specified by the Zoning Ordinance.

Motion: Otis Perry moved to remove the case from the table. George Reagan seconded. U/A

Steve Grill of Bedford, NH presented the case on behalf of the applicant. He addressed the two remaining issues:

1. The possibility of using 101 Back Road as an alternative

There were lengthy negotiations between T-Mobile and Mr. Binnie over a year's time and the parties were unable to come to terms. If they had come to terms, a variance still would have been required.



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2. The height issue

The original proposal was for 180' with a 175' center line height. Below 140' center line the coverage breaks up. They can compromise to 155' center line height which will make the tower 160'. The board would be able to approve with the height restriction condition. At that height there is a possibility of one more carrier using the tower.

Mr. Grill mentioned he submitted a letter enumerating the variance criteria on July 12th which is in the record, but he could enumerate them orally if the board preferred.

The board members asked clarifying questions of Mr. Grill and Gerry Squires, T-Mobile agent which they addressed. Bob Hall wondered whether the shot clock has expired and if the applicant would be willing to extend another 60 days if needed. The applicant will agree to that.

After a brief recess for Mr. Grill to confer with his client, he returned and stated regarding the 20' additional height issue, his client is agreeable.

Regarding the second issue of fees, they are worried about setting a precedence paying attorney fees. One option to address the issue is to make it a condition of approval. The other option is for it to be billed as special consultant fees.

Bob Hall stated the board needs five voting members. There were four full members in attendance and two alternates. After reviewing the previous minutes, Rich Onufry was asked to vote since he had attended more meetings on the topic.

The board heard a report from the technical consultant, IDK. Ivan Pagacik spoke on behalf of IDK Communications. The board asked clarifying questions about gap vs coverage of Mr. Pagicik which he answered.

Motion: Otis Perry moved to reopen the public hearing. George Regan seconded. U/A
Ms. Piekut read into the record three emails from members of the public.

Public hearing opened.

Matt Walker, 45 Samuel Hanson Ave is opposed to the tower. If it had been there before, he would not have moved in there. This is for potential customers- he hasn't heard any current T-Mobile customers in favor of this tower.

Doug Eason, 2 Penny Ln is opposed due to potential negative health impacts, future real estate value impact and aesthetics. He also mentioned Mr. Binnie was not here to give his account of the negotiations.

Colleen Walker, 45 Samuel Hanson Ave wondered if the board agreed that the applicant has met the criteria and also how much of the attorney consultation fee is in question. She thought perhaps the board should review if there is a need for more parcels where this use is allowed, but not to put it at this location.

Mr. Grill addressed the public comments. Health impacts are regulated at the federal level.

Public hearing closed.



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Motion: Otis Perry moved to deny the application. Rich Onufry seconded.

Discussion:

The board discussed whether the variance criteria were met.

Otis Perry: He was not convinced the hardship criteria were met. The basis of the hardship argument was a business decision because negotiations broke down between the original parties- though no proof of this was supplied.

Regarding the gap in coverage issue; the federal regulation stipulates 'adequate coverage' which is vague.

One hardship criterion is that the land cannot be used in accordance with the existing zoning, but the land is currently being used in accordance with the existing zoning for agricultural purposes.

As a licensed real estate broker, he believes the neighboring properties would experience diminution of value if the tower was put at this location.

Dover has a Tower Location Ordinance. It is not in the spirit of the ordinance to address inadequacies by variance.

Rather, that Zoning ordinance would need to be addressed.

There's no evidence that public safety would be enhanced by the location.

Due to the application not meeting those four criteria, he would not support the application.

George Regan: There was not enough information given to support the hardship criteria. The board has to look at the big picture and compare the hardship to the current zoning. He understands the economic challenge for the applicant regarding the one-year term, but the board has to look at the benefits to the City as a whole. Due to these issues, he would not support the application.

Rich Onufry: He agreed with all that has been spoken. The hardship issue has not been demonstrated.

Frank Landford: He doesn't believe the hardship or public interest criteria have been met.

Bob Hall: He doesn't believe the application benefits the public interest. There has been a large outpouring of public in opposition to this application.

The application is not in the spirit of the ordinance. There is an ordinance in place directing where these towers are allowed.

He believes the property values in that area will be affected by the tower.

A hardship case does not exist in this instance- for the reasons already stated.

Vote: U/A to deny the application.

4. OTHER BUSINESS

NONE

5. ADJOURN

Motion: Otis Perry moved to adjourn. Anthony Sillitta seconded. Vote: U/A. Adjourned: 8:45 p.m.

LAW OFFICE OF STEVEN E. GRILL
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November 7, 2018

BY EMAIL and FED EX

Zoning Board of Adjustment
City of Dover, NH
City Hall - 288 Central Avenue
Dover, NH 03820
ATT: Ms. Elena Piekut, Assistant Planner/Zoning Administrator

Re: **MOTION FOR REHEARING**

Case No. Z18-07

Application of Industrial Tower and Wireless, LLC, for a Variance for a Wireless
Telecommunications Facility proposed to be installed at 200 Henry Law Avenue, Dover,
NH

Dear Members of the Board:

This letter shall serve as the Applicant's Motion for a Rehearing in the above matter pursuant to RSA Chapter 677. The Applicant respectfully submits that the decision of the Dover Zoning Board of Adjustment (the "ZBA") which disallowed the above Application was unlawful or unreasonable for each of the following reasons.

- 1. The ZBA has not provided the Applicant with a timely written statement of its reasons.**

Section 704 of the Telecommunications Act of 1996 (the "TCA") requires municipalities to provide a timely written explanation to the Applicant of the reasons for any denial of permission to construct wireless telecommunications facilities, such as the facility which was the subject of the Application herein. *See* 47 U.S.C. §332(c)(7)(B)(iii). The United States Supreme Court made this clear in *T-Mobile S. v. City of Roswell*, 572 U.S. ___, 135 S. Ct. 808, 816, 190 L. Ed. 2d 679, 691(2015) ("locality must provide or make available its written reasons at essentially the same time as it communicates its denial"). An even more specific requirement is imposed by New Hampshire law, which requires zoning boards to "provide the applicant with written reasons for the disapproval," RSA § 677:3, I, within five (5) days of the decision, RSA §677:3, II. And, the

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ZBA's own Rules of Procedure require that where, as in this case, an application for a variance is denied, "the notice [of the denial] shall include the reasons therefore [*sic.*]"

Moreover, the written decision must contain more than mere generalities or conclusions. *See, e.g., Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F. Supp. 2d 311, 318-319 (D. Mass. 2002); *New Cingular Wireless PCS, LLC v. Town of Greenfield*, 2010 U.S. Dist. LEXIS 94214 (D.N.H. 2010).

Despite these clear requirements, the only communication the Applicant has received from the City since the vote to deny its Application was taken by the ZBA on October 18, 2018, is a letter dated October 23, 2018, sent via email on October 24, 2018, which simply reports the results of the vote taken by the ZBA in open session following the close of the public hearing on October 18, 2018. No reasons have been provided.

The ZBA's failure to provide a written explanation of the reasons for its denial is unreasonable and contrary to law, and is prejudicial to the Applicant's ability to exhaust its administrative remedies by seeking a rehearing.

The Applicant files this Motion for a Rehearing based on its notes and recollections of the deliberations which occurred following the October 18 public meeting. It reserves all rights with respect to the failure to furnish a written statement of reasons as required by the authorities cited above. This includes, but is not limited to, the right to object to any grounds for denial which were not clearly discussed and voted on by the ZBA during its deliberations. This also includes the right to amend this Motion as permitted by New Hampshire law.

2. The ZBA committed errors of law by examining grounds other than hardship, and then compounded this error by applying the wrong hardship standard.

Article XIII, Section 170-52.C (4) of the Dover Zoning Ordinance provides that the Dover Zoning Board of Adjustment ("ZBA") is empowered to grant a variance "where unusual difficulty or special hardship would be imposed by the literal application and rigorous enforcement of this Chapter." Although the City is free to impose all of the more rigorous criteria contained in the applicable New Hampshire statute, RSA 674:33, it has not done so. Thus, to the extent the ZBA considered factors other than "unusual difficulty or special hardship" when it decided the Applicant's request for a variance, it went beyond the power granted to it by the Zoning Ordinance. The ZBA thus committed an error when it deliberated concerning the factors other than hardship which are enumerated in the New Hampshire statute, RSA 674:33; the Zoning Ordinance directs the ZBA to consider only "unusual difficulty or special hardship" when deciding a request for a variance.

Even more important, the ZBA did not apply the correct definition of "hardship," which has a special meaning in cases where a wireless carrier needs to close a significant gap in coverage. The existence of such a gap is a "unique circumstance" which warrants a finding of a "hardship" if the proposal is the only feasible way to close that gap. In such a case, a grant of a zoning variance is required "in order to avoid an effective prohibition of wireless services." *Nextel Communications*

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of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F. Supp. 2d 396, 406-07 (D. Mass. 2002) (“the general law in Massachusetts regarding variances” gives way to federal law in the “special case” of wireless communications facilities.) The court in the *Wayland* case explained that a zoning board cannot deny a variance if in so doing it would have the effect of prohibiting wireless services. *See id.* at 406. In addition, the possibility that a zoning decision might violate the TCA is evidence which a local zoning authority must take into account. *See id.*

Although *Wayland* involved Massachusetts zoning law, the same principles are routinely applied in New Hampshire. *See, e.g., New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 U.S. Dist. LEXIS 26739, ** 9-10 (D.N.H. 2014) (where a significant coverage gap exists but the municipality does not support a proposed facility because it prefers “other solutions on aesthetic grounds,” the municipality must identify the other feasible alternatives); *Indus. Communs. & Elecs, Inc. v. Town of Alton*, 2012 U.S. Dist. LEXIS 135158 (D.N.H. 2012) (where evidence established that zoning regulations made it impossible to provide adequate coverage without a variance, ZBA's decision to deny a variance had the effect of prohibiting the provision of wireless services in violation of federal law.) The New Hampshire Supreme Court has expressly recognized this interplay between federal law and New Hampshire law. *See Daniels v. Town of Londonderry*, 157 N.H. 519 (2008) (local land use officials must consider federal law when deciding applications for permission to construct wireless facilities, because federal telecommunications law acts like an “umbrella” over otherwise applicable state law). *See also, Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38 (1st Cir. 2009); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2nd Cir. 1999); *Nextel v. Manchester-by-the Sea*, 115 F. Supp.2d 65, 66-67 (D. Mass. 2000). Instead of addressing the unique federal law issues raised by the Application, however, the ZBA's analysis purported to “balance” T-Mobile's need to provide reliable in-building coverage with unspecified interests of City residents in the vicinity. For present purposes, it suffices to say that there is no authority for using this type of “balancing” test to determine whether or not to allow construction of a wireless antenna facility.

3. The ZBA's denial was not supported by substantial evidence contained in a written record.

In addition to the requirement of a written decision, discussed, above, the TCA requires that the reasons for denial of an application to construct wireless telecommunications facilities be “supported by substantial evidence contained in a written record.” *See* 47 U.S.C. §332(c)(7)(B)(iii).

It is the Applicant's understanding and recollection that the ZBA denied the Application because: (1) although the ZBA had retained special counsel to advise the ZBA concerning TCA issues, the ZBA was unsure how to define a significant gap in coverage; (2) the ZBA concluded that whatever the definition may be, there was insufficient evidence of a significant gap in coverage; (3) in order to determine whether a “hardship” existed, the ZBA applied a balancing test and concluded that the interests of City residents outweighed the interests of the Applicant and its proposed tenant, T-Mobile, in closing its coverage gap, which the ZBA described as a “sliver;” (4) the ZBA concluded that the Applicant and T-Mobile had not adequately explained why the parcel known as 101 Back Road as unavailable; (5) the ZBA concluded that the Applicant had not adequately explored other

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unspecified alternatives to the proposed site at 200 Henry Law Avenue; and (6) the ZBA concluded that the value of neighboring properties would be adversely affected if the variance requested by the Applicant were allowed.

The ZBA did not address several other issues that were and still are relevant to this Application during its deliberations on October 18. The issues not reviewed include the results of the balloon test which the ZBA had required the Applicant to conduct, and which established that even at the full height of 180 feet, the facility would not be as obtrusive as many had feared. The ZBA also did not review the Applicant's proposal to limit the height of the proposed tower to 160 feet, rather than the 180 feet which had initially been requested, or the fact that building a tower at any other alternative location, including 101 Back Road, would require a variance. The ZBA also did not identify any alternative location, other than 101 Back Road.

To the extent grounds were discussed by the ZBA during its public deliberations and determined to support the denial of the Application, none of those grounds is supported by substantial evidence in the written record.

First, the evidence in the written record required a factual finding that there is a significant gap in coverage. As the Applicant explained at several points during the hearing process, a significant gap simply means that more than a *de minimus* number of people – potential customers as well as actual customers – do not have reliable wireless service. *See, e.g., Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643-644 (2nd Cir. 1999). Although a case-by-case analysis is appropriate and there is no single bright line test, lack of adequate coverage to even a single important thoroughfare in a community will amount to a “significant gap.” *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009). Here, the Applicant's evidence established that, based on 2010 Census data, 1,568 people live in the area of Dover which the Applicant's proposed tenant, T-Mobile would serve by the proposed facility. Based on the same Census, the City has a total population of 29,987, so the area in question contains 5.2% of the City's population. T-Mobile cannot presently provide reliable “in-building” coverage to this area. This inadequate coverage was confirmed by the independent consultant hired by the City, who concluded that three major roads and the surrounding neighborhoods lack reliable service. This evidence plainly established a “significant gap” in coverage.

Second, the record required a finding by the ZBA that the 101 Back Road parcel was not a feasible alternative. In this regard, the evidence established that the Applicant had selected one of only a few large parcels in the vicinity, making it certain that the Applicant could meet the setback requirements contained in the Dover Zoning Ordinances. The only other alternative identified during the months of hearings, 101 Back Road, was not available. The evidence established that the Applicant's proposed tenant, T-Mobile, had negotiated with the owner of 101 Back Road for approximately one (1) year and had agreed in principle to subsidize the owner's construction of a large new cell tower, and then to rent space on that tower so that it could deploy antennas. However, the lease negotiations ultimately fell apart when the owner of the parcel insisted on the right to terminate the lease without cause, on one year's notice. Planning Staff issued a Memo dated July 16, 2018, in which Staff reported statements it claimed had been made by the owner of the 101 Back Road parcel. Staff argued that these statements showed the reason why negotiations

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broke down was not as clear as what T-Mobile had explained; in this regard, the Memo reports that the owner of the parcel stated that “the negotiations dropped off, and [he] doesn’t recall one party or the other pulling out, they just dropped off.” T-Mobile, however, provided the testimony of its agent at the October 18 hearing. He stated on the record that T-Mobile asked only for terms which are customary in its industry, including the ability for T-Mobile to terminate only for extraordinary events such as a loss of its FCC license. It ceased negotiations when the owner inserted a new term at the eleventh hour, seeking to give the owner the right to terminate the lease *without cause*. *See also*, emails exchanged between Attorneys Grill and Hilson on July 18 and 19, 2018. The Applicant was not required to go further to explain the reasons for T-Mobile’s business determination that 101 Back Road was unavailable on commercially reasonable terms. Stated another way, T-Mobile cannot be forced to agree to a lease containing a term which is outside the norms of its industry. Moreover, there was no reason to believe that a 180-foot (or taller) tower at 101 Back Road would have been more acceptable to area residents than the facility proposed for the nearby location off Henry Law Avenue. The ZBA should not have attempted to second guess T-Mobile’s business judgment. There was no evidence that T-Mobile’s decision to withdraw after months of negotiations was pretextual or otherwise improper. The ZBA should have found that 101 Back Road was not available as an alternative.

Third, there was no basis for the ZBA to conclude that the Applicant should have done more to investigate additional alternatives. Despite keen interest on the part of Staff and area residents in finding an alternative to the site which was the subject of this Application, no one identified any such alternative, let alone any alternative that had features which might help make the facility less objectionable to area residents. Similarly, despite repeated requests for information throughout the hearing process, the ZBA never requested that either the Applicant or the City’s independent consultant identify any such alternatives, although it easily could have. *See, e.g.*, letter of Attorney Grill to Attorney Hilson, dated June 1, 2018 (responding to seven items contained in a Staff email as well as other items that had been raised at the May 22, 2018, public hearing). In fact, the issue of an investigation into other alternatives was never raised at all until the last hearing, on October 18, 2018. Most importantly, even casual knowledge of the area is enough of a basis to conclude that no better alternatives exist; as the Applicant repeatedly stated, there are only a few large lots close enough to the T-Mobile coverage gap, and none of these would allow for better screening of the proposed facility from the neighborhood.

Fourth, the general concerns of residents in the area simply are not the kind of “substantial evidence” upon which a denial can be based. To be sure, a few dozen people (out of the nearly 1,600 people in the area) signed a petition expressing opposition to the facility. However, neither the TCA nor New Hampshire law grants residents an unrestrained veto power over proposed wireless facilities; any other principle would gut the special legal protections granted to developers of these kinds of facilities. To the contrary, any objections must be grounded in the specifics of the case. The concerns voiced by those residents who actually appeared at the hearing and testified (which was a much smaller number than the signers of the petition) also did not amount to substantial evidence. These people testified to fears about the health effects of a cell tower, the aesthetic impact of a tower, and potential impacts on their property values, but these were all general concerns which would apply to any cell tower in this vicinity, regardless of the specific parcel on which it was placed. As such, the concerns cannot be used as a basis for denial. *See*

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Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51, 61 (1st Cir. 2001); *Nextel Communications Inc. v Manchester-by-the-Sea*, 115 F. Supp.2d. 65, 71-72 (D. Mass. 2000); *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury*, 2003 U.S. Dist. LEXIS 2642, *42-43 (D. Mass 2003).

Finally, there was no substantial evidence regarding any adverse impact on property values. In this regard, the only competent evidence was submitted by the Applicant, in the form of the report of Real Estate Consultants of New England, Inc., submitted on or about May 9, 2018. That report examined relevant data, including data concerning residential properties located near other cell towers in Dover itself as well as in the neighboring City of Rochester, New Hampshire. The report also included the results of a national e-mail survey of appraisers and assessors. Based on the data reviewed, the report concluded that “the proposed tower [at 200 Henry Law Avenue] will have no measurable impact on surrounding property values due to proximity or visibility.” On this record, the ZBA could not have found that the proposed facility would impact on the value of neighboring properties.

All of the concerns about the impact of the tower, while sincere, were merely the generalized concerns that apply to any cell tower located near residential property and were not specific to the proposed site. These concerns thus should not have been used as a basis to deny the Application.

In addition, there was no substantial evidence that the other variance criteria discussed by the ZBA (public interest, substantial justice, and spirit of the Ordinance) were not satisfied by the Applicant’s evidence. Assuming for the sake of argument that these other criteria apply, the ZBA did not explain why each of them had not been satisfied.

In summary, the evidence established a significant gap in coverage, and established that there were no feasible alternatives to the 200 Henry Law Avenue parcel. The Applicant thus established a right to a variance under applicable law.

4. The ZBA’s decision has the effect of prohibiting T-Mobile from providing wireless telecommunications services.

The TCA forbids municipalities from regulating wireless facilities in a manner which effectively prohibits wireless carriers, such as the Applicant’s proposed tenant T-Mobile, from providing reliable wireless coverage. *See City of Manchester*, 2014 U.S. Dist. LEXIS 26739 at **4-7. Thus, once a significant gap in coverage has been shown, a municipality cannot neither reject the only feasible alternative nor apply its criteria in a manner which results in a denial and reveals that any future applications are likewise doomed to fail. *See, e.g., Omnipoint Commc’ns MB Operations v. Town of Lincoln*, 107 F. Supp. 2d 108, 115 (D. Mass. 2000); *Town of Amherst v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9, 14 (1st Cir. 1999) (“If the criteria [in a local ordinance] 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.”)

Here, a significant gap indeed exists. As already noted above, the term “significant gap” plainly includes an inability to provide reliable in-building coverage to more than a *de minimus* number

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of consumers. Under this well-accepted definition, T-Mobile's inability to provide reliable coverage to an area in which more than 5% of the City's population lives is a "significant gap."

Thus, the real question in this case is simply whether the record establishes either that the only feasible alternative has been rejected, or that any other applications would be subjected to the exact same objections and, thus, would be doomed to fail.

There are no feasible alternatives to 200 Henry Law Avenue.

On the record evidence, the ZBA had no basis to conclude that feasible alternatives might exist. T-Mobile negotiated for approximately one year with the owner of the 101 Back Road parcel before concluding that it would not be feasible to reach a commercially reasonable deal with him. The owner had proposed building a new tower on that parcel, at an unspecified location which would have required obtaining a variance, obtaining permission to cross wetlands and obtaining other unspecified zoning relief. He expressed a willingness to allow T-Mobile to rent space on this facility, in exchange for sharing the cost of permitting and construction and paying monthly rent upon completion. But ultimately (and at the eleventh hour), the owner insisted on the right to terminate the T-Mobile tenancy without cause, on one year's notice. Although he never appeared to explain why he insisted on this term, presumably he wanted the freedom to re-develop this large residentially-zoned parcel in the event a more profitable opportunity presented itself. T-Mobile found the insistence on this new term to be unreasonable, and ended the negotiations. At that point, the Applicant began to pursue the variance it would need in order to construct a tower at 200 Henry Law Avenue to be utilized by T-Mobile.

In a Memo issued to the ZBA three days before the scheduled July 19, 2018, public hearing, Planning Staff reported that it had reached out to the owner of the 101 Back Road parcel, on its own initiative, one week before the July 19 hearing. The owner confirmed that there had been protracted negotiations with T-Mobile, but (according to the Memo) he reported that the negotiations had "dropped off" and he could not recall why. He did not deny that he had insisted on a right to terminate *without cause* on one year's notice, but rather (again, according to the Memo) blamed this position on T-Mobile's alleged insistence on a similar right to terminate. Once T-Mobile's agent finally had an opportunity to respond to this Memo at the October 18, 2018 hearing, however, he explained on the record that T-Mobile had only asked for a right to terminate in accordance with industry customs, based on extraordinary events such as the loss of its FCC license.

Even assuming for the sake of argument that report of the owner alleged statement's to Staff was entitled to weight by the ZBA in the absence of a witness willing and able to make these statements on the record, the report should have been deemed immaterial. The Applicant should not have been required to ask its proposed tenant to gather business records and other additional evidence, beyond the unequivocal testimony of its agent concerning the reasons why negotiations ended. What is more, the ZBA should not have taken it upon itself to second guess T-Mobile's business determination that 101 Back Road was not available on commercially reasonable terms. The negotiations were not a pretext. They indisputably took place with a serious purpose for a long period of time. Moreover, it cannot seriously be disputed that a new 180-foot tower on the 101

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Back Road parcel -- a height which the independent consultant retained by the ZBA found would be required at that location -- would have required a variance and would have faced the exact same hurdles as the proposed facility at the 200 Henry Law location.

In fact, in an email to the ZBA dated October 18, 2018, residents of Falcon Drive (a small residential development which abuts the 101 Back Road parcel) made it clear that they would have objected to any new tower on that parcel, as well, explaining that they consider a cellular antenna tower to be markedly different in character from the four existing AM radio antennas that currently populate that parcel. Because of this difference, they would oppose any new cell site at 101 Back Road, and for the exact same reasons used by the ZBA to deny the Application with respect to 200 Henry Law Avenue, even after the Applicant proposed lowering the height to 160 feet.

Other than the 101 Back Road parcel, neither Staff nor any other opponent of the proposed facility offered even a single idea as to what kind of alternative might be acceptable. *See Amherst*, 173 F.3d at 17 (when a municipality denies applications to construct wireless facilities, applicants are entitled to be given some idea of "what will do the trick").

It is undisputed that the City regulations restrict new towers to 15 specific locations and that none of these are close enough to the T-Mobile gap to make it feasible for T-Mobile to use it to close its gap. In fact, T-Mobile has already deployed antennas on towers which have been built at these sites, including several of the ones closest to the proposed location. It also recently installed antennas on a smokestack in downtown Dover, approximately one mile from the proposed new tower. Despite all of these antenna facilities, the City's independent consultant confirmed that T-Mobile has "LTE in building coverage gaps in the City of Dover in the Henry Law Ave, Court Street and East Watson Street areas." Therefore, T-Mobile needs to locate antennas on a new facility, to be built on a parcel on which such facilities are not permitted by the Ordinance.

The City's consultant also confirmed that a new facility at 200 Henry Law Avenue would allow T-Mobile to close this gap, although he determined that the full requested height of 180 feet was more than necessary. In response, the Applicant agreed to reduce the proposed height to 160 feet.

There simply are no other locations that are even remotely more suitable. The factors that the ZBA relied on in issuing its denial for the 200 Henry Law Avenue location would all apply with equal or greater force to any other parcel in the vicinity. Although the Applicant believes this to be obvious, the issue must be addressed now because, at the final hearing on October 18, 2018, the ZBA raised for the first time the question whether adequate efforts had been made to look for an alternative parcel.

It must be emphasized that, in order to meet the setback requirements for cell towers contained in Section 170.E.(3)(a) of the Dover Zoning Ordinance, for a 160-foot tall tower placed in the exact middle of a square parcel, the absolute minimum amount of land required is nearly three acres. Of course, it would be exceedingly rare to find a three-acre parcel that has no improvements or natural features which would prevent placement in the dead center, so generally speaking any lot would have to be considerably larger than three acres. Thus, a large lot is required. In addition, any

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location must be as far away from residential uses as possible, in order to minimize the aesthetic impact on such properties.

The general vicinity where the new facility needs to be located is zoned rural residential and is characterized by mixed uses. Although there are some agricultural and commercial uses, the area is largely residential. There are only a few large parcels. This includes the subject parcel at 200 Henry Law Avenue (approximately 55 acres) and the unavailable parcel at 101 Back Road parcel (approximately 25 acres). The other large parcels are, at best, obviously less suitable and in most cases are obviously not feasible at all.

For example, there are four parcels in the immediate vicinity of 200 Henry Law Avenue which are owned by the State of New Hampshire and held for conservation and public recreation (Tax Map Nos. K-2-0, K-1-B, N-18-1, and N-18-3). These are not available for construction of a tower, but even if they were, they are in the same vicinity as the proposed facility and would face all of the same objections.

As another example, the 3.39-acre parcel known as 38 McKone Lane (Tax Map No. K-1-A) contains a single-family home and is subject to conservation restrictions. Thus, in essence this entire parcel would be needed if the tower were to be located there, making it unusable for the existing residential use or for any other use. It would make no sense to suggest that the owners demolish their house so that a tower could be built. And, again, this is the exact same vicinity as the proposed location, making it subject to all of the same objections.

The Ayer Trust owns two parcels on McKone Lane. The first (Tax Map N-18-2) is only a little more than one acre, and abuts land which is subject to a conservation easement. It is obviously unsuitable. The other property owned by that Trust, 100 McKone Lane (Tax Map N-18-6) is also likely too small, with only 5.44 acres compared to the approximately 55-acre site which is the subject of the Application. And, once again, each of these parcels is as close to the same neighbors who voiced strong opposition to a tower at 200 Henry Law Avenue. A tower on either of these other parcels would certainly provoke the same sentiments.

Locations to the east and south are even less feasible. While there are a handful of parcels that are large enough in this vicinity, the land begins to slope downward, making the elevation too low to build a structure that could reach the area where T-Mobile already has a coverage gap. For example, the 66-acre property owned by Williams and Preston at 105 Middle Road (Map No. K-6-0) is obviously too low to be considered feasible; in order to reach the area where the gap exists, any tower would need to be much taller than the 180-foot maximum height contained in the Ordinance's Performance Standards. And, like all of the other parcels in this vicinity, nearby residential uses make it self-evident that the neighbors would oppose the idea of a tower at this location.

It also bears repeating that much of the area to the east and south is already served by T-Mobile from other sites, especially the existing site at 286 Middle Road, where T-Mobile has antennas installed on a large guyed tower at a height of 205 feet above grade. *See* letter from Attorney Grill dated April 26, 2018, and attached coverage maps. This was discussed at some length during the

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public hearings. Looking for a site in an area where coverage already exists would make no sense at all.

In short, it is clear that in order to close its coverage gap, T-Mobile needed to receive a variance for the location it selected, because there are no other feasible alternatives.

Any other application is doomed to fail.

Based on the criteria used by the ZBA to decide the Application, any other application would fare no better; as with the 200 Henry Law Avenue location, any other site would also require a variance, and any other site would be subject to the exact same objections from residents as 200 Henry Law Avenue.

Importantly, the ZBA has already concluded that T-Mobile does not have a “significant gap” in coverage, and that the concerns of neighboring residents about things such as health and property values therefore outweigh any desire by T-Mobile to provide additional service to its customers (and potential customers) in this section of Dover. This conclusion, applied to any other application, would result in denial of a variance.

And, the ZBA has also rejected the Applicant’s statements, contained in its Application and reiterated throughout the hearing process, that there simply are no other alternatives, let alone alternatives that are better suited. In fact, throughout the entire hearing process not a single alternative to 200 Henry Law Avenue was suggested by anyone, other than 101 Back Road which is simply not available for the reasons already stated. Similarly, the ZBA did not ask its independent consultant to look for or to analyze any other locations.

The fact the City’s Planning Staff is hostile to any new facility in this part of the City is also significant. *See Amherst*, 173 F.3d at 14. In this regard, the Staff submitted a Memo dated April 19, 2018, before the ZBA had held even a single hearing, recommending that the Application be denied. This Memo erroneously assumed that the Application, which sought a variance to build personal wireless service facilities as that term is defined by the TCA, was not entitled to the protections of the TCA because the TCA does “not apply to speculative developers of tower structures.” The Memo also erroneously recommended that the Application should be denied *without even affording the Applicant an opportunity to present evidence or address legitimate concerns at a public hearing*.

Staff’s subsequent actions continued to reflect a bias against the construction of a facility in this area of Dover. For example, on or about July 12, 2018, the Staff decided to contact the attorney for the owner of the 101 Back Road parcel via email. In that email, Staff states that the Applicant had suggested that the landowner had been unreasonable during negotiations, “which is out of line with our experience,” and used other language and punctuation which clearly suggested the answers that the Staff wanted to receive. The unusual maneuver of soliciting statements from another landowner who arguably has a financial incentive in the outcome of a hearing is evidence that, even after months of hearings, Staff was still trying to influence the outcome. That is, Staff was still dead set against a new wireless facility in this part of Dover, regardless of the evidence

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and the applicable law. Knowing that T-Mobile had already rejected the 101 Back Road site, Staff took the obviously erroneous position that a new cell tower could have been built on the 101 Back Road parcel without a variance. Given the fact that this parcel is not one of the fifteen parcels enumerated in the Ordinance where towers can be built as a matter of right, this position is simply wrong. In fact, at the time Staff made this statement, it had not even determined the size or location of any such tower, because no such details had ever been provided by the landowner.

It also bears repeating that 101 Back Road was in no way a “better” alternative than 200 Henry Law Avenue. The closest residential neighbors on Falcon Drive made it clear that, while they were prepared to accept the four existing AM antenna towers at 101 Back Road, they would not accept a new cell tower at that location. *See* email dated October 18, 2018, from Janine Terry Flanders to the Zoning Board (stating that a 180-foot cell tower “is larger, more unsightly, and send[s] out different types of emissions than a radio tower. We feel that comparison is like apples to oranges and no one [who owns property on Falcon Drive] is in favor.”)

As one further example, at the final hearing, Staff suggested for the first time that additional locations should have been investigated, but failed to point to even a single parcel that it believed might be better suited for a cell tower. Staff is plainly very familiar with this part of Dover, and was obviously opposed to the 200 Henry Law Avenue location. If there were really any better alternatives, Staff would have identified them. Staff, however, did not do so.

In short, Staff’s opposition to the Application and its insistence that it be denied, without acknowledging the Applicant’s right to the protections of federal law and without suggesting any way for the Applicant’s proposed tenant to close its significant gap in coverage, demonstrates that Staff is simply unprepared to support any application for a new tower in this part of the City.

Although the extent to which the ZBA was influenced by Staff’s submissions is unclear, it stands to reason that the hostile environment is one more reason to conclude that any further applications will not succeed.

As a result of the City’s Ordinance which necessitates a variance for any facility that would be capable of providing the needed coverage and the manner in which the City determined the Applicant’s request for such a variance, coupled with the demonstrable hostility of the City’s planning staff towards the building of such a facility in the area in question, there simply is no way that any other application could succeed. As such, the evidence demonstrates that the City has effectively prohibited wireless services in a manner which violates the TCA.

The Applicant should be granted a rehearing.

The Applicant respectfully requests that the ZBA grant this Motion for a Rehearing so that it can then re-open its deliberations in order to address and correct each of the errors identified above. In particular, it should: (1) reconsider the determination of a lack of hardship using the correct criteria and standards established by federal law, New Hampshire law, and the Dover Zoning Ordinance; (2) reconsider the evidence submitted by the Applicant and the lack of substantial rebuttal evidence on each of the points identified above; (3) find that the Applicant and its proposed tenant, T-

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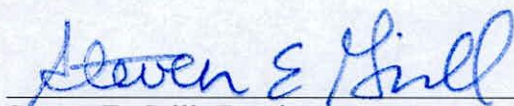
Mobile, established the existence of a significant gap in coverage; (4) find that no other feasible alternatives were identified during the months of hearings; (5) find that there are, in fact, no other feasible alternatives; (6) find that the Applicant's proposal to limit the height of its proposed facility to 160 feet was a reasonable way to address and to mitigate the concerns of the City residents who voiced objections to this proposal; and (7) grant this Application for a variance.

The Applicant does not believe that any new evidence is required in order for the ZBA to grant this requested relief. In the event, however, that the ZBA believes additional information about the lack of feasible alternatives is necessary for its determination, then the Applicant requests that the public hearing be reopened solely to receive evidence as to this single issue, which was raised for the first time at the final hearing on October 18.

Respectfully submitted,

INDUSTRIAL TOWER AND WIRELESS, LLC

By its Attorney:



Steven E. Grill, Esquire

cc: Christopher T. Hilson, Esquire (By email)