ANDERSON KREIGER LLP

BRIAN S. GROSSMAN
bgrossman@andersonkreiger.com
T: 617-621-6582
F: 617 621 6682

July 23, 2014

By Electronic Mail and
First Class Mail
Zoning Board of Adjustment
City of Rochester
31 Wakefield Street
Rochester, NH 03867

MOTION FOR REHEARING – RSA 677:2

RE:	Applicant:	New Cingular Wireless PCS, LLC ("AT&T")
	Property Owner:	Matthew G. Scruton
	Property:	144 Meaderboro Road, Rochester, New Hampshire Parcel ID 232-16-3 (the "Property")
	Petition:	(1) Special Exception for a Wireless Communications Facility pursuant to Section 42.14(D)(4), Section 42.23(a)(1), and Section 42.23(c)(27), of the Ordinance; and (2) Any other relief required within the jurisdiction of the Zoning Board of Adjustment (All relief is requested if and to the extent necessary, all rights reserved under the Federal Telecommunications Act of 1996 ("TCA") and otherwise).

Dear Board Members:

By its Motion for Rehearing dated July 11, 2014, AT&T moved for a rehearing by the Zoning Board of Adjustment (the "Board") of the Board's Vote on June 11, 2014 and Notice of Decision dated June 13, 2014 (collectively the "Decision"), denying AT&T's application for the above-captioned zoning relief to construct and operate a wireless communication tower and facility to be located at the above Property (the "Motion").

Pursuant to RSA 677:3, the Board must "within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration." However, if an extension is mutually agreed to by the Board and the party requesting the rehearing, the deadline for action can be extended (otherwise, the request is deemed denied after the 30 day period runs).

AT&T respectfully requests that the Board schedule any discussion concerning the Motion for this matter for its regularly scheduled meeting on September 10, 2014. Therefore, an extension must be agreed to by AT&T and the Board.[1]

As the Board may be aware, the Federal Communication Commission ("FCC") has established a "Shot Clock" deadline for municipalities to issue permits or otherwise act on applications for siting, construction or modification of wireless communication facilities. In the absence of a mutually agreed extension, the 150-day Shot Clock deadline will expire on September 4, 2014.

In order to permit the Board to accommodate AT&T's request, by this letter, AT&T confirms that it and the Board mutually agree to extend both the (i) deadline for the Board to act on its Motion for Rehearing pursuant to RSA 677:2 and (ii) deadline under the FCC Shot Clock to take final action on AT&T's application (including a decision on the Motion) to and including September 15, 2014.[2]

Please sign where indicated below to confirm the Board's acceptance of this agreement to extend the above-referenced deadlines and return a date-stamped copy to me.

Thank you for your consideration in this matter. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Brian S. Grossman

SO AGREED AND ACCEPTED,

_____, Duly Authorized
Zoning Board of Adjustment

cc: James Smalanskas (by email)
Kevin Mason (by email)
Kristen LeDuc (by email)
Stephen D. Anderson, Esq. (by email)

---

[1] An extension for the Board to act would also be necessary even if the Board intended to consider the Motion at its next regularly scheduled meeting on August 13, 2014, because it is more than 30 days from the date the Motion was filed.

[2] If the Board grants AT&T's Motion, AT&T will work with the Board to set a new mutually-agreeable Shot Clock deadline to allow the Board to conduct the rehearing.

ANDERSON & KREIGER LLP

BRIAN S. GROSSMAN
bgrossman@andersonkreiger.com
T: 617-621-6582
F: 617-621-6682

July 11, 2014

BY HAND
Zoning Board of Adjustment
City of Rochester
31 Wakefield Street
Rochester, NH 03867

MOTION FOR REHEARING – RSA 677:2

RE:	Applicant:	New Cingular Wireless PCS, LLC ("AT&T")
	Property Owner:	Matthew G. Scruton
	Property:	144 Meaderboro Road, Rochester, New Hampshire Parcel ID 232-16-3 (the "Property")
	Petition:	(1) Special Exception for a Wireless Communications Facility pursuant to Section 42.14(D)(4), Section 42.23(a)(1), and Section 42.23(c)(27), of the Ordinance; and (2) Any other relief required within the jurisdiction of the Zoning Board of Adjustment (All relief is requested if and to the extent necessary, all rights reserved under the Federal Telecommunications Act of 1996 ("TCA") and otherwise).

Dear Board Members:

AT&T moves for a rehearing by the Zoning Board of Adjustment (the "Board") of the Board's Vote on June 11, 2014 and Notice of Decision dated June 13, 2014 (collectively the "Decision"), denying AT&T's application for the above-captioned zoning relief to construct and operate a wireless communication tower and facility to be located at the above Property.

AT&T respectfully requests that the Board:

1. Grant AT&T's motion and rehear AT&T's application and the Board's Decision; and
2. Grant the requested relief to permit AT&T's proposed wireless communications tower and facility.

The Board should grant AT&T's motion because:

1. The Board's Decision violates the TCA's requirements for a denial of an application for a personal wireless service facility in that:

    a. The Decision was not "in writing and supported by substantial evidence contained in a written record" within the meaning of the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(iii);

    b. The Decision "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services" within the meaning of the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II);

    c. The Decision was based on "environmental effects of radio frequency emissions" within the meaning of the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(iv); and

2. The Decision is illegal and unreasonable under New Hampshire law;

In support of this motion, AT&T relies on the record of the Board's proceedings on AT&T's application, including without limitation, AT&T's complete application and all information submitted by AT&T in support of its application, and studies demonstrating that wireless communications facilities do not result in a diminution of property values.

I. FACTS

On or about April, 2014, AT&T filed an application for a Special Exception to permit its proposed Wireless Communication Facility (the "Facility") on property located at 144 Meaderboro Road, Rochester, New Hampshire (the "Property"). The Property is in the City's Agricultural District and the Facility is permitted by Special Exception from the Board under the applicable provisions of the City of Rochester Zoning Ordinance (the "Ordinance"). The application included a statement demonstrating compliance with the new provisions of the Ordinance concerning wireless communications facilities and the generally applicable special exception criteria.

At the April 9, 2014 hearing, the only held on the application on, AT&T's representatives (i) provided an overview of the project, (ii) reviewed the radio frequency propagation maps demonstrating the significant gap in AT&T's wireless network coverage (the "Targeted Coverage Area"), the need for the Facility and how the proposed Facility would address the significant gap, and (iii) demonstrated the project's compliance with the Special Exception criteria.

In opposition, the Board heard (i) only generalized concerns regarding the aesthetics of the proposed tower applicable to any tower that could be proposed to address AT&T's significant

gap in the Targeted Coverage Area, (ii) concerns about health effects and safety of radio frequency emissions, and (iii) unsupported statements concerning diminution in property values.

II. FEDERAL TELECOMMUNICATIONS ACT OF 1996

AT&T is licensed by the Federal Communications Commission to provide wireless services across the country and throughout New Hampshire, including the City of Rochester and surrounding communities. AT&T's application is governed by the TCA which the United States Supreme Court has explained as follows:

> Congress enacted the Telecommunications Act of 1996 (TCA) ... to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." ... One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934 ... to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities ... 47 U.S.C. § 332(c)(7). Under this provision, local governments may not "unreasonably discriminate among providers of functionally equivalent services," § 332(c)(7)(B)(i)(I), take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," § 332(c)(7)(B)(i)(II), or limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv). They must act on requests for authorization to locate wireless facilities "within a reasonable period of time," § 332(c)(7)(B)(ii), and each decision denying such a request must "be in writing and supported by substantial evidence contained in a written record," § 332(c)(7)(B)(iii).

City of Rancho Palos Verdes, Cal. v. *Abrams*, 544 U.S. 113, 115-116 (U.S. 2005) (internal citations omitted).

One focus of the TCA is to override boards that do not decide matters based upon the merits of local ordinances and, instead, yield inappropriately to ill-founded opposition. *Brehmer* v. *Planning Board of Town of Wellfleet*, 238 F.3d 117, 122 (1st Cir. 2001),[1] citing *Roberts* v. *Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 709 N.E.2d 798, 806 (1999) ("Congress certainly intended to protect providers of [personal wireless] services from irrational or substanceless decisions by local authorities who might bend to community opposition to these facilities."). Each of the TCA's substantive and procedural limitations is designed to protect the prospective providers of telecommunications services[2] from overzealous or parochial regulation

---

[1] *Brehmer* was overruled on jurisdictional grounds in *Metheny* v. *Becker*, 352 F.3d 458 (1st Cir. 2003).

[2] As the Circuit Court explained in *Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One* v. *Todd*, 244 F.3d 51, 57 (1st Cir. 2001), the TCA's protections are designed to encourage the expansion of personal wireless services:

at the local level.[3] *Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One* v. *Todd*, 244 F.3d 51, 57-58 (1st Cir. 2001). See also *Town of Amherst* v. *Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir. 1999).

To comply with the TCA, a local board's decision denying a request for zoning relief for a telecommunications tower must "be in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii). *City of Rancho Palos Verdes, Cal.* v. *Abrams*, 544 U.S. 113, 115-116 (2005) (internal citations omitted); *Southwestern Bell Mobile Sys., Inc.* v. *Todd*, 244 F.3d 51, 59-60 (1st Cir. 2001). "If a board decision is not supported by substantial evidence ... then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the TCA's national policy goals." *SBA Towers II, LLC v. Town of Atkinson, New Hampshire*, 2008 WL 4372805 (D. N.H. 2008), citing *Second Generation Props., L.P.* v. *Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002). Under the substantial evidence test, the board "'is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands,'" so that when its decision is precluded by the record evidence, it must be set aside. *SBA Towers*. (quoting *Allentown Mack Sales & Serv., Inc.* v. *N.L.R.B.*, 522 U.S. 359, 378, (1998)).

In the present case, there is no dispute about AT&T's significant coverage gap in the area of the proposed facility and the absence of feasible alternatives.[4] "The argument that no tower is

---

> [T]he TCA reflects Congress's intent to expand wireless services and increase competition among those providers. See *Sprint Spectrum L.P.* v. *Town of Easton*, 982 F.Supp. 47, 49 (D. Mass. 1997). Congress sought to accomplish this goal by reducing the regulation and bureaucracy that stood in the way of a steady and rapid expansion of personal wireless services. See *Nextel Communications of the Mid-Atlantic, Inc.* v. *Manchester-by-the- Sea,* 115 F. Supp. 2d 65, 67 (D. Mass. 2000).

[3] The Act imposed these limitations because, despite the growing popularity of personal wireless services, land use applications for such facilities were often subject to interminable delays and denied for pretextual reasons, a situation which threatened to thwart the development of the facility networks necessary for efficient utilization of the frequencies dedicated to personal wireless services. *See Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One* v. *Todd*, 244 F.3d 51, 57 (1st Cir. 2001) ("as Congress found, 'siting and zoning decisions by non-federal units of government[ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network.'"), citing *Omnipoint Corp.* v. *Zoning Hearing Bd. of Pine Grove Township*, 181 F.3d 403, 407 (3d Cir. 1999) and H.R. Rep. No. 104-204, at 94, *reprinted in* 1996 *Code Cong. & Admin. News*, at 61. Accordingly, in the Act, Congress sought to preserve a role for local authorities in siting personal wireless facilities while ensuring that parochial interests would not frustrate national telecommunications policy. *See* H.R. No. 104-204, at 94, *reprinted in* 1996 *Code Cong. & Admin. News*, at 61 ("Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.").

[4] The only expert evidence in the record concerning the need for the Facility is the Radio Frequency Report of Ernesto Chua, dated March 31, 2014 included with AT&T's application (the "RF Report") which states that the proposed Facility is necessary to address significant gap in coverage that includes Walnut Street (Route 202A), Crown Point Road, Sheepboro Road, Ten Rod Road, Four Rod Road, Sampson Road, Meaderboro Road and the surrounding areas (the "Targeted Coverage Area").

needed is unavailable to the town." *National Tower* v. *Plainville Zoning Board of Appeals*, 297 F.3d 14, 19 (1st Cir. 2002). *See Second Generation Properties, L.P.* v. *Town of Pelham*, 313 F.3d 620, 629 (1st Cir. 2002).

III. THE DECISION

At its hearing held on June 11, 2014, the Board voted, to deny AT&T's proposed Facility. The Board issued a brief one page decision on June 13, 2014. The only reason for denial set forth in the Decision is that "the proposal is detrimental, injurious, obnoxious, or offensive to the neighborhood."

Prior to the close of the public testimony, one Board member took a "straw poll" of those in attendance by requesting the audience to raise their hands indicating if they were "for" or "against" the proposal. The straw poll, and not the application of the relevant standards under the Ordinance, formed the apparent basis for the determination that the proposed Facility was detrimental, injurious detrimental, injurious, obnoxious, or offensive to the neighborhood." However, the Decision does not provide any further explanation, factual basis, or citation to any evidence whatsoever in the record as grounds for the denial.

IV. DISCUSSION

Under New Hampshire law, an applicant is entitled to a special exception if the criteria are met. *Fox* v. *Town of Greenland*, 151 N.H. 600 (2004); *Cormier, Trustee of Terra Realty Trust* v. *Town of Danville ZBA*, 142 N.H. 775 (1998). Under the TCA, the Board's decision must be made in writing and be based on substantial evidence to deny the Special Exception. In addition, the Decision cannot prohibit nor have the effect of prohibiting the provision of personal wireless services. Both state and federal law compel the granting of the special exception in this case.

1. AT&T Demonstrated Compliance With The Special Exception Criteria

AT&T submitted a written statement demonstrating compliance with all of the relevant special permit criteria. The only criterion that the Decision cites for the Board's denial is that "the proposal is detrimental, injurious, obnoxious, or offensive to the neighborhood." The Decision makes no findings of fact, cites no evidence, and gives no further explanation as to how the proposal fails to meet this Special Exception criterion.

The Board's conclusion that special exception criterion was not met does not withstand scrutiny under New Hampshire law and the Telecommunications Act. As stated by the First Circuit Court of Appeals:

> "In a number of cases, courts have overturned denials of permits, finding (for example) that safety concerns and *aesthetic objections rested on hollow generalities and empty records*."

Town of Amherst, 173 F.3d 9, 16 (1st Cir. 1999) (emphasis added) and cases cited. Courts have frequently annulled local zoning denials which were based on the alleged visual impacts and/or alleged adverse impacts on neighboring property values. See, *e.g, SBA Towers, supra; Nextel Communications, Inc.* v. *Manchester-by-the-Sea*, 115 F. Supp. 2d 65, 72 (D. Mass. 2000) and cases cited.

AT&T amply demonstrated that it satisfied all criteria required for the grant of the requested relief, including the single criterion cited by the Board. AT&T demonstrated that the proposed Facility is not detrimental, injurious, obnoxious or offensive to the neighborhood. The proposed Facility is unmanned and passive in nature. The Facility will only be visited one to two times per month by authorized personnel in an SUV-sized vehicle; therefore it will have no material impact on traffic near the Property. The Facility will not generate any excessive noise, heat, smoke, glare, effluent, odor or pollution.

AT&T also demonstrated that the location of the proposed Facility utilizes significant setbacks to adjacent properties and the existing vegetation on and near the Property to help minimize any alleged adverse visual impacts. The proposed Facility will involve no overcrowding of land or undue concentration of population.

The record also shows that the location and scale of the equipment shelter and access drive are in keeping with typical accessory buildings and access drives in the neighborhood. In any event, the equipment shelter and surrounding compound will be substantially screened from view by virtue of their location and surrounding vegetation. AT&T demonstrated that the proposed Facility will promote collocation and reduce the number of new structures ultimately needed to provide wireless communication services in the surrounding area. As a result, the proposed Facility is consistent with, and not injurious or detrimental to, the existing neighborhood with regard to scale and location.

AT&T demonstrated that the proposed Facility would not be detrimental to property values in the surrounding area. In support of its application, AT&T referenced copies of numerous reports from the record appendix in the *Daniels* case that analyze that question as to other towers in similar settings in New Hampshire and incorporated these reports by reference. These reports consistently demonstrate that wireless towers (such as the proposed Facility) do not diminish the value of surrounding residential properties.

Beyond demonstrating that the proposed Facility would not be injurious or detrimental to the neighborhood, AT&T demonstrated that the Facility will benefit the neighborhood by providing enhanced wireless communications services to the residents, visitors and businesses in the vicinity of the Property. As the federal district court recently ruled in *New Cingular Wireless PCS, LLC v. City of Manchester, NH*, 2014 WL 799327 (D.N.H. 2014) when it ordered the Manchester ZBA to issue a use variance for a telecommunications tower in a residentially zoned area of the city, the Board must take into account the "substantial benefits the public will obtain if the tower is built as proposed," including advancing the significant public purposes of the TCA; improving advanced, seamless, state-of-the-art wireless communication coverage in the

target area; enhancing public safety and economic development; and providing opportunities for collocation, which would diminish the need for other carriers to build their own towers in the vicinity. AT&T's proposed Facility will promote the public interest in the same manner. The Facility will bring advanced wireless services to the citizens, residents, businesses, visitors and travelers in this under-served area of Rochester; will enhance communications for voice, data and in-building applications; will promote public safety by enabling AT&T's subscribers to communicate immediately with police, fire, EMT, and other public officials in the event of a fire, accident, or other medical emergency or natural disaster; and will promote co-location and helping to minimize the number of new towers in the City.

As the New Hampshire Supreme Court has noted, "A tower at this site would also serve the public interest in that it would alleviate a significant gap in coverage and would be used to provide service for at least two other wireless telecommunications companies to limit the need for any further towers." *Daniels v. Londonderry*, 953 A.2d 406, 414 (N.H. 2008). The purpose of AT&T's application is the same as the proponent in *Daniels*, i.e., to alleviate a significant gap and thereby serve the public interest in this area.

2. The Board's Decision is Not "In Writing" Within the Meaning of the TCA

The only reason for denial set forth in the Decision states that "the proposal is detrimental, injurious, obnoxious, or offensive to the neighborhood." The Decision does not provide any explanation, factual basis or evidence in the record to support this basis for the denial. Under the TCA, simply parroting a criterion and stating that an applicant has failed to meet it, is not sufficient to satisfy the TCA's "in writing" requirement.

The Board's Decision fails to meet the TCA's requirement for a written decision because it offers no factual findings, legal conclusions, or evidentiary basis upon which a Court may evaluate its conclusion. Instead, the Decision relies upon a mere recitation of the Ordinance. This type of conclusory statement is insufficient to meet the written denial requirement of the TCA. *See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F.Supp.2d 311, 318-319 (D.Mass. 2002), *see also*, *Sprint Spectrum v. Town of Swansea*, 574 F. Supp. 2d 227, 236 (D. Mass. 2008) (board failed to provide substantial evidence when its decision merely "parrot[ed]" the city's bylaws). Although the board need not make formal findings of fact or state every single fact in the record, it may not "hide the ball". *National Tower*, 297 F. 3d at 20-21. A written decision must contain a "sufficient explanation of the reason for the denial to allow a reviewing court to evaluate the evidence supporting those reasons." *Id.*

The Board's Decision in this case is similar to that involved in the *Town of Randolph* case where the Court found that the decision to deny an application for a communications tower was insufficient to meet the requirements of the TCA. 193 F.Supp.2d at 318. In that case, the Board of Selectmen's written decision stated that the special permit was denied "because 'the use is not in harmony with the intent and purpose of the zoning bylaw because it does not conform with the zoning bylaw' and because it 'does not meet the

other provisions of the zoning bylaw for issuance of a special permit as follows: The proposed [tower] does not meet all the other applicable requirements of the zoning bylaw and will not serve the public good.'" *Id.* In overturning the Board's decision, the Court found that "these conclusory statements amount to little more than an official 'because we said so[,]'" and, thus, were insufficient under the TCA. *Id.*

The Board's Decision here offers no more than a conclusory statement reciting a criterion for a Special Exception as stated in its zoning ordinance. This recitation provides no basis for a Court to evaluate the evidence supporting the Board's denial and therefore fails to meet the standard for a written record articulated in the *Randolph, Wayland* and *Swansea* cases.

3. The Board's Decision is Not Supported by Substantial Evidence in the Written Record

The TCA provides 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). The Board's Decision here is not supported by substantial evidence in the written record.

Where a local zoning authority denies a wireless carrier's request for zoning relief, its decision must be substantiated by objective evidence in the record. *See Telecorp Realty, LLC v. Town of Edgartown*, 81 F.Supp. 2d 527 (D. Mass. 2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, et al.*, 231 F. Supp. 2d 396, 404, (D.Mass. 2002), *citing Penobscot Air Services, Ltd. v. Federal Aviation Administration*, 164 F. 3rd 713, 719 (1st Cir. 1999). The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 59 (1st Cir. 2001). Moreover, "the substantial evidence requirement expressly proscribes local government agencies from reaching decisions based on unsubstantiated conclusions." *Edgartown* at 260. Here, AT&T introduced specific and uncontroverted evidence that the Facility complied with the Ordinance and would not be detrimental or injurious to the neighborhood.

No allegation of "detriment" or "injury" to the neighborhood can withstand even the most basic factual scrutiny. There is no substantial evidence to suggest that there is a change in scale or other characteristics of the Facility that will have any impact on the neighborhood. The Board's conclusion to the contrary relies on an "empty record" and "hollow generalities." *Amherst* at 16. *See also SBA Towers*, 2008 2l 4372805 at *14.

Under the substantial evidence test, the Board cannot rely upon generalities about visual impacts that are not "grounded in the specifics of the case." *New Cingular Wireless PCS LLC* v. *Town of Stow*, 2009 WL 2018450 (D. Mass. 2009) at *8 ("The bare conclusory assertions that New Cingular's addition would be unsightly are not even accompanied by a

conclusory assertion that the addition would make the smokestack substantially worse than what is already there."), citing *Todd*, 244 F.3d at 61.

In similar contexts, the First Circuit has distinguished between site-specific concerns and generalized concerns that "refer to negative comments that are applicable to any tower regardless of location." *Todd*, 244 F.3d at 61 (visual impact). *See also SBA Towers, supra; Nextel Communications of the Mid-Atlantic, Inc.* v. *Town of Sudbury*, 2003 WL 543383 (D. Mass. 2003) (same) and cases cited. See *ATC*, 303 F.3d at 97-98. If generalized concerns applicable to any tower constituted substantial evidence, localities could deny almost any application because "[f]ew people would argue that telecommunication towers are aesthetically pleasing."[5] *Todd*, 244 F.3d at 61. However, it was precisely the types of generalized concerns that would be applicable to any tower that could address AT&T's significant gap in coverage that were presented to the Board and upon which it apparently relied.

Moreover, the mere fact of opposition is simply not substantial evidence. See *ATC Realty, LLC* v. *Town of Kingston, New Hampshire*, 303 F.3d 91, 97(1st Cir. 2002) ("[C]ourts have consistently held that a 'few generalized expressions of concern with "aesthetics" cannot serve as substantial evidence on which [a town] could base [a] denial.'" (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999)); *Iowa Wireless Servs.*, 29 F. Supp. 2d at 921. In *SBA Towers II, LLC* v. *Town of Atkinson*, N.H, 2008 WL 4372805 (D. N.H. September 19, 2008), the Court stated:

> It was unreasonable and arbitrary for the ZBA to reject plaintiff's evidence and opt, instead, to rely on the extensive abutter opposition to conclude that property values would be adversely impacted by the proposal. That input simply is not substantial evidence. See *Town of Amherst*, 173 F.3d at 16 (citing cases where denial of permits were overturned because of "hollow generalities and empty records"); see also *Iowa Wireless Servs.*, 29 F. Supp. 2d at 921 (citing cases which hold "that the generalized concerns of citizens are insufficient to rise to the level of substantial evidence").

As the record demonstrates, due to the lack of existing structures within the vicinity of the Targeted Coverage Area that will allow AT&T to provide adequate coverage to this significant gap in its wireless network, a new tower in this area of the City is required. The generalized concerns expressed by the public are not based on substantial evidence and the Board's Decision must be reversed in order to avoid violating the TCA.

---

[5] In *Todd*, the Board acted properly because the comments "specifically addressed whether this 150-foot tower was appropriate for this particular location, on the top of a fifty-foot hill in the middle of a cleared field" in the geographic center of town, where it "would be seen daily by approximately 25% of the Town's population." *Id.*

4. The Board's Decision Results in an Effective Prohibition of the Provision of Personal Wireless Services in Violation of the TCA

The TCA provides that local governments making zoning decisions that involve "the placement…of personal wireless telecommunications facilities shall not prohibit or have the effect of prohibiting personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). By denying AT&T's application for zoning relief, the Board has effectively prohibited AT&T from providing personal wireless services in violation of the TCA because AT&T has a significant gap in coverage in the Targeted Coverage Area and there are no feasible alternatives to AT&T's proposed solution to address that gap. *See Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40, 57 (1st Cir. 2012) (quoting *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009)). *See also Nat'l Tower LLC v. Frey*, 164 F. Supp. 2d 185, 188 (D. Mass. 2001) *aff'd sub nom. Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Sprint Spectrum L.P. v. Town of Swansea*, 574 F. Supp. 2d 227, 237 (D. Mass. 2008).

The RF Report included in AT&T's application, provides a description of the Targeted Coverage Area and a statement that the area represents a significant gap and includes Walnut Street (Route 202A),[6] Crown Point Road, Sheepboro Road, Ten Rod Road, Four Rod Road, Sampson Road, Meaderboro Road and the surrounding areas (the "Targeted Coverage Area"). The RF Report included a table of AT&T's existing sites and radio frequency propagation maps that depicted AT&T's existing facilities. The propagation maps along with the RF Report demonstrate that AT&T has a significant gap in coverage in the Targeted Coverage Area. As demonstrated by the RF Report and propagation maps, AT&T has existing facilities on the existing towers located nearest to the Targeted Coverage Area and these existing faculties are unable to provide adequate coverage to this area. The RF Report by AT&T's radio frequency expert is uncontroverted by any evidence in the record.

AT&T's application also included an Alternatives Analysis by Site Acquisition Specialist, Kristen LeDuc, dated February 28, 2014 (the "Alternatives Analysis"). As detailed in the Alternatives Analysis, AT&T employed a comprehensive and systematic site selection process. AT&T first sought to identify suitable existing structures for a potential facility. As set forth in the Alternatives Analysis, due to the lack of existing structures in the area, a new tower is required to address AT&T's significant gap in coverage in this area.

Based upon the uncontroverted facts on record in this case, the proposed Facility at the property is the only feasible alternative to serve AT&T's customers and prospective customers. As is made clear by the RF Report, the Facility's structure and location was determined by applying computer generated simulations to pinpoint specific regions needing telecommunications service from the facility in the network. The simulations

[6] The RF Report also provides that the Annual Average Daily Traffic statistics from the State of New Hampshire Department of Transportation included approximately 4,700 cars per day on Walnut Street and 900 cars per day on Four Rod Road.

model characteristics such as antenna type, gain, height, power output, terrain, topography, elevations and the range of frequencies used. Based on the data obtained from the simulations, AT&T's RF Engineers identified a limited search area within which the telecommunication facility must be located to ensure reliable coverage for customers.

Given the evidence before the Board and the Board's conclusory statement in the Decision, further efforts to locate an alternative site to provide adequate coverage to the Targeted Coverage Area would be fruitless. As established by the RF Report, a new tower in this same neighborhood is required to address AT&T's significant gap in coverage. The generalized concerns about the Facility being allegedly "detrimental to the neighborhood" do not support the Board's Decision. See *Todd*, 244 F.3d at 61. As a result, the Board's Decision has effectively prohibited wireless services. *See Omnipoint Holdings, Inc. v. City of Cranston*, 586 F. 3d. 38, 50 (1st Cir. 2009); *see also Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 630 (1st Cir. 2002).

Therefore, the Board's Decision results in an effective prohibition of the provision of personal wireless services and must be reversed in order to avoid violating the TCA.

5. The Board's Decision Was Based on Environmental Effects of Radio Frequency Exposure in Violation of the TCA

The TCA provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). *See, e.g., Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070, 121 S.Ct. 758, 148 L.Ed.2d 661 (2001) (the TCA preempts "state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe"); *Freeman v. Burlington Broadcasters*, 204 F.3d 311, 320 (2d Cir.), *cert. denied*, 531 U.S. 917, 121 S.Ct. 276, 148 L.Ed.2d 201 (2000) (the Federal RF Safety Standards totally pre-empt conflicting attempts to regulate RF emissions); *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 494-495 & n.3 (2d Cir. 1999) ("health concerns expressed by residents cannot constitute substantial evidence;" "environmental effects" and "health concerns" are interchangeable; "when the testimony [before the board] is almost exclusively directed to health effects, there must be substantial evidence of some legitimate reason for rejecting the applications to avoid the conclusion that the denials were based on the impermissible health effects ground"); *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1998) (the Act precludes consideration of "health concerns from radio emissions"); *USCOC of New Hampshire RSA #2, Inc. v. City of Franklin, N.H.*, 413 F. Supp. 2d 21, 29 (D. N.H. 2006) ("Local zoning authorities may not … make zoning decisions based on concerns over the environmental or health effects of the radio emissions associated with wireless telephone service").

Members of the public that spoke in opposition to the Facility cited health risks from the radio frequency emissions by the Facility as part of the basis for their opposition. These health concerns played a significant role in the opposition by some members of the public. By later relying on the straw pole of the same members of the public as part of the basis for the denial, the Board impermissibly included such health concerns within its basis for the denial. As a result, even if other grounds may be given as the basis for a denial, where health risks are included as a component of the decision-making process, the Board's Decision is still subject to reversal for violating the TCA. *See T-Mobile Northeast LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009) ("any decision actually based on environmental effects is a violation, whether other legitimate reasons factored into the decision or not.")

Therefore, the Board's Decision improperly relied on environmental effects of the proposed Faclity and must be reversed in order to avoid violating the TCA.

V. CONCLUSION

The Board should promptly grant rehearing and approve the requested zoning relief to allow the Facility which is needed to address AT&T's significant gap in coverage in the Targeted Coverage Area. Failing to do so would violate the requirements of New Hampshire zoning law and the federal Telecommunications Act, and would be contrary to New Hampshire Supreme Court on the very issues at stake here.

AT&T respectfully requests that the Board schedule this application for a public hearing at its next meeting for which proper notice can be given.

If I can provide any further information regarding this application, please let me know.

Sincerely,

Brian S. Grossman

cc: James Smalanskas (by email)
Kevin Mason (by email)
Kristen LeDuc (by email)
Stephen D. Anderson, Esq. (by email)