STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: March 31, 2014)

LINDA TUCKER and TUCKAHOE LAND CO. L.P.	:	
V.	:	**C.A. No. WC-2011-0538**
NORTH KINGSTOWN ZONING BOARD OF REVIEW, T-MOBILE NORTHEAST LLC, DANIEL PIRHALA, VINCENT BRUNELLE, JOHN GIBBONS, GREGG O'NEILL and STEVEN CRAVEN	:	

DECISION

K. RODGERS, J. Linda Tucker and Tuckahoe Land Co. L.P. (collectively Appellants) appeal from a decision of the North Kingstown Zoning Board of Review (the Board) granting a use variance, three dimensional variances, and a special use permit to T-Mobile Northeast LLC (T-Mobile) to construct a 120-foot telecommunications tower upon a residential lot located at 170 Slocum Road, North Kingstown, Rhode Island.

Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Board's decision is affirmed.

I

Facts and Travel

T-Mobile is a subsidiary of T-Mobile USA Inc., a national telecommunications provider, which, through its various subsidiaries, has a Federal Communications Commission (FCC) license to operate a digital personal communications wireless service

network throughout the country, including in Rhode Island and in the Town of North Kingstown. T-Mobile provides wireless service to customers through a network of antennae that broadcast signals between towers and to customers' wireless phones and devices. Antennae can be mounted on the exterior of towers or other structures or within the interior of a structure such as a unipole.

When T-Mobile discovers that an area within its network lacks sufficient coverage to provide its customers with reliable service to make and maintain calls, it tries to remedy the coverage gap by either looking for an existing tower on which to place antennae or, as a last resort, building one of its own. It is this type of "coverage gap" situation that provides the backdrop for the instant action.

T-Mobile had received complaints from Amtrak that customers would often lose cellular phone service while passing through a portion of the Amtrak line near Slocum Road along the North Kingstown/Exeter town line. Various properties in the vicinity of the Amtrak line were reviewed in order to ascertain where an antenna could be installed to address the coverage gap. Ultimately, T-Mobile identified 170 Slocum Road in North Kingstown as the ideal spot to locate a telecommunications tower, which, as originally planned, included exterior-mounted antennae. The proposed site, identified as Assessor's Map 56, Lot 11, is located in a Rural Residential zone and is owned by Alfred T. Cole, Jr. (the Property).

On November 10, 2010, T-Mobile filed an Application with the Board for various forms of relief. Specifically, T-Mobile sought: (1) a special use permit seeking relief from Article III, Land Use Table—Utilities Section of the North Kingstown Zoning Ordinance (the Zoning Ordinance) to operate the proposed telecommunications tower in

a Rural Residential zone; (2) a use variance under § 21-325(15)(a)[1] of the Zoning Ordinance in order to install the proposed telecommunications tower within 500 feet of a Scenic Overlay District; (3) a rear yard dimensional variance under § 21-325(15)(c)(3)[2] of the Zoning Ordinance to locate the proposed telecommunications tower seventy-two feet from the property line of an abutting residential property; (4) a side yard dimensional variance under § 21-325(15)(c)(3) to locate the proposed telecommunications tower within sixty-five feet from an abutting residential property; and (5) a dimensional variance under § 21-325(15)(c)(11)[3] to locate the proposed telecommunications tower 1.15 miles from an existing guyed tower located at the Yawgoo Valley Ski Area. See Application (Appl.) Ex. 1, Nov. 10, 2010.

T-Mobile's Application was duly presented to and reviewed by the North Kingstown Planning Commission (Planning Commission) in January and April 2011. In the course of the review sessions, the Planning Commission suggested several changes, and said changes were also included in the Town Planner's recommendations to the Board. The changes included: (1) replacing the exterior–mounted communications tower with a unipole/flagpole style, with all interior-mounted antennae; (2) relocating the position of the tower to the northeast corner of the Property; (3) reducing the size of the lease area from 3600 square feet to 3300 square feet; and (4) utilizing deer-resistant

[1] Section 21-325(15)(a) prohibits the placement of telecommunications towers within 500 feet of any Scenic Overlay District except by a use variance.

[2] Section 21-325(15)(c)(3), which regulates the placement of "Telecommunications towers" in the Town of North Kingstown, requires that "[c]ommunications towers . . . be set back from all property lines a minimum of one foot for each one foot of tower height. When the property abuts a residential district or historic district, the setback distance shall be 1.5 feet for each one foot of tower height."

[3] Section 21-325(15)(c)(11) requires that a monopole seventy-five feet in height or greater be located 1.5 miles from any other guyed tower.

plantings rather than arbor vitae. Tr. 6, May 31, 2011; see also May 4, 2011 report by Rebecca P. Lamond, AICP, Principal Planner to Board. T-Mobile implemented all the Planning Commission's recommendations and, by written decision dated June 21, 2011, the Planning Commission approved T-Mobile's plan. However, the changes requested by the Planning Commission also necessitated slight changes in T-Mobile's Zoning Board Application. T-Mobile submitted its revised Application and all supporting documents by way of a Supplemental Information Packet dated June 16, 2011 (Supp. Appl.) The revised Application sought a fifty-five foot rear property setback and a forty-five foot side yard property setback rather than seventy-five and sixty-five foot setbacks, respectively. See Supp. Appl., Ex. 1 at 4.

T-Mobile's Application was presented at public hearings before the Board on May 31[4] and July 12, 2011. Testifying on behalf of T-Mobile were radio frequency engineer Bryan Eicens[5] (Eicens), planning consultant Ed Pimental (Pimental), and site acquisition specialist Peter Fales (Fales). Appellants were represented by counsel at the two public hearings before the Board, and counsel had the opportunity to question each of the witnesses.[6] Appellant Linda Tucker (Tucker) also testified before the Board.

[4] Because the revised Application and site plan following the changes suggested by the Planning Commission had not yet been prepared and because the Planning Commission's decision had not yet been reduced to writing, the public hearing was limited in scope and testimony on May 31, 2011. See Tr. 19-21, 23-24, May 31, 2011. Although all other witnesses were present to testify at both hearings, Pimental appeared only on May 31, 2011.

[5] The hearing transcripts consistently spell his name as "Eicenens," however, the Application materials and T-Mobile's briefs spell the name "Eicens."

[6] Although all other witnesses were present to testify at both hearings, Pimental appeared only on May 31, 2011. Counsel for Appellants did question Pimental at that time. Tr. 21-22, May 31, 2011.

Eicens presented coverage maps to the Board which showed both the existing coverage in the area as well as the proposed coverage. Tr. 14-32, July 12, 2011; see also Supp. Appl., Ex. 3, at 10-15. Through the use of these maps, Eicens explained the different levels of coverage that could be achieved—more specifically the difference between reliable In-Building coverage and reliable In-Vehicle coverage.[7] He noted that coverage for the Amtrak line would require reliable In-Building coverage, a higher level of coverage than In-Vehicle. Tr. 15, July 12, 2011. He testified that, with the construction of the tower, T-Mobile hoped to achieve a level of -76 dBm[8] along the Amtrak line, which would provide reliable In-Building coverage to Amtrak passengers and would also address some customer complaints T-Mobile received from people living in the area. Id.

In order to determine the type of coverage needed, Eicens developed standard deviation propagation maps. Id. at 18. The predictions in the propagation maps were

[7] According to Eicens, "In-Vehicle coverage is the minimum level of acceptable coverage within the T-Mobile network in areas with low population and along major highways covering rural areas. One must bear in mind that designing for only the In-Vehicle coverage threshold will typically result in unreliable In-Building coverage, and hence customer dissatisfaction." Supp. Appl., Ex. 3, ¶ 10. In-Building Residential coverage, on the other hand, "is the mid-level of coverage within T-Mobile's network. In-Building Residential coverage is targeted for residential areas and low-rise commercial districts [.]" Id. at ¶ 11.

[8] In order to provide for the various levels of coverage, T-Mobile has scientifically determined the strength of the wireless signal necessary to provide each level. Supp. Appl., Ex. 3, ¶ 13. Eicens noted in his Affidavit:

> "Wireless signal strength is measured on a logarithmic power scale referenced to 1 milli-watt of power . . . . Signal strength levels less than 1 milli-watt being negative . . . . The smaller the negative dBm number, the stronger the signal . . . . T-Mobile's system requires an ambient signal level of -84 dBm to provide reliable In-Vehicle coverage, and an ambient signal level of -76 dBm to provide reliable In-Building Residential coverage." Id. at ¶ 15.

based on baseline data assembled by members of Eicens's team who would either ride the area in a vehicle or ride the Amtrak line with an antenna to measure signal strength. Id. at 16. While acknowledging that some of the poor reception areas on the existing map still show up on the proposed map, Eicens noted the reason is due to the remoteness of some of the areas for which thorough testing cannot be accomplished; however, should the tower go in, the poor reception areas would disappear. Id. at 17-18. Further, when asked if penetrating a steel train is the main reason for the coverage gap, Eicens answered that, while it may be a contributing factor, the primary reason for the poor coverage is the actual terrain of the area. Id. at 20. The terrain, however, would have relatively little impact on the tower as proposed on the Property because it provides the antennae with a clear line of site to the Amtrak line. Id. at 21.

Pimental authored a planning consultant report dated March 18, 2011,[9] and offered testimony concerning the appropriateness of the proposed tower siting. Tr. 8-11, May 31, 2011. Pimental noted in his testimony that aside from finding a location that meets the coverage goals, a primary concern when locating a tower is its impact on the residents. Id. at 8. Toward that end, Pimental prepared a neighborhood analysis of ten lots surrounding the Property. He noted that the nearest residence is 350 feet away from the tower; beyond that, the next two nearest houses are 600 feet away. Id. at 8-9. This density translates to one unit for every thirty-eight acres. Id. at 9. Based on this,

[9] This March 18, 2011 report was not separately identified and marked as an exhibit before the Board, but it was certified by the Town of North Kingstown as being part of T-Mobile's Application. A revised report dated June 14, 2011, was attached to T-Mobile's revised Application, see Supp. Appl., Ex. 5, but Pimental did not provide testimony at the subsequent July 12, 2011 public hearing before the Board.

Pimental concluded that the proposed tower on the Property would have limited impact on residents in the vicinity. Id.

Pimental also commented on the tower's impact on the Scenic Overlay District. He opined that while the tower would only be 280 feet from a scenic corridor, i.e., Slocum Road, rather than the 500 feet required by the Ordinance, placing the tower further back from the road would require an extended driveway that, itself, would inhibit the agricultural vista. Id. at 10. Pimental further noted that the existence of surrounding tree lines would help mitigate any visual impact on the Scenic Overlay District. Id.

Fales testified as to the various properties he explored to find a suitable placement for T-Mobile's tower. Tr. 6-14, July 12, 2011. His findings were also documented in an Affidavit he executed on November 14, 2010, submitted in connection with T-Mobile's original Application. See Appl., Ex. 5. Fales noted that he could find no solution that would not require one or more variances. Tr. 7, July 12, 2011. He listed the parcels he studied and the reasons they were discounted and concluded that the Property was the only viable option. Id. at 7-13; see also Appl., Ex. 5, ¶¶ 8-19. While the subject Property is zoned Rural Residential, Fales did look at neighboring plats for any Industrial or Business zones; however, he determined that none offered feasible solutions. Tr. 10-13, July 12, 2011.

Tucker, either individually or as a partner in Appellant Tuckahoe Land Co. L.P., owns property abutting the Property to the east and south, as well as two additional house lots at 70 Slocum Road and 897 Indian Corner Road, approximately forty acres immediately across the street from the Property on the Exeter side of Slocum Road, and a residential development within a mile from the Property. Tr. 38-39, July 12, 2011.

Tucker testified the proposed tower would be visible from the house lots in that residential development as well as from her place of business at 757 Indian Corner Road. Id. at 39.

The Board unanimously voted to grant T-Mobile's Application on July 12, 2011. Tr. 59, July 12, 2011. A written decision was issued on July 29, 2011, and filed with the Town Clerk on the same day. According to the Board, its decision was based upon the following findings of fact:

> "1. The applicant meets the standards outlined in the Telecommunications Act of 1996. These standards mandate providers to meet coverage requirements for telecommunications customers. This can be considered as a hardship in granting a variance. The standards include identifying a significant gap in coverage and investigating other reasonable sites for tower placement.
>
> "2. There are no other parcels in the coverage area that would not require relief from the requirements of the Zoning Ordinance. The parcel is unique in that it meets the coverage requirements in the search area. The relief to be granted is the least relief necessary.
>
> "3. The applicant investigated several other parcels in the coverage area however either the property owners were not willing to have the tower on their property, terms for the lease could not be agreed upon or the property itself was environmentally constrained and not conducive to tower placement. Some of these parcels would have required greater variances, were in the scenic overlay or were in more residentially dense areas. The proposed site would have less impact on nearby residences.
>
> "4. The applicant has received complaints from Amtrak and users of the train that there is a gap in coverage. This gap in coverage is also evidenced in the site coverage plots.
>
> "5. The use will not disrupt the neighborhood or the privacy of abutting landowners by excessive noise, light, glare or air pollutants.

> "6. The hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain.
>
> "7. The granting of the requested variance will not alter the general character of the neighborhood. Proposed buffering around the compound area, the unipole design and the proposed setback off of the road will mitigate some of the impacts.
>
> "8. The Zoning Board of Review previously granted a use variance in a scenic overlay area for a telecommunications tower.
>
> "9. Based on the findings of fact listed above, not granting the requested relief amounts to more than a mere inconvenience." Dec., July 29, 2011.

On August 16, 2011, Appellants appealed the Board's decision to this Court. Appellants argue the Board committed legal error in its application of both the Zoning Ordinance and the federal Telecommunications Act of 1996, codified at 47 U.S.C. § 330, et seq. (the TCA). In sum, Appellants argue that the Board (1) erred in determining there was a significant gap in wireless coverage; (2) failed to consider alternatives under the TCA; (3) failed to find that all beneficial use of the Property would be lost for purposes of the granting of a use variance; (4) overlooked substantial evidence indicating the requested relief would alter the general character of the surrounding area or impair the intent or purpose of the Zoning Ordinance or comprehensive plan; (5) erred because T-Mobile failed to provide sufficient evidence that the proposed tower cannot be located in a permitted district for purposes of granting a use variance; (6) failed to consider a telecommunications tower owned by Amtrak, located approximately 1290-feet from the proposed T-Mobile tower, for purposes of granting a dimensional variance under § 21-325(15)(c)(11); and (7) failed to determine T-Mobile had no other reasonable alternative

way to enjoy a legally permitted use of the Property for purposes of granting the dimensional variances.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id.

When reviewing a decision of a zoning board, this Court '"must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Rhode Island law defines "substantial evidence" as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'"

Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

III

Analysis

A

47 U.S.C. § 330, et seq.: TCA

In reaching its decision, the Board relied, in part, on the provisions of the TCA. Appellants now argue the Board misapplied its provisions.

A brief overview of the TCA is in order. In February 1996, President William J. Clinton signed the TCA into law. The "primary purpose . . . [of the law is] to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'" Reno v. ACLU, 521 U.S. 844, 857 (1997) (quoting Pub. L. No. 104-104, 110 Stat. 56). To that extent, the TCA reflects Congress's intent to expand wireless services and increase competition among providers. Southwestern Bell Mobile Sys. Inc. v. Todd, 244 F.3d 51, 57 (1st Cir. 2001) (citations omitted). In order to accomplish this goal, Congress sought to encourage the expansion of personal wireless services by preempting state regulations inconsistent with these goals. Id.

While the TCA does not preempt all local zoning laws,[10] it expressly preempts those rules and laws regulating "the placement, construction, and modification of personal wireless services facilities . . . [that] have the effect of prohibiting the provision

[10] Section 332(c)(7)(A) of the TCA acknowledges that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II) (2010). Accordingly, where a wireless communications provider seeks relief under a local zoning ordinance, the relevant inquiry is whether the local ordinance prevents a wireless provider from closing significant gaps in the availability of its wireless services. See Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 50 (1st Cir. 2009). This is a two-part inquiry which requires the wireless service provider to demonstrate that: (1) a significant gap in coverage exists; and (2) there are no alternatives to the carrier's proposed solution such that a denial of the relief would constitute an effective prohibition of wireless services. See Green Mountain Realty Corp. v. Leonard, 688 F.3d 40, 58 (1st Cir. 2012); Omnipoint Holdings, Inc., 586 F.3d at 48. The carrier bears the burden of showing an effective prohibition has occurred. Omnipoint Holdings, Inc., 586 F.3d at 48.

Unlike the deference a court typically accords decisions of a local zoning board of review, the First Circuit has determined that issues involving whether there is an effective prohibition of personal wireless services under the TCA "'present questions that a federal district court determines in the first instance without any deference to the [local regulatory authority] [.]'" Green Mountain Realty Corp., 688 F.3d at 60 (quoting Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 22 (1st Cir. 2002)). Accordingly, this Court—just like its federal counterpart—will determine whether the TCA applies at all, without any deference to the Board's decision.

1

Existence of a Significant Gap in Coverage

"Through the significant-gap analysis courts 'determine whether a coverage problem exists at all.'" Omnipoint Holdings, Inc., 586 F.3d at 48-49 (quoting Second

General Props., LP v. Town of Pelham, 313 F.3d 620, 631 (1st Cir. 2002)). In this regard, this Court must distinguish between a significant coverage gap and "a mere, and statutorily permissible, dead spot." Green Mountain Realty Corp., 688 F.3d at 57. "Dead spots" are defined as "'[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service.'" Id. at 58 (quoting 47 C.F.R. § 22.99 (2005)). In determining whether a coverage gap exists as opposed to a dead spot, courts consider the physical size of the gap, the number of users the gap affects, and whether all the carrier's users are similarly affected by the gaps. Id. at 49. Thus, this inquiry is entirely fact-driven. Id. at 48.

Eicens, trained to identify service gaps in wireless communications systems, presented coverage maps which depict the lack of service in the area surrounding the Property and the Amtrak line. Supp. Appl., Ex. 3, at 10-15. At the July 12, 2011 Board hearing, Eicens testified that "[a]s Amtrak goes north or south, and we have thousands of commuters on there on a daily basis, they hit a spot of poor coverage along the Amtrak line where Slocum Road comes in." Tr. 15, July 12, 2011. Eicens continued: "[the area in question] is really bad, where we expect dropped calls and not to be able to make a call. As you can see, we have a clear coverage gap along the Amtrak area." Id. at 17. The coverage maps, presented to this Court as part of T-Mobile's Application, fully support Eicens's testimony as they show a virtual lack of service in the proposed coverage area. See Supp. Appl., Ex. 3, at 10-15. While Eicens conceded the Amtrak train only passes through the affected area for a few brief seconds, he did note that the disruptions were significant enough to warrant complaints from Amtrak based upon its

own passenger complaints. Tr. 20-21, July 21, 2011. Eicens's Statement of Project Objection and Design Criteria, attached to T-Mobile's Application, similarly notes:

> "Without a wireless transmission facility located at or near this location, a significant area of inadequate, unreliable coverage would remain in T-Mobile's wireless network in the vicinity of the proposed installation. This lack of service area or 'gap' in coverage would adversely impact the service T-Mobile is able to provide to businesses and residents in the area." Supp. Appl., Ex. 3, ¶ 26.

In light of the foregoing evidence, this Court concludes that a significant coverage gap exists in the area around Slocum Road. The Amtrak line is a heavily traveled and important route that services thousands of people daily. See Omnipoint Holdings, Inc., 586 F.3d at 49 (noting that the need for wireless coverage around a heavily trafficked and important travel way is sufficient to show a significant gap in coverage). According to Eicens, customers do not simply experience a momentary interference, but rather entire calls are either dropped or unable to be made. Tr. 17, July 21, 2011. Furthermore, this coverage gap not only affects Amtrak commuters but also residents in the surrounding area. See id. at 16. Based upon the number of people affected by the gap as well as the gap's physical size (as evidenced by the coverage maps provided by Eicens), it is apparent that T-Mobile has identified an area that constitutes more than a statutorily permissible dead zone and is a significant gap in coverage.

2

Alternative Solutions

Having found that a significant gap in coverage exists, this Court must next determine whether there were alternative solutions to remedy this significant gap such that a denial of the relief sought would constitute an effective prohibition of personal

wireless services. See Green Mountain Realty Corp., 688 F.3d at 58; Omnipoint Holdings, Inc., 586 F.3d at 48. While there is no general rule classifying what is an effective prohibition, it has been held that an applicant must "show from language or circumstances not just that *this* application has been rejected but that further reasonable efforts are likely to be so fruitless that it is a waste of time even to try." Green Mountain Realty Corp., 688 F.3d at 58 (citing Town of Amherst, N.H. v. Omnipoint Commc'ns Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999)) (emphasis in original). An effective prohibition may occur when there are no feasible alternatives to the proposed tower, see id., and the burden rests with the carrier to prove that it investigated the possibility of other viable alternatives before concluding no other plans were feasible. See Omnipoint Holdings, Inc., 586 F.3d at 52.

At the July 12, 2011 Board hearing, Fales testified concerning the process by which the Property was selected, the various sites that were considered for a telecommunications tower and why the Property was the only viable spot. See generally Tr. 6-13; 32-37, July 12, 2011; Appl., Ex. 5. Fales testified that once T-Mobile's radio frequency engineers determine the need for coverage, he is given exact coordinates to search the area to find the best solution. Tr. 6, July 12, 2011. Fales further testified that, in order to meet the coverage goals, the tower could not be placed in an area where a variance would not be needed. Id. at 7. In other words, there was no location outside the Rural Residential zone or Scenic Overlay District upon which a telecommunications tower could be erected that would rectify the existing coverage gap in the area.

Fales discussed the various parcels of property that were considered. As to 86 Slocum Road (or Slocum Grange), Fales testified that while it would work for the radio

frequency engineer, there was no interest from the landowners to lease the land and the parcel would require additional dimensional relief from that needed for the proposed tower at the Property. Id. at 7-8; Appl., Ex. 5, ¶ 8(a). Similarly, Amtrak was not interested in allowing T-Mobile to lease or otherwise rebuild Amtrak's nearby, existing monotube structure to hold antennae. Tr. 8, July 12, 2011; Appl., Ex. 5, ¶ 8(b). With regard to two other potential sites—905 Indian Corner Road and 35 Liberty Road—Fales noted that they were both much more residential than the area surrounding the Property, both would require more dimensional relief beyond the relief needed for the Property, and the 35 Liberty Road property had potential wetland issues.[11] Tr. 8-9, July 12, 2011; Appl., Ex. 5, ¶ 8(c)-(d). Upon the Planning Commission's request, Fales also examined the Mumford property on Railroad Avenue, but he determined it was too close to another existing T-Mobile site and would provide redundant coverage without achieving the intended coverage objective. Tr. 9, July 12, 2011.

Fales further testified that he looked for properties in nearby zones that would require less zoning relief; however, the potential sites either were surrounded by more existing residences, thereby creating a greater visual impact, or too close to an existing T-Mobile site, thereby providing redundant coverage. Id. at 10-13. In particular, Fales examined 567, 557, 755 and 809 Indian Corner Road, 22 Exeter Road, and 135 and 471 Dry Bridge Road. Appellant Tucker owns 755 and 809 Indian Corner Road and she was not interested in leasing space to T-Mobile. Id. at 11-12; see also Appl., Ex. 5, ¶ 8(e).

[11] Fales's testimony before the Board was inconsistent with his Affidavit inasmuch as it relates to these properties meeting the coverage objectives according to T-Mobile's radio frequency expert. See Tr. 8, July 8, 2011; cf. Appl., Ex. 5, ¶¶ 8(c)-(d).

Fales's thorough testimony regarding T-Mobile's efforts to investigate alternative sites and the incumbent burdens those other sites would pose demonstrate that there was no reasonable alternative site for T-Mobile's tower. In light of this evidence, any decision denying T-Mobile's requested relief would have constituted an effective prohibition of wireless service, an intolerable result under the TCA. Accordingly, this Court concludes that T-Mobile has satisfied the two-part inquiry under the TCA and the TCA applies to T-Mobile's Application before the Board. It is through this lens, then, that T-Mobile's Application and the Board's decision thereon must be viewed.

B

The Zoning Ordinance

In addition to determining whether the TCA applies and that T-Mobile has satisfied the standards therein, this Court must next consider whether the Board's decision was proper under local laws to the extent such local laws are not preempted by the TCA.

Appellants contend the Board's decision to grant the use variance, each of the three dimensional variances, and the special use permit violated Zoning Ordinance §§ 21-14, 21-15, which govern variances and special use permits generally, and § 21-325(15), which specifically governs the placement of telecommunications towers. Each count in Appellants' Amended Complaint will be discussed seriatim.

1

Count I: Use Variance

Zoning Ordinance § 21-325(15)(a) prohibits telecommunications towers "in or within 500 feet of any scenic overlay district except by a use variance [.]" Appellants

allege the Board's decision to grant a use variance to allow the building of a tower within 500 feet of a Scenic Overlay District was in error because (1) T-Mobile failed to demonstrate that the land could not "yield any beneficial use if it is to conform with the land use provisions of the Zoning Ordinance," and (2) T-Mobile did not comply with the evidentiary requirements of § 21-325(15)(b). Am. Compl. ¶¶ 5-6.

a

§ 21-14(b)(1): Evidence of No Beneficial Use

Zoning Ordinance § 21-14(b)(1) states in pertinent part:

> "(b) Evidence required for grant of variance. The zoning board of review shall, in addition to the standards in subsection (a) of this section, require that evidence be entered into the record of the proceedings showing that:
>
> "(1) In granting a use variance, the subject land or structure cannot yield any beneficial use if it is required to conform to the land use sections of this chapter." Id.[12]

The standard for this type of variance "rests upon a showing that . . . the ordinance . . . has the effect of depriving the applicant of all beneficial use of [the] property." Bilodeau v. Zoning Bd. of Review of Woonsocket, 101 R.I. 73, 74, 220 A.2d 224, 225 (1966). However, in light of the TCA's mandate discussed above, § 21-14(b)(1) must be read in such a manner so as not to effectively prohibit the provision of personal wireless service.

[12]The Rhode Island Zoning Enabling Act of 1991, codified at §§ 45-24-27 – 45-24-72, mandated that all municipalities amend its zoning ordinance to comply with the terms of the Act. Sec. 45-24-29(b)(5). In many respects, then, there are identical or substantially similar provisions in both the state law and local law. Indeed, Appellants cited to the Zoning Ordinance in their Amended Complaint and to corresponding state statutes in their memorandum in support of their appeal. However, because there is no argument that the Zoning Ordinance somehow contravenes state law, this Court will refer only to the Zoning Ordinance provisions raised by Appellants in their Amended Complaint, unless otherwise necessary.

With respect to wireless telecommunications facilities, courts within the First Circuit have noted that the "need for closing a significant gap in coverage, in order to avoid an effective prohibition of wireless services, constitutes [a] unique circumstance when a zoning variance is required." Nextel Commc'ns of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F. Supp. 2d 396, 406-07 (D. Mass. 2002). To the extent the "beneficial use" requirement would constitute an effective prohibition of personal wireless services, it is preempted by TCA's mandate that wireless carriers provide reliable coverage to their customers.

Fales testified before the Board that, while evaluating coverage sites, he could find no solution that did not require one or more variances. Tr. 6-13, July 12, 2011; see also Appl., Ex. 5. Fales concluded in his Affidavit that not only is there a coverage gap in the area, but also:

> "Without a wireless transmission facility located at or near this location, a significant area of inadequate, unreliable coverage would remain in T-Mobile's wireless network in the vicinity of the proposed installation. This lack of service area or 'gap' in coverage would adversely impact the service T-Mobile is able to provide to businesses and residents of this area." Appl., Ex. 3, ¶ 26.

This evidence demonstrates that T-Mobile identified a significant gap in coverage and the unavailability of other alternative sites. In light of these unique circumstances, this Court is left to conclude the application of the "no beneficial use" standard would constitute an effective prohibition of personal wireless services. In this context, T-Mobile was not required to demonstrate that the land in question could serve no other beneficial use, because such a showing would add an impermissible hurdle to the federal telecommunications regulatory scheme. In this context, the "no beneficial use"

requirement is preempted by the TCA. Accordingly, the Board did not err by failing to consider whether or not T-Mobile would be deprived of all beneficial use if the requested relief was not granted.

b

§ 21-325(15)(b): Evidence of Other Potential Sites

Section 21-325(15) of the Zoning Ordinance specifically discusses development standards for telecommunications towers. One such requirement is that the applicant present evidence that the proposed tower cannot be located in a permitted district. Specifically, § 21-325(15)(b) reads in relevant part:

> "b. Applications for a use variance or a special use permit shall be accompanied by evidence that the proposed tower cannot be located in a permitted district. Such evidence shall consist of the following information for a minimum of three potential sites:
> "1. Site Plans;
> "2. Photographs of the site and surrounding areas; and
> "3. Written documentation of the lack of a site in a permitted district." Id.

Mindful of the apparently mandatory language contained in the section, this Court may only remand, reverse, or modify the Board's decision "if substantial rights of the Plaintiff have been prejudiced" by the Board's failure to follow these requirements. See § 45-24-69(d). Here, no such prejudice exists.

The language of § 21-325(15)(b) provides for the manner by which an applicant may present evidence of alternative sites to the Board. The provision neither grants rights to the applicant nor prescribes any sanctions. In this sense, the requirements of § 21-325(15)(b) are really a matter of form more than substance, intended to enable the Board to better analyze whether a purported use contravenes the intent of the Zoning

Ordinance by putting the onus on the applicant to provide detailed site plans, photographs, and written documentation of the lack of a site in a permitted district. Where evidence exists relating to alternative sites, regardless of the form in which it is presented to the Board, the Board's decision may only be overturned if it was clearly erroneous in light of said evidence and worked to prejudice objectors. Sec. 45-24-69(d).

Here, the evidence shows that T-Mobile substantially complied with the requirements set forth in § 21-325(15)(b). At the Board hearing, Fales discussed at length his search for properties in a permitted zone. Tr. 6-13, July 12, 2011. Fales identified properties at 567 and 557 Indian Corner Road, both zoned General Business and located about .8 miles from the proposed site. Id. at 11. With regard to these sites, Fales testified that each was surrounded by neighboring houses much closer than the residential houses near the Property, thus increasing the visibility for abutters. Id. Fales also looked at 755 and 809 Indian Corner Road, both zoned General Industrial and owned by Appellant Tucker. Id. at 11. According to Fales, however, these properties did not provide viable alternatives because T-Mobile and Tucker could not come to terms on a leasing agreement, inter alia. Id. at 12; see also Appl., Ex. 5, ¶ 5(e). Fales then identified 22 Exeter Road, located approximately .9 miles from the proposed site, and noted that the visual impact of the tower would be much greater because the surrounding area was much more residential. Tr. 12, July 12, 2011. Additionally, the proposed tower would need to be taller to have the same "coverage footprint." Id. Fales also identified potential sites at 135 and 147 Dry Bridge Road, both zoned Limited Industrial. These sites were too close to an existing T-Mobile site and would result in redundant coverage that would not remedy the coverage gap. Id. at 12-13.

Fales also assessed existing structures. In both his testimony before the Board and in his Affidavit, Fales determined that the existing Amtrak monotube was not viable because Amtrak would not agree with lease terms with T-Mobile nor allow its structure to be rebuilt. Id. at 8; Appl., Ex. 5, ¶ 8(b). Fales also considered two Town-owned properties and structures thereon but concluded that neither was viable. Town-owned property on Glen Hill Drive is comprised entirely of wetlands and is also in close proximity to residences. Appl., Ex. 5, ¶ 10(i). Town-owned property at 121 Indian Corner Road would also have a visual impact on neighboring residences and, in any event, even a 200' tower thereon would not provide the coverage objective. Id. at ¶ 10(ii).

In total, Fales identified no less than fifteen potential sites either in writing, see Appl., Ex. 5, ¶¶ 8-10, or orally, Tr. 7-13, July 12, 2011. At least four of those properties were stated to be zoned General Business. The Board thoroughly questioned Fales and he explained in detail why not one of the fifteen potential sites would work. Board Member Gibbons remarked during deliberations, "I think they worked diligently at looking at other sites. They wanted to, they chose a site that is virtually almost on top of the tracks. I think they've probably chosen the best site, accomplished the goal." Id. at 54. Furthermore, in its written decision, the Board determined that:

> "no other parcels in the coverage area . . . would not require relief from the requirements of the Zoning Ordinance . . . . The applicant investigated several other parcels . . . however either the property owners were not willing to have the tower on their property, terms for the lease could not be agreed upon or the property itself was environmentally constrained and not conducive to tower placement." Dec. at ¶¶ 3-4.

Therefore, while T-Mobile did not present detailed site plans or photographs for three potential sites as set forth in Zoning Ordinance § 21-325(15)(b), there was sufficient evidence from which the Board could determine that the proposed tower could not be located in a permitted district. The Board's review of Fales's extensive review of alternative sites worked no prejudice to Appellants.

2

Counts II, III, IV, V: Dimensional Variances

The Board granted T-Mobile three dimensional variances: (1) a variance to locate the tower fifty-five feet from the rear property line, where 180 feet is required; (2) a variance to locate the tower forty-five feet from the side property line, where 180 feet is required; and (3) a variance to locate the tower 1.15 miles from the existing tower at Yawgoo Valley, where 1.5 miles of separation is required. Appellants contend that all three were granted in error because T-Mobile failed to show that there is no other reasonable alternative way to enjoy a legally permitted use of the subject Property absent variance relief. Am. Compl. ¶¶ 9, 14, 17. Additionally, Appellants contend the Board erred in granting the dimensional variance from the minimum separation between towers under § 21-325(15)(c)(11) because it did not consider a nearby Amtrak telecommunications tower located 1290 feet from the proposed T-Mobile tower site. Id. at ¶ 12.

a

The "Mere Inconvenience" Standard

Zoning Ordinance § 21-14(b)(2) requires that evidence be entered into the record of the proceedings showing that:

> "In granting a dimensional variance, the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Id.

Contrary to Appellants' argument, there is no requirement that T-Mobile had to show there was no other reasonable alternative way to enjoy a legally permitted use. Indeed, the "no reasonable alternative" standard was removed from § 45-24-41(d)[13] in 2002, and was replaced by the "mere inconvenience" standard. See Lischio, 818 A.2d at 691. In its decision, the Board applied the correct standard and found that "[b]ased on the findings of fact listed above, not granting the requested relief amounts to more than a mere inconvenience." Dec. ¶ 9. Under the unique circumstances presented here, it cannot be said that such a finding was clearly erroneous.

T-Mobile is a FCC licensed wireless provider and is obligated by the license to provide a certain level of coverage to its subscribers. T-Mobile has demonstrated a need for coverage in the area, and that the proposed installation is the only feasible means reasonably available to T-Mobile. This Court reiterates, the "need for closing a significant gap in coverage, in order to avoid an effective prohibition of wireless services, constitutes [a] unique circumstance when a zoning variance is required." Nextel Commc'ns of the Mid-Atlantic, Inc., 231 F. Supp. 2d at 406-07. Such a unique circumstance exists here, and indeed, the Board concluded as much.

Board Member Brunelle noted, "[i]f you go by the gap coverage where they require positioning of the antennas to satisfy the gaps, it would be more than a mere inconvenience." Tr. 56, July 12, 2011. Similarly, with regard to the required distance

[13] Zoning Ordinance §§ 21-14(a)-(b) track §§ 45-24-41(c)-(d), which establish the standards and evidentiary requirements for granting variances.

between towers, Board Member Brunelle further noted, "I mean, if that's the optimal location for that tower to achieve or to satisfy the gaps, then it would be more than a mere inconvenience if it wasn't put in that location." Id. at 56-57. Based on the foregoing evidence, including the appropriateness of the proposed site and the lack of reasonably available alternative sites, this Court concludes the Board's decision is supported by substantial evidence in the record and was not error.

b

Consideration of the Amtrak Tower

Additionally, Appellants contend the Board erred in its decision to grant the dimensional variance from the minimum separation between towers required by § 21-325(15)(c)(11) because the Board did not consider the existence of an Amtrak-owned telecommunications tower located approximately 1290 feet from the proposed T-Mobile tower site. Appellants argue the omission is significant because the Board failed to consider uncontested facts pertinent to their inquiry. Appellants, however, do not specify what pertinent uncontested facts the Board failed to consider. Indeed, a review of the record reveals the Board's decision was thorough, thoughtful, and supported by the evidence.

The record shows the Board was aware of the Amtrak telecommunications tower and considered it during its final deliberations. T-Mobile's Application clearly states that an Amtrak monotube tower exists on Slocum Road, but that Amtrak was not interested in allowing T-Mobile to lease or rebuild the structure. Appl., Ex. 5, ¶ 8(b). Additionally, during the July 12, 2011 hearing, Fales discussed how T-Mobile sought permission from Amtrak to place a tower on its property and was denied. Tr. 8, July 12, 2011. Fales

further noted that Amtrak has consistently denied permission to build cell towers on its property. Id. at 29-30. Board Member Brunelle specifically referenced the Amtrak tower during the Board's deliberations as well. Id. at 55. In its decision, the Board concluded that T-Mobile had "investigated several other parcels in the coverage area however either the property owners were not willing to have the tower on their property [or] terms could not be agreed upon . . . ." Dec. at ¶ 3. The evidence of record clearly establishes that Amtrak was unwilling to enter into a lease with T-Mobile and that the Board indeed considered this in its decision in stating that "terms could not be agreed upon" with respect to other parcels that were investigated.

Accordingly, the decision to grant the dimensional variance to allow for less than 1.5 miles from an existing guyed tower was not in error. The Board clearly considered the existing Amtrak telecommunications tower and concluded, consistent with the substantial evidence in the record, that Amtrak's monotube did not provide a viable alternative.

3

Count VI: Special Use Permit

Zoning Ordinance § 15(a)(1) requires:

> "(a) In granting a special use permit . . . under this chapter, the zoning board of review shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings:
>
> "(1) The requested special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this chapter or the comprehensive plan upon which this chapter is based."

Appellants contend the Board erred in deciding that the special use permit will not alter the general character of the surrounding area and impair the intent and purpose of the Zoning Ordinance or the comprehensive plan. Am. Compl. ¶ 20. Specifically, Appellants argue "when considering the purpose of the Scenic Overlay District, the Minimum Separation between Towers, and the acquisition of Development Rights to surrounding farmland, it is clear that the proposed tower impairs the 'protection of the natural, historic, cultural and scenic character of the town [.]'" Appl. Mem. at 6. Appellants' argument is without merit.

In its decision, the Board concluded that the requested relief would not alter the general character of the neighborhood and that "[p]roposed buffering around the compound area, the unipole design and the proposed setback off of the road will mitigate some of the impacts." Dec. at ¶ 7. A review of the record shows there was substantial evidence to support the Board's conclusion.

The report of Pimentel, attached to T-Mobile's Application, attests to T-Mobile's success in mitigating the visual impact of the tower. The report reads in pertinent part:

> "The proposed site is by far one of the best sites that this planning consultant has ever assisted in locating a telecommunications tower. Residential presence is almost non-existent. Although, there is the presence of a scenic overlay district, the tower will nevertheless be setback a minimum distance of 260-feet.[14] Besides, the entire rear portion is almost entirely dedicated to farming practices, one of the primary reasons for introducing a scenic overlay

[14] Pimental's original report dated March 18, 2011, did not appear to be submitted with T-Mobile's original Application but was certified by the Town as being part of the record. See supra n.8. In any event, Pimental's revised report dated June 14, 2011, was submitted to the Board in T-Mobile's Supplemental Information Packet and reflects this identical finding, save for the minimum setback from Slocum Road as being 285 feet in the revised report as opposed to 260 feet in the original report. Pimental Report at 17, Mar. 18, 2011; cf. Supp. Appl. 5, at 17.

> along this portion of Slocum Road. Farmland preservation is of the utmost importance, and the reason why situating the tower a greater distance off of Slocum Road inappropriate—[n]egligible reduction on visibility, and yet potentially greater impact on active farming operation(s). Therefore, introduction of the proposed tower will neither impair the intent and purposes of the Ordinance or Comprehensive Plan." Pimental Report at 17, Mar. 18, 2011.

Pimental's conclusion is also largely supported by Fales's testimony, which pointed out that there is only one residence that would "really have any view from a close standpoint" of the tower. Tr. 11, July 12, 2011. Indeed, the area around the Property is the least residential in the area. Id. at 8-11.

The evidence also demonstrated that T-Mobile took even further steps to mitigate the visual impact of the tower: The proposed plans show the tower will be entirely enclosed by an eight-foot high wood stockade fence surrounded by ten-feet to twelve-feet high evergreen hemlocks along its perimeter. Id. at 5. T-Mobile will also make use of already-existing vegetation on the Property by placing it further back from Slocum Road, thereby mitigating the effect of the unipole on the surrounding properties. Id. at 57.

In sum, there was substantial evidence that the tower would have a minimal impact on the surrounding area and, therefore, the Board's findings that the tower will not alter the character of the neighborhood and the general intent of the Zoning Ordinance was not clearly erroneous in light of this evidence.

IV

Conclusion

For all these reasons, this Court finds the TCA preempts those provisions of the Zoning Ordinance that would effectuate a prohibition of personal wireless services. Thus, T-Mobile's Application is properly viewed in accordance with the TCA.

After a review of the entire record, this Court finds the standard for granting a use variance that there be "no beneficial use" of the subject Property in the absence of relief is preempted by the TCA in this case. This Court also finds the Board's decision to issue a use variance, three dimensional variances, and a special use permit to T-Mobile is neither in violation of statutory or ordinance provisions, nor clearly erroneous in light of the reliable, probative, and substantive evidence in the record. Accordingly, this Court affirms the Board's decision.

Counsel for Appellee shall prepare a judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Linda Tucker v. North Kingstown Zoning Board of Review, et al.**
CASE NO:	**WC-2011-0538**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**March 31, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Dawson Hodgson, Esq.**
For Defendant:	**William M. Dolan, III, Esq.** **Edward D. Pare, Jr., Esq.** **James H. Reilly, Esq.**