

Town of Leicester  
**ZONING BOARD OF APPEALS**  
Washburn Square  
Leicester, Massachusetts 01524



GENERAL MINUTES / June 24, 1999

Members Present: Jim Buckley; Chairman, Vaughn Hathaway,  
Laurence Todd, Linda Finan

Called to order at 8:20 pm

Memorandum received from the Planning Board regarding a submitted application on a Definitive Subdivision for Lakeview Estates, Burncoat Lane Extension (7 lots). It is being submitted to the ZBA for review and recommendations for consideration by the Planning Board in its deliberation. The Zoning Board Members reviewed the plan and made 5 recommendations and suggested modifications on the project. (attached)

MOTION made and seconded by Jim Buckley and Laurence Todd to approve minutes of May 20, 1999. Vote: UNANIMOUS

A letter received from Attorney Joe Cove regarding Cellular One. Enclosed is a copy of the Plaintiff's Opposition Brief. Mr. Cove is requesting the board to review.

Executive Session has been requested.

MOTION: Linda Finan - to go into Executive Session for further discussion into the matter of Civil Action No. 98 CV 11959RCL. Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One, plaintiff - VS. - Laurence M. Todd, Vaughn N. Hathaway, Jr., James T. Buckley, Linda G. Finan, Dennis E. Hennessy, As they are the members of and constitute the Board of Appeals of the Town of Leicester, Worcester County, Massachusetts, Defendants. Memorandum of Plaintiff, Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One, In Opposition To Motion Of Defendant Town Of Leicester For Summary Judgment.

SECONDED: Jim Buckley - Discussion: Poll of the Board - - -  
Vote: Jim Buckley - Yes, Linda Finan - Yes, Laurence Todd - Yes, Vaughn Hathaway - Yes.

Executive Session Called To Order At 7:50 pm

Discussion: Initial settlement proposal of lowering the tower to 100 feet from 150 feet. The board voted NO. Mr. Cove suggested the board grant the 150 feet with

conditions that an alternate site be chosen. If an alternate site is chosen, should the board grant this, the civil action be withdrawn and the original petition be granted.

The board disagrees.

Mr. Cove made the Motion of the Defendant, Town of Leicester for Summary Judgment. The Plaintiff, Southwestern Bell Mobile System, opposes the Motion. The Plaintiff reason: The Defendants Have Misstated the Legal Issue.

As stated on Page 5 of the Civil Action Motion, par. #4, Further, the 'facts' to which the opponents 'testified' and on which the Board now relies, lack any support in the record and are not credible. This is referring to the decreasing value of property within the Cell Tower Area.

As stated in the minutes, evidence points to the decrease in property value within such areas.

Stated on Page 6 of the Civil Action Motion, par. #3, In summary, even if the Court were to consider the citizen opposition relied upon by the Board in determining whether there is "substantial evidence" in the record to support the Board's decision, the citizen opposition in this instance does not amount to "substantial evidence" when considered in the light which the record as a whole furnishes.

As stated in the minutes, substantial evidence was presented in print, by the citizens in opposition & also stated in the, Introduction of Mass. General Laws, Chapter 40A,; 'to conserve the value of land and buildings'.

This Civil Action started with and ended with the wording, 'No Substantial Evidence'. This board feels there was substantial evidence present and their Decision was justified.

A meeting with the Town Administrator and Town Council might be in order. At present, it is in the courts hands and it will be decided within that realm, as to the acceptance of this summary. Whether it will go to trial or be settled out or court.

No new evidence can be presented.

MOTION: Linda Finan - To Close Executive Session.

SECONDED: Vaughn Hathaway - Discussion: Poll of the Board - Jim Buckley - Yes, Linda Finan - Yes, Laurence Todd - Yes, Vaughn Hathaway - Yes.

Executive Session closed at 8:15 pm

Respectfully submitted,

Barbara Knox

**JOSEPH C. COVE**  
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June 15, 1999

Mr. Laurence Todd  
Leicester Zoning Board of Appeals  
Town of Leicester  
3 Washburn Square  
Leicester, MA 01524

RE: Cellular One  
Vs. Laurence Todd, et al  
Civil Action No. 98CV11959RCL

Dear Mr. Todd:

Enclosed please find copy of Plaintiff's Opposition Brief. Would you be kind enough to share this with your Board.

Very truly yours,

  
Joseph C. Cove (JCC)

JCC/amc  
8850-1  
Encl.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98 CV 11959RCL

SOUTHWESTERN BELL MOBILE )  
SYSTEMS, INC. d/b/a CELLULAR ONE, )  
Plaintiff )  
VS. )  
LAURENCE M. TODD, VAUGHN N. )  
HATHAWAY, JR., JAMES T. BUCKLEY, )  
LINDA G. FINAN, DENNIS E. HENNESSY, )  
As They Are the Members of and Constitute )  
the Board of Appeals of the Town of )  
Leicester, Worcester County, Massachusetts, )  
Defendants )

**MEMORANDUM OF PLAINTIFF, SOUTHWESTERN BELL MOBILE  
SYSTEMS, INC., d/b/a CELLULAR ONE, IN OPPOSITION TO MOTION OF  
DEFENDANT TOWN OF LEICESTER FOR SUMMARY JUDGMENT**

**STATEMENT PURSUANT TO LR 56.1**

The parties are in agreement that there are no material facts of record as to which there exists a genuine issue to be tried and that this matter is ripe for summary judgment as to Count I of the Plaintiff's complaint. The sole issue to be determined by the Court in these cross motions for summary judgment is whether the decision of the Defendant Board of Appeals of the Town of Leicester is supported by "substantial evidence contained in a written record" as required by 47 U.S.C. §332(c)(7)(B)(iii).

**ARGUMENT**

The Plaintiff, Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One ("Cellular One") opposes the *Motion of the Defendant, Town of Leicester for Summary Judgment* for all of the reasons set forth in the *Memorandum In Support of Motion of Plaintiff, Southwestern Bell*

*Mobile Systems, Inc., d/b/a Cellular One, For Summary Judgment As to Count I of the Complaint*, previously filed in this matter, and for the following additional reasons.

**1. The Defendants Have Misstated the Legal Issue.**

In support of their motion for summary judgment, the Board of Appeals of the Town of Leicester ("Board") incorrectly asserts that "[i]f there is a rational explanation for the denial (even though a contrary conclusion could be drawn from the same evidence), then, as a matter of law, the Court must deny summary judgment for the Plaintiff and grant summary judgment to the Defendant." *Memorandum of the Defendant, The Board of Appeals for the Town of Leicester, In Opposition to the Plaintiff's Motion for Summary Judgment as to Count I of the Complaint and Memorandum in Support of Defendants' Motion for Summary Judgment in Favor of Town of Leicester* ("Defendants' Memorandum"), p.5.

The proper standard of review is not merely whether the Board has articulated a rational reason for denial, but whether the Board has articulated a rational reason for denial which is not only (a) supported by "substantial evidence contained in a written record, " 47 U.S.C. 332(c)(7)(B)(iii)<sup>1</sup>, but also (b) is a valid reason for denial "under the criteria laid down by the zoning law itself." *Town of Amherst, New Hampshire v. Omnipoint Communications, Enterprises, Inc.*, \_\_\_\_ F. 3d \_\_\_\_ (1st Cir. 1999). "The substantial evidence test . . . involves some deference but also has some bite." *Id.* at \_\_\_\_\_. It requires that the Court:

. . . overturn the board's decision if it 'cannot conscientiously find that the evidence supporting the decision is substantial, *when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.*' [citation omitted.] [Emphasis added.]

*Bellsouth Mobility, Inc. v. Gwinnett County, Georgia*, 944 F. Supp. 923, 928 (N.D.Ga. 1996).

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<sup>1</sup> The Exhibits appended to the Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment are not part of the record before the Board, which was previously filed by the Defendants with the Court.

2. **Citizen Opposition, Without Supporting Evidence, Cannot Constitute “Substantial Evidence” Within the Meaning of 47 U.S.C. § 332(c)(7)(B)(iii).**

In support of its contention that there is substantial evidence in the record before the Board to support the Board's reasons for denial, the Board is constrained by the absence of any other evidence in the record in its favor, to point to the comments of six citizens of Leicester (three of whom have the same last name and only one of whom is identified as a potential abutter). (Defendants' Memorandum, pp.7-10.) None of these citizens submitted any evidence to support their opinions.

The overwhelming trend of authority has been that the unsubstantiated, generalized concerns of citizens opposing an application to construct a personal wireless service facility will not be deemed to constitute substantial evidence under 47 U.S.C. §332(c)(7)(B)(iii). *See, e.g., Bellsouth Mobility, supra* at 928; *Illinois RSA No.3, Inc. v. County of Peoria*, 963 F. Supp. 732, 744-745 (C.D. Ill. 1997); *Omnipoint Corp v. Zoning Hearing Board of Pine Grove Township*, 20 F. Supp. 2d. 875, 880 (E.D.Pa. 1998); *Primeco Personal Communications, L.P. v. Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998).

The only case to the contrary, which the Defendants in this case rely upon, is *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F. 3d 423 (4th Cir. 1998). In reaching its conclusion that the City Council of Virginia Beach could rely upon generalized concerns of citizen opposition, the *Virginia Beach* Court reasoned:

The Virginia Beach City Council is a state legislative body, not a federal administrative agency. The ‘reasonable mind’ of a legislator is not necessarily the same as the ‘reasonable mind’ of a bureaucrat, and one should keep the distinction in mind when attempting to impose the ‘substantial evidence’ standard onto the world of legislative decisions. It is not only proper but even

expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters.

*Id.* at 430.

Unlike the Virginia Beach City Council, the Board in this case is not a legislative body entitled to entertain political considerations as a basis for its decision making. In Massachusetts towns, the legislative authority in zoning matters is reserved to the Town Meeting, subject to the limitations set forth in the Zoning Act. *See* M. G. L. c. 40A, §5. The Board, acting on applications for special permit, has no legislative authority.

[A board of appeals] is an administrative body which may be authorized to exercise *quasi-judicial powers*. It employs such powers . . . when it hears and grants or denies applications for special permits. *It is a body without legislative authority* . . . .[Emphasis added.]

*Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 157 (1976).

As such:

The board must act fairly and reasonably *on the evidence presented to it*, keeping in mind the objects and purposes of the enabling act and the by-law. [Emphasis added.]

*MacGibbon v. Board of Appeals Duxbury*, 356 Mass. 635, 638-639 (1970).

Therefore, the rationale for the decision in *Virginia Beach*, which in any event goes against the weight of authority, is simply not applicable. The Board in the instant case is not entitled to weigh political considerations in its decision-making and should be held to a standard of decision-making which is based upon substantial evidence relevant to the standards and criteria set forth in the Town of Leicester Zoning Bylaw.

3. **Even if the Board Could Consider the Unsubstantiated Opinions of Citizens Opposed to the Facility, Those Opinions Do Not Furnish Substantial Evidence to Support the Board's Decision.**

Even if [this Court] were to adopt the Fourth Circuit's more deferential standard [in *Virginia Beach*] toward the evidentiary value of constituent testimony, on which we take no position, the volume and specificity of the comments in the proceedings here do not reach even the low threshold set by that decision. Therefore, we find that the few generalized expressions of concern with "aesthetics" cannot serve as substantial evidence on which the Town could base the denials.

*Cellular Telephone Co. v. Town of Oyster Bay*, 166 F. 3d 490, (2d. Cir. 1999).

In *Virginia Beach* the evidence which the City Council was entitled to consider included "numerous petitions opposing the application," *Id.* at 430, and the "repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views." *Id.* at 431.

In the instant case, there were no such petitions or widespread opposition. As set forth above, the citizen opposition on which the Board relies in Defendants' Memorandum came from six citizens, three of whom appear to be related to each other.

Further, the 'facts' to which the opponents 'testified' and on which the Board now relies, lack any support in the record and are not credible. For example, the 'testimony' of one of the citizens that the developer of the Blair subdivision will build \$120,000 houses instead of \$210,000 houses and is against the proposed facility, (Defendants' Memorandum, p. 7-8) is belied by the fact that Blair attended none of the Board's hearings and didn't even write a letter to the Board. It is odd that the Board would now rely on this 'testimony' since the chairman of the Board, Mr. Todd, acknowledged during the hearing the impropriety of relying on such testimony when he stated, "Having not received any communication, I can't guess as to what other people are thinking." (*See Record, Tab 9, p. 11.*) Cellular One respectfully submits that the more

rational inference is that Blair would not have stood by idly if he believed his gross revenues would drop by \$90,000 on each of 57 lots (\$5,130,000). The citizen 'testimony' is also completely inconsistent with the report of the professional appraiser submitted by Cellular One who gives detailed price and sales data concerning this subdivision in her report. (*Record, Tab 6, p. 5.*)<sup>2</sup>

In the Defendants' Memorandum, the Board points to no evidence whatsoever to support its conclusion that the facility will be an attractive nuisance, but merely notes that the "attractive nuisance claim remained a concern as the end of three months of hearings." (Defendants' Memorandum, p. 7.)

Similarly, the Board points to no evidence to support its conclusion that the proposed facility will have a negative impact on property values, contenting itself only with providing a critique of the appraiser's report which concluded there would be no adverse effect on property values. (Defendants' Memorandum, pp. 9-10.)<sup>3</sup>

In summary, even if the Court were to consider the citizen opposition relied upon by the Board in determining whether there is "substantial evidence" in the record to support the Board's decision, the citizen opposition in this instance does not amount to "substantial evidence" when considered in the light which the record as a whole furnishes.

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<sup>2</sup> Likewise, the assertion of one of the citizens, that there would be 51 units within 200 to 300 feet of the proposed facility (Defendants' Memorandum, p.8) is patently untrue and is belied by the plan submitted as Exhibit 2 to the Defendants' Memorandum (not a part of the record before the Board), which shows that only three of the proposed lots are adjacent to Locus. The comment of one of the citizens relied on by the Board that the facility will be visible to 25% of the town's population (Defendants' Memorandum, p.9) is hyperbole and refers to the speaker's estimate that 25% of the town's population consisted of school age children who go to the Leicester public schools adjacent to Locus.

<sup>3</sup> As noted in the *Memorandum in Support of Motion of Plaintiff, Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One for Summary Judgment as to Count I of the Complaint*, the preservation of property values is not a criteria of the Town of Leicester Zoning Bylaw. Moreover, the Board is not entitled to simply attempt to discredit the appraiser's report but, if the Board "wanted to use this criterion as a basis for denying [the] application, the burden was on them at the administrative level to put some evidence in the record on property values . . . ." *Sprint Spectrum, L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 254 (D. Conn. 1998).

## CONCLUSION

The citizen opposition on which the Board relies in Defendants' Memorandum does not amount to "substantial evidence contained in a written record" to support the Board's conclusion that Cellular One's proposed facility does not meet the visual impact criteria of the Town of Leicester Zoning Bylaw. Further the Board was unable to point to any evidence in its record to support its conclusions that Cellular One's proposed facility will constitute an attractive nuisance, or will have an adverse effect on property values.

Therefore, the Board's decision is not supported by substantial evidence in its record, as required by 47 U.S.C. 332(c)(7)(B)(iii) and, Defendants' Motion for Summary Judgment should be denied.

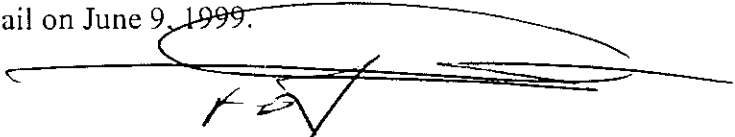
Respectfully submitted,  
SOUTHWESTERN BELL MOBILE SYSTEMS,  
INC. d/b/a CELLULAR ONE,  
Plaintiff,  
By its Attorneys,  
D'AGOSTINE, LEVINE, PARRA & NETBURN P. C.

By: 

Louis N. Levine - BBO #296880  
F. Alex Parra - BBO #390315  
268 Main Street  
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June 9, 1999

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by first class mail on June 9, 1999.

  
F. Alex Parra - BBO #390315

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