

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

***** *
OMNIPOINT COMMUNICATIONS, INC. *
*
v. * CASE NO. _____
*
CITY OF NASHUA and CITY OF NASHUA *
ZONING BOARD OF ADJUSTMENT *
*
***** *

COMPLAINT

The Plaintiff, Omnipoint Communications, Inc. (“OCI”), by and through its attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, complains against the City of Nashua (“City” or “Nashua”) and the City of Nashua Zoning Board of Adjustment (“ZBA”) and states that:

NATURE OF THE CASE

1. OCI brings this action to require the City and ZBA to authorize OCI to construct a 105 foot Wireless Communications Facility (“WCF”) on a parcel of land in Nashua, New Hampshire. As required by Nashua’s Zoning Ordinance, OCI applied to the ZBA for a special exception. The ZBA’s refusal to grant the special exception is illegal or unreasonable under New Hampshire State Law and violates the Telecommunications Act of 1996 (“TCA”).

PARTIES AND JURISDICTION

2. OCI is a Delaware corporation with a principal place of business at 15 Commerce Way, Norton, Massachusetts. OCI is licensed to provide wireless telecommunications in and around Nashua, New Hampshire, Hillsborough County.

3. The City of Nashua is a municipal corporation with offices in Nashua, County of Hillsborough, New Hampshire, and has a mailing address of 229 Main Street, P.O. Box 2019, Nashua, New Hampshire 03061.

4. The Zoning Board of Adjustment is a quasi-judicial body of the City of Nashua with offices in Nashua, County of Hillsborough, New Hampshire, and has a mailing address of 229 Main Street, P.O. Box 2019, Nashua, New Hampshire 03061.

5. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 and 1367. Venue is proper in accordance with 28 U.S.C. § 1391(b).

FACTS

OCI's Application

6. OCI applied to the ZBA for a special exception pursuant to Article VII, Section 16-227 of the Nashua Zoning Ordinance (the "Ordinance") to locate a wireless communications facility on an approximately 63.46-acre parcel of land at 111 Coburn Avenue shown on Map F, Lot 79 of the tax maps of the City of Nashua (the "Property"), including a 105' telecommunications tower with 9 internally-mounted panel antennas, within an approximately 70' x 70' leased area situated at the southern end of the Property. The proposed site of the wireless communications facility is surrounded by mature trees (primarily coniferous) with an average canopy height of approximately 78' to the south and 81' to the north.

7. The Property has been leased by its fee owner for 99 years to a homeowners' association known as 111 Coburn Association, Inc. (the "Association"). The 99-year lease commenced on December 1, 1972. Under the lease, the Property is the site of a housing development known as Coburn Woods. Coburn Woods contains 220 detached single-family homes. Coburn Woods also contains a number of areas designated as "Common Property" under

the organizational documents of the Association. According to the Association's organizational documents, the rights of the homeowners with respect to the Common Property are subject to the authority of the Association's board of directors (the "Board of Directors") to "maintain, alter, repair, operate and otherwise administer and care for the Common . . . Property." The Board of Directors' authority includes the power "[t]o purchase, sell, lease, or otherwise obtain and use any property or other facilities in the course of [the] administration and management of the Common Property."

8. In accordance with its authority under the Association's organizational documents, the Board of Directors has entered into a sublease agreement with OCI to permit the location of the WCF within a portion of the Common Property.

9. As originally proposed, the WCF would have included a 150' monopole-style telecommunications tower with nine externally-mounted panel antennas. During the three month period that the ZBA considered OCI's application, OCI revised the plans for the WCF by relocating the facility to an area farther removed from residences abutting the Property on Lutheran Drive and reducing the height of the pole from 150' to 105'. In addition, OCI modified the design of the tower so that, rather than being exposed and visible, the panel antennas would be hidden from view within the monopole.

10. Under the Ordinance, telecommunications towers are permitted in all zoning districts of the City by special exception.

11. Section 16-434 of the Ordinance provides that the ZBA *must* grant a special exception if the following five conditions are fulfilled:

- (1) The requested use is listed as a special exception in the Use Matrix (§ 16-26. Table 26-1) or is permitted as a special exception by another provision of this Chapter;

- (2) The requested use will not create undue traffic congestion, or unduly impair pedestrian safety;
- (3) The requested use will not overload any public water, drainage or sewer system, or any other municipal system to such an extent that the requested use or any developed use in the immediate area of the city will be unduly subjected to hazards affecting health, safety or the general welfare;
- (4) Any special regulations for the use set forth in this article are fulfilled;
- (5) The requested use will not impair the integrity or be out of character with the district or immediate neighborhood in which it is located, nor be detrimental to the health, morals, or welfare of the residents of the city.

See City of Nashua Zoning Ordinance, attached hereto as Exhibit A.

12. The ZBA conducted public hearings in connection with OCI's request for a special exception on September 26 and November 21, 2006. In addition, OCI conducted a balloon test at the Property on October 7, 2006. During the course of the hearings, OCI made a detailed presentation in support of its application for a special exception. In addition, OCI submitted the following materials for consideration by the board:

- a. an affidavit prepared by a radio frequency engineer describing the purpose to be served by the WCF and the manner in which its location was selected;
- b. RF coverage plots illustrating the existence of a significant coverage gap in Nashua to be filled by the WCF;
- c. an affidavit prepared by a professional engineer describing the structural design, loading capacity, and collapse characteristics of the proposed tower;
- d. a report describing the acoustic dispersion produced by the ground-based telecommunications equipment proposed in connection with the WCF indicating that the equipment to be installed by OCI would generate approximately the same level of noise as an ordinary refrigerator; and

e. copies of five separate appraisal reports dating from the early 1990s through May 2006 concerning the impact of wireless telecommunications facilities on property values in a wide range of communities throughout New Hampshire and the region, each concluding that such facilities do not negatively affect the value of surrounding properties.

13. At a meeting of the ZBA on December 12, 2006, the board voted to deny OCI's application, finding that although the first four conditions for a special exception were satisfied in this case, the requirement that the requested use not impair the integrity or be out of character with the area where it is proposed had not been met. *See* Letter from the ZBA, attached hereto as Exhibit B.

14. In addition, the ZBA found that "property values could be negatively impacted" by the WCF, citing this conclusion in both its deliberations at the December 12 meeting and its written decision as an additional basis for denying the special exception requested by OCI.

15. OCI timely submitted a motion for rehearing. On January 23, 2007, the ZBA voted to deny the rehearing. *See* Letter from the ZBA, attached hereto as Exhibit C. This appeal follows.

The ZBA's Mistakes of Fact

16. As reflected in the ZBA's written decision and in the audio recording of its December 12 meeting, the board based its denial of the special exception on a number of mistaken factual considerations. Specifically, during their deliberations at the December 12 meeting, members of the ZBA made the following observations:

a. the Coburn Woods development includes "deeded common areas" in which every homeowner is granted an interest;

- b. the residents of Coburn Woods paid “premium prices” for their homes based on the “natural common area” at the development;
- c. the Common Property at Coburn Woods, according to the organizational documents of the Association as well as the conditions imposed in connection with the variance issued in 1972 to permit the construction of the development, is required to remain in its “natural state”;
- d. the WCF constitutes a “commercial venture” on Common Property, which the rules and regulations of the Association prohibit;
- e. the location of the WCF could interfere with pedestrian traffic over walking paths in the area where it is proposed;
- f. the proposed location of the WCF is in violation of the “condominium charters” governing Coburn Woods;
- g. a negative inference concerning the proposed WCF can be drawn from the fact that “the board of directors which voted for this thing has yet to appear before this board and make its case for it”; and
- h. the portion of the Property proposed for the WCF had remained in its natural undeveloped state since the construction of the Coburn Woods development.

17. Each of the preceding statements by the members of the ZBA is either unsupported or directly contradicted by the evidence presented during the proceedings in this matter.

18. None of the testimony or written materials provided in this case indicates that the residents of Coburn Woods hold deeded interests in the Common Property or that any “condominium charters” proscribe the placement of the WCF at its proposed location. On the

contrary, the record reflects the fact that homeowners at Coburn Woods have a limited right to use the Common Property, subject to the authority of the Board of Directors to manage, sell, lease and otherwise administer such property. Furthermore, the evidence presented to the ZBA clearly shows that Coburn Woods is not organized as a condominium and that, pursuant to the organizational documents of Coburn Woods, the Board of Directors may permit the location of the WCF on Common Property just as it has permitted other improvements on the Common Property in the past.

19. Similarly, the statement that homeowners at Coburn Woods and in neighboring areas paid “premium prices” for their houses is simply unfounded. The record in this case contains no evidence whatsoever concerning the prices that residents of Coburn Woods or any other neighborhood paid for their homes relative to the prices paid by others in Nashua for their houses.

20. The assertion that the Common Property at Coburn Woods is required to remain in its “natural state” is contrary to both the oral testimony of long-term residents of Coburn Woods as well as the original plans for the development approved by the ZBA in 1972. Far from showing that the areas at Coburn Woods designated as Common Property must remain undeveloped, the evidence presented in this case indicates that, as originally approved, the plans for Coburn Woods called for the location of various utilities and improvements on Common Property. Moreover, a number of residents testified that the area where the WCF is now proposed was originally designated as a parking and storage site for recreational vehicles and has since been converted to a location for the stockpiling of construction materials and debris.

21. The conclusion reached by a number of ZBA members that the proposed WCF will interfere with pedestrian traffic is also contrary to the evidence presented in this case. As

shown by both the testimony and the plans for the WCF that were provided to the ZBA, the location of the WCF would be removed from all established walking paths on Common Property at Coburn Woods.

22. Finally, with respect to the characterization of the WCF as an impermissible “commercial venture” on Common Property, a number of residents of Coburn Woods acknowledged that the use of Common Property for infrastructure needed to provide various utilities, such as electricity, cable, and telephone services, is well-established. None of the evidence provided in this matter supports the board’s characterization of the WCF as a “commercial venture” that is unlike the existing utilities located on Common Property at Coburn Woods. Indeed, the entire Coburn Woods development is one large commercial venture in which the fee owner of the Property charges monthly rent for the maintenance of homes on its land. Moreover, the Ordinance itself distinguishes between wireless telecommunications facilities and commercial uses, permitting the former by special exception in all zoning districts, including those designated as residential, but prohibiting the latter in any district not specifically designated for commercial use.

The ZBA’s Failure to Focus on OCI’s Specific Application

23. In support of its application, OCI presented testimony as well as detailed plans, studies and reports demonstrating that each of the conditions for a special exception specified by the Ordinance were satisfied in this case. Specifically, the evidence presented to the ZBA showed that:

a. because the proposed WCF would be unmanned and would require only one to two maintenance visits per month on average by trained personnel using light-duty utility vehicles, the facility would not generate significant traffic;

b. the WCF would not include a generator and would produce no greater level of noise than a typical refrigerator;

c. at 105', the proposed tower would be substantially screened from view by existing mature trees and other vegetation in the area and would be difficult to see from nearby public ways or residences;

d. because the tower would not be lit and would incorporate only internally-mounted antennas, its visual impact with respect to the properties from which it could be seen would be minimal, barely distinguishable from the trunks of the mature trees surrounding it; and

e. the ground-based equipment associated with the tower would be limited to three cabinets measuring 83''h x 52''w x 28''d, a battery back-up cabinet measuring approximately 68''h x 28''w x 31''d, and a power and telephone utility cabinet measuring approximately 60''h x 25''w x 10''d, all seated at the base of the tower on small concrete pads occupying a total area of just 15 square feet.

24. In denying the special exception, the ZBA improperly focused on concerns relating to wireless telecommunications in general and their impact and appropriateness in various settings rather than the specific characteristics and design of the WCF at issue in this instance. As a result, the ZBA's decision fails to take into account the particular elements of the WCF that make it appropriate at its proposed location.

25. In addition, the ZBA dismissed all of the appraisal reports submitted in support of the proposed WCF as inapplicable, stating that "[n]one of the assessments forwarded by the applicant provide [*sic*] a reasonable duplication of the proposed tower" in this case. At the same time, the board relied on a report submitted by abutters which concluded that a 120' telecommunications tower in North Hampton, New Hampshire would decrease values of

adjacent properties in that town as support for its determination that the WCF proposed by OCI in this instance would diminish surrounding property values.

26. The reports submitted by OCI show that over the past decade wireless telecommunications facilities have consistently been found to have no negative affect on surrounding property values in settings ranging from urban to rural throughout the region.

27. In addition, one of the reports that OCI submitted is a June 1988 study by Crafts Appraisal Associates entitled Study of the Impact of Telecommunications Towers on Real Estate Values of Surrounding Properties Located in Southern New Hampshire. This Court has previously referenced the same report as supporting evidence indicating that a 150' monopole in the City of Franklin would not diminish surrounding property values. *See USCOC of New Hampshire RSA #2 v. City of Franklin*, No. 04-66-JM, 2005 U.S. Dist. LEXIS 40040, at * 7 (D. N.H. Jan. 12, 2005).

28. On the other hand, the report submitted by the opponents of the WCF indicates that, in one instance, an appraiser reached a different conclusion with respect to a tower in North Hampton. Indeed, the North Hampton report itself includes as attachments a number of other studies, two of which disagree with the report's conclusion that the tower in North Hampton would diminish surrounding property values.

29. Nevertheless, based on the report provided by parties opposing the WCF, as well as the testimony of various abutters concerning their personal opinions with respect to the effect that the facility would have on the values of their homes, the ZBA found that "property values could be negatively impacted" in this case.

30. Where a zoning board of adjustment fails to adequately support its implicit or explicit findings, the board's decision will be reversed. *See Cormier, Trustee of Terra Realty*

Trust v. Town of Danville ZBA, 142 N.H. 775 (1998). In the present case, a single appraisal report and the personal concerns of local residents cannot adequately support the ZBA's conclusion that the WCF could negatively affect local property values in Coburn Woods and the surrounding area given the numerous reports to the contrary provided by OCI.

The ZBA's Improper Considerations

31. A special exception is a use permitted upon certain conditions that are specifically set forth in a municipality's zoning ordinance. Geiss v. Bourassa, 140 N.H. 629, 631-32 (1996).

32. In considering whether to grant a special exception, the board may not vary any of the requirements as set forth within the zoning ordinance. McKibbin v. City of Lebanon, 149 N.H. 59, 61 (2003).

33. The provisions of the Ordinance governing the conditions to be fulfilled in connection with a request for special exception contain no requirement that the proposed use must be shown not to diminish surrounding property values.

34. Additionally, the ZBA did not request a site-specific appraisal concerning the impact of the WCF with respect to local property values at any point during its proceedings in connection with this matter. However, during their deliberations, several members of the ZBA indicated that they would have found such information useful in determining whether the WCF would impair the integrity or be out of character with the area where it is proposed.

35. Consequently, the ZBA's decision in this case was unlawful because the board, in both its deliberations at the December 12 meeting and in its written decision, treated the question whether the proposed WCF could diminish surrounding property values as an additional condition to be satisfied in order for the requested special exception requested by OCI to be granted.

36. The ZBA also incorrectly applied conditions related to a variance granted in 1972 concerning the property to OCI's proposed use.

37. Because cluster subdivisions were not permitted under the Ordinance in any zoning district at the time, a variance was required to permit the creation of the Coburn Woods development in 1972.

38. As a condition of granting the variance, the ZBA required that "the development plan and elevations as submitted to the Board be strictly adhered to except for any street modifications suggested by the Planning Board."

39. Because the WCF proposed by OCI was not shown on the original development plan for Coburn Woods, some members of the ZBA noted during their deliberations on December 12 that the WCF cannot be permitted by special exception alone. Instead, they reasoned, an amendment of the 1972 variance issued in connection with the original approval of Coburn Woods would be required.

40. The conclusion that the WCF requires zoning relief other than a special exception ignores both the current provisions of the Ordinance as well as the fact that the approved plans for Coburn Woods did not address or contemplate wireless telecommunications facilities – or cable television, for another example, because, at the time, such facilities did not exist. However, following the advent of cellular telephones and related technology in the 1980s, the Ordinance was revised to expressly provide that wireless telecommunications facilities are permitted in every zoning district in Nashua by special exception. Therefore, to hold that despite the current provisions of the Ordinance relating to wireless telecommunications facilities in general, the WCF in this instance is subject to special zoning requirements based on a variance issued before such facilities even existed constitutes selective and unequal enforcement of the

Ordinance in violation of New Hampshire law. *See Alexander v. Town of Hampstead*, 129 N.H. 278 (1987) (holding that an ordinance may not be selectively enforced against an applicant where other similarly situated persons have not been subjected to the same requirement).

41. In addition, the determination that the WCF requires an amendment of the variance originally issued in connection with the Coburn Woods development overlooks the fact that the plans presented to the ZBA in 1972 have not been strictly adhered to over the past twenty-four years. For example, the locations of various improvements, including a man-made detention pond in the area where the WCF is proposed, differ from what is shown on the approved plans for Coburn Woods, although no amendment of the 1972 variance was ever required in connection with their construction. Likewise, the conversion of the RV storage area to construction debris and stockpiling occurred without any requirement that the original variance be amended. The installation of facilities to provide cable television to the residents of Coburn Woods was completed without any requirement that the original variance be amended. Accordingly, the determination that the conditions of the 1972 variance apply to OCI's proposal for a WCF in this instance is unlawful and unreasonable.

THE ZBA's Violation of the Telecommunications Act of 1996

42. The Telecommunications Act of 1996 (the "TCA") was enacted in order to promote the rapid deployment in the United States of advanced telecommunications systems, including personal wireless services ("PWS").

43. The wireless communications services that OCI plans to use the WCF to provide are within the definition of PWS set forth in the TCA.

44. In order to advance its central purpose, the TCA expressly provides that local governmental authorities may not undertake any action that “prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332 (c)(7)(B)(i)(II).

45. In addition, the TCA requires that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing *and supported by substantial evidence* contained in a written record.” 47 U.S.C. § 332 (c)(7)(B)(iii) (emphasis added).

46. In its application and presentations to the ZBA, OCI submitted detailed evidence showing that the proposed location of the WCF was required in order to fill a significant coverage gap in Nashua where wireless communications services provided by OCI are not available.

47. OCI also provided testimony and written evidence showing that all of the conditions required for a special exception under the Ordinance in connection with the WCF had been satisfied by its proposal and that there are no feasible existing alternative structures that could be used for the purpose the WCF is intended to serve.

48. In response to alternative sites suggested by opponents of the WCF, OCI investigated the specific alternative sites and submitted RF maps, written evidence, and testimony by an RF engineer explaining why the alternative sites were not viable. The ZBA recognized this testimony, and in fact, the ZBA agreed that there are no feasible alternative structures or collocation opportunities that would obviate the need for the proposed WCF.

COUNT I
(Violation of N.H.R.S.A. 677:4)

49. OCI incorporates by reference the allegations of paragraphs 1 through 48 set forth above as if fully set forth herein.

50. The decision of the ZBA denying the special exception was illegal or unreasonable and should be reversed.

COUNT II
(47 U.S.C. § 332(c)(7)(B)(iii))

51. OCI incorporates by reference the allegations of paragraphs 1 through 50 set forth above as if fully set forth herein.

52. The TCA requires that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” 47 U.S.C. § 332 (c)(7)(B)(iii).

53. The ZBA’s denial of the special exception and authorization to OCI to construct the proposed facility was not supported by “substantial evidence contained in a written record” as required by 47 U.S.C. § 332(c)(7)(B)(iii) and is in violation of the provisions of the TCA.

COUNT III
(47 U.S.C. § 332(c)(7)(B)(i)(II))

54. OCI incorporates by reference the allegations of paragraphs 1 through 53 set forth above as if fully set forth herein.

55. The TCA, 47 U.S.C. § 332(c)(7)(B)(i)(II) provides, inter alia, that “[t]he regulation of the placement, construction and modification of personal wireless service facilities by any state or local government instrumentality thereof... (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

56. The ZBA’s denial of the special exception effectively prohibits OCI from providing personal wireless services in the areas of Nashua that would be covered by the WCF. As a result, the ZBA’s decision is in violation of the provisions of the TCA proscribing the

authority of local governments to regulate the placement and construction of telecommunications facilities.

PRAYER FOR RELIEF

WHEREFORE, Omnipoint Communications, Inc., respectfully requests that this Court:

A. Issue orders requiring the City of Nashua Zoning Board to file a certified record with the Court;

B. Declare that the decision of the City of Nashua Zoning Board of Adjustment was illegal or unreasonable;

C. Declare that the decision of the City of Nashua Zoning Board of Adjustment was not supported by substantial evidence contained in a written record and thereby violates the Telecommunications Act of 1996, 47 U.S.C. §332(c)(7)(B)(iii);

D. Declare that the decision of the City of Nashua Zoning Board of Adjustment has the effect of prohibiting the provision of personal wireless services and thereby violates the Telecommunications Act of 1996, 47 U.S.C. §332(c)(7)(B)(i)(II);

E. Order Omnipoint Communications, Inc.'s application for a special exception approved;

F. Issue a Writ of Mandamus and/or an injunction ordering the Town and its instrumentalities to immediately issue all approvals and permits necessary to allow construction of the proposed tower to begin without further delay, including without limitation all ZBA approvals;

G. Award Omnipoint Communications, Inc. reasonable attorneys' fees for bringing and prosecuting this matter; and

H. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,
OMNIPOINT COMMUNICATIONS, INC.

By Its Attorneys,
McLANE, GRAF, RAULERSON &
MIDDLETON PROFESSIONAL ASSOCIATION

Date: February 20, 2007

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