# No. 00-1164

## United States Court of Appeals
## for the First Circuit

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,
D/B/A CELLULAR ONE,
PLAINTIFF-APPELLANT,

*v.*

LAURENCE M. TODD, AS HE IS A MEMBER OF AND CONSTITUTE THE BOARD OF APPEALS OF THE TOWN OF LEICESTER, WORCESTER COUNTY, MASSACHUSETTS; VAUGHN N. HATHAWAY, AS HE IS A MEMBER OF AND CONSTITUTE THE BOARD OF APPEALS OF THE TOWN OF LEICESTER, WORCESTER COUNTY, MASSACHUSETTS; JAMES T. BUCKLEY, AS HE IS A MEMBER OF AND CONSTITUTE THE BOARD OF APPEALS OF THE TOWN OF LEICESTER, WORCESTER COUNTY, MASSACHUSETTS; LINDA G. FINAN, AS SHE IS A MEMBER OF AND CONSTITUTE THE BOARD OF APPEALS OF THE TOWN OF LEICESTER, WORCESTER COUNTY, MASSACHUSETTS; AND DENNIS E. HENNESSEY, AS HE IS A MEMBER OF AND CONSTITUTE THE BOARD OF APPEALS OF THE TOWN OF LEICESTER, WORCESTER COUNTY, MASSACHUSETTS,
DEFENDANTS-APPELLEES.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

# BRIEF OF THE DEFENDANTS-APPELLEES, LAURENCE M. TODD, ET AL.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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## STATEMENT OF FACTS

The Town of Leicester (hereinafter, "the Town") is located in the central portion of the Commonwealth of Massachusetts adjacent to the City of Worcester; the Town is one thousand (1,000) feet above mean sea level and generally sits on an elevated plateau with certain hills fifty (50) to sixty-five (65) feet higher than the mean elevation to the north and west of the center of the Town. See Site Plan and topographic inserts. (A. 275, 276 and 281). The Appellant (hereinafter, "Cellular One") proposes to construct a one hundred fifty (150) foot lattice tower at one of the highest points in the Town: 180 Paxton Street, locally known as "Carey Hill", (hereinafter, "locus").

The locus is at elevation 1,064 feet above sea level, (A. 275, 276); it is a barren, treeless location exceeding twenty-five (25) acres in area. (A. 268, 328). The locus is approached on the south from a neighborhood of older, established homes adjacent to a public school complex. At the top of the hill (locus) there are located two forty (40) foot water tanks painted green/beige owned by a district water company which intends on leasing the locus to Cellular One. The locus is in the SA zone (Suburban-Agricultural), which is classified for residential, agricultural and municipal use

with the majority of development on Paxton Street and surrounding streets. (A. 74).

The locus is ringed on the south and southwest by an older residential area on Paxton Street, Whittemore Street, Washburn Street and Manville Street. (A. 74). The northerly and northeasterly side of the hill is draped by a fifty-seven lot residential subdivision in an open field known as Carey Hill Estates referred to at various locations throughout the Record in the Appendix, viz.: Appraisal Report of Deborah Haskell (A. 75); reference to the "Development" by Mr. Todd, Chairman of the Zoning Board of Appeals (hereinafter the "Board") (A. 245, 248, 273, 274); site plan of Cellular One using the residential subdivision plan as a plan of reference for the layout of the Cellular One site plan. (A. 62, 275).[1] The subdivision plans and approvals predated the Cellular One application for a special permit. At the northerly entrance to the subdivision, the closest residential lot is two hundred (200) feet from locus. (A. 261).

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[1] Cellular One's site plan at A. 62 states in part under the heading, "Plans of Reference":

> Construction Plan, Carey Hill Estates, Leicester Massachusetts Owner Octavia A. & Ellsworth R. Hyland, 175 Paxton Street, Leicester, MA 01533, Pepared by James E. Kalloch PE,PLS Engineer/Surveyor dated 8/30/96

In May 1998, the Town of Leicester (hereinafter, "the Town") adopted a by-law regulating the siting of telecommunications towers (Add. 35-38), which among other items, requires a facility to have *minimal visual impact*. In April 1998, Cellular One applied for a special permit pursuant to this by-law. In June 1998, the Board held its first hearing on the application of Cellular One. The Board heard testimony from Cellular One detailing the height of the tower and the FAA requirements that the tower be lighted with two permanent beacon lights and painted in alternating sections of red and white. Various neighbors and abuttors to the site gave strident opposition to the tower, calling it a "visual eyesore" (A. 239); "not the right fit for that area, that is just common sense." (A. 246); suggesting an adverse effect on the neighborhood, particularly the residential subdivision under construction. (A. 248).

The hearing resumed on August 18, 1998 when Cellular One presented an appraiser offering the opinion that the tower would not impact property values in the neighborhood. (A. 72). Community opposition again surfaced with specific opposition focused on visual impact (A. 258) and concerns regarding other sites that were not considered but would have less visual impact. At least one member of the Board, Mr. Todd, expressed concern that Cellular One had not made a good faith

attempt to locate other suitable but less spectacular locations. (A. 263).

It is admitted that Cellular One did not seek out this locus; the water district offered it to them. Cellular One was solicited; it did not arrive at this locus after an exhaustive survey of every other possible location. (A. 29, 345). Additionally, when asked if this locus was the only possible locus for location of a wireless tower, Cellular One stated it was not the only possible locus. (A. 346).

On September 8, 1998, the Board reconvened its public hearing. Two members of the Board, Mr. Todd and Mr. Hathaway, visited three of the comparable sites referred to in Ms. Haskell's report and found them not comparable to the locus: none of the sites were in an open field, none near elementary schools or high schools and none were within two hundred feet of a residence. (A. 273). The Board went on to discuss the efforts of Cellular One in siting this tower in Leicester and found that minimal efforts were made to investigate other less spectacular sites. (A. 273).

The Board concluded its hearing with a unanimous vote to deny the permit, each member giving a basis for denial in reference to the by-law, viz.: the tower does not meet the requirement of minimal visual impact; adverse impact on sur-

rounding property values and an attractive nuisance to children. (A. 273, 274).

The District Court (Hon. R. Lindsay, J.) found that the Board had substantial evidence to deny the permit: ". . . the Board reasonably could decide that notwithstanding what else is on this site, a 150- foot tower, lattice tower, with all of its accouterments, these antenna and the like on this site did not meet the requirement of the by-law, 5.4. that the proposed facility will have minimal visual impact. That leaves it open to the appellate [*sic*] here to get a site that does have minimal visual impact, but insofar as the matter is before me I believe there is substantial evidence to support a conclusion that this proposed facility do not meet the by-law requirement, that having minimal visual impact." (A. 364).

## SUMMARY OF THE ARGUMENT

When reviewing the action of a local zoning board (hereinafter, "the Board") denying a special permit for the construction of a wireless communications tower, the Court will look to see if the Board had before it such relevant evidence as a reasonable mind would accept as adequate to support the denial of the permit based upon the Town's zoning by-laws. Consistent with Constitutional precedent and the Congressional intent to preserve local zoning authority, the Court

will defer to local decision makers on questions of visual intrusion and aesthetic impact. (pp. 9-12).

The Board properly denied the permit because of visual impact when, among other facts, the record discloses:

> the topography of the locus is at 1064 feet above mean sea level. (Site plan and topographic map: A. 274, 275);
>
> the general area is a barren, treeless field (A. 268);
>
> locus is visible to about 25% of the Town (A. 258);
>
> locus is on a main road in the Town, Route 56 (A. 274);
>
> locus is centrally located near the center of the Town and municipal and residential uses (A. 74, 75, 274 and throughout the record);
>
> locus is ringed with a 57 lot residential subdivision;
>
> the proposed facility by FAA regulations must be painted in alternating colors of red and white and bear two flashing beacon lights so as to stand out and not present a hazard to air traffic. (pp. 12-18).

The Board has no burden of proof to sustain in supporting the denial of a permit; the focus is on the evidence and the conclusions drawn there from. The burden of proving compliance with the Town's zoning by-laws remains with the applicant. (pp. 11-12).

A one hundred fifty (150) foot lattice tower painted red and white with flashing beacon lights sited on the top of a barren hill, the highest point in town, ringed with residen-

tial development creates a severe visual impact — this fact is neither a "hollow generality" nor an "unsubstantiated concern". (pp. 18-22).

The Appellant (hereinafter, "Cellular One") is wrong in suggesting that the locus under review (hereinafter, "locus") is the only site in the Town when the record discloses that:

> Cellular One did not find this site, it was given to them;
>
> there may be other suitable sites not yet made available;

It is improper on these facts to argue that the action of the Board results in a prohibition of wireless communications in the Town when only one site has been advanced for consideration. (pp. 22-24).

*Minimal visual impact* is a distinct and lawful requirement of the zoning by-law governing placement of towers in the Town separate and apart from economic impact. The absence of specific evidence detailing loss to surrounding property values does not imply the absence of visual intrusion. (pp. 24-26).

An order from this Court to the Board to grant the permit is premature when only one site has been considered and where no viable alternatives have been discussed. A Federal Court order will have the harmful effect of:

F.3d 423 (4th Cir. 1998). Substantial evidence is not a preponderance of the evidence. *NLRB* v. *Grand Canyon Mining Company*, 116 F.3d 1039, 1044 (4th Cir. 1997).

A Court is not free to substitute its judgment for the Board's — it must uphold a decision that has substantial support in the record as a whole even if it might have decided differently as an original matter. *NLRB* v. *Grand Canyon Mining Company*, *supra* at 1044. The fact that two inconsistent conclusions may be drawn from the same body of evidence does not prevent the Board's finding from being supported by substantial evidence. *American Textile Manufacturing Institute* v. *Donovan*, 452 U.S. 490, 522 (1981). The appellate court is not engaged in fact finding and allows the administrative agency's determinations of credibility to stand unless extraordinary circumstances require otherwise. *Dilling Mechanical* v. *NLRB*, 107 F.3d 521, 524 (7th Cir. 1997). Thus, the standard of review is a deferential standard: the court will not engage in its own fact-finding, but defer to the facts on the record and all the reasonable inferences, which can be drawn there from. *Aegerter* v. *City of Delafield, Wis.*, 174 F.3d 886 (7th Cir. 1999).

The reviewing court is further guided in its endeavors by several signposts unique to the TCA.

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The reviewing court is further guided in its endeavors by several signposts unique to the TCA.

1. The language of the TCA clearly states that local zoning authority is preserved subject to four limitations: a) no discrimination or blanket prohibition; b) act on permit request within a reasonable time; c) denial of request to be supported by substantial evidence in a written decision; d) no regulation based on environmental effects. TCA. (Add. 33).

2. The legislative history of the TCA radiates the Congressional intent not to "federalize" local zoning. The legislative committee reports state that the act (TCA) rejects the notion of "a national telecommunications siting policy" as indicated in an earlier House version of the Bill; the TCA prevents "preemption of local land use decisions and preserves the authority of . . . local governments over zoning and land use matters" except in the limited circumstances described above; the TCA should "provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent service." H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Session at 201, 207-208 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 215, 222.

3. Unlike a closely related provision in the Federal Administrative Procedures Act[2], the TCA does not require the Board to articulate written findings of fact and conclusions which has led the Fourth Circuit Court of Appeals to opine:

> The simple requirement of a "decision in writing" cannot reasonably be inflated into a requirement of a "statement of . . . findings and conclusions and the reasons or basis therefore." . . .

*AT & T Wireless PCS* v. *City Council of Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998). Followed in *AT&T Wireless PCS* v. *Winston-Salem*, 173 F.3d 307, 312-313 (4th Cir. 1999).

Informed by the Congressional intent to preserve local zoning authority subject to the limitations above and directed to revisit the Board's reasons for denial of Cellular One's permit, the court is ready to consider the record. Given the deferential nature of the review and the language of the statute, which specifically exempts the Board from filing written findings of fact and conclusions thereon, it is difficult to accept Cellular One's contention that the burden of proof has shifted to the Board. Although Cellular One cites several lower court opinions referring to a "burden of proof", a more instructive reading of those cases is that

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[2] "All decisions {in adjudications or formal rulemaking} shall include a statement of . . . findings and conclusions, and the reasons or the basis therefor . . ." 5 U.S.C. § 557(c).

the "focus" of review is on the local zoning authority's reasons for denial and not on the applicant's reasons for approval. The Second Circuit Court of Appeals recognized the allocation of the burden of proof to be a thorny issue and left the question as unresolved, deciding the case on substantial evidence grounds. *ATT Wireless* v. *Oyster Bay*, 166 F.3d 490, 496-497 (2nd Cir. 1999). In a carefully detailed decision citing both Federal and State law, the Supreme Judicial Court for the Commonwealth of Massachusetts had no difficulty with this question: there is no burden of proof on the Board; the burden does not shift from the applicant.

> We do not interpret Section 332(c)(7)(B)(iii) to shift the burden between a PWS provider seeking site approval. . . . Rather, it sets forth standards that a local authority must meet if it denies a siting request: the denial must be in writing, and supported by substantial evidence contained in a written record.

*Roberts* v. *Southwestern Bell*, 429 Mass. 478, 491 (1999).

The Board submits that the instant appeal can be adequately decided, as in the Second Circuit, by focusing review on the Board's record and reasons for denial rather than allocating burdens of proof.

2. ***The Evidence***

In its opening bid to place a wireless communications tower in the Town, Cellular One chose the most prominent and

spectacular location in the Town. The record discloses the following:

> the topography of the locus is at 1064 feet above mean sea level. (Site plan and topographic map: A. 274, 275);
>
> the general area is a barren, treeless field (A. 268);
>
> locus is visible to about 25% of the Town (A. 258);
>
> locus is on a main road in the Town, Route 56 (A. 274);
>
> locus is centrally located near the center of the Town and municipal and residential uses (A. 74, 75, 274 and throughout the record);
>
> locus is ringed with a 57 lot residential subdivision.

It is unfortunate that the record does not convey a more visual description of the locus especially here when we are reviewing what went before the eyes and ears of the Board. We are today confined by the one-dimensional reality of ink on paper and the partisan characterizations given by an interested party. Nevertheless, we can certainly glean a sense of depth and visual perspective from the community testimony given to the Board at each of three separate hearings:

> MR. PIKE: It would be a visual eyesore for the people living around it.
>
> MR. ROBERT HYLAND: I think his statement is true, that it will decrease property values.
>
> MRS. JOSEPH HYLAND: . . . Mr. Blair has had 59 subdivisions. He never once didn't finish one. He has 14 houses sold. The first house in that field

houses sold. The first house in that field directly behind that is $210,000. If you build this tower, it will cost the town money. He is going to build a $120,000 house, because the people who paid $210,000 aren't going to buy it with a tower in their backyard. . . . (A. 239-240).

MR. ROCKY HYLAND: . . . In all the sites where these towers are near residential homes, the value of the houses went down.

MR. JEFF PIKE: I did not know about this tower at all. I am a prospective buyer of one of those houses. I have put a deposit on this house. I chose that area because it is very scenic. This is going to be an eyesore, and it's going to ruin the property values. (A. 246).

MR. TODD: There is a development in that area, the proposal predates this petition. I have a concern that given there is development going on, and this proposal, whether or not we are in fact dealing with an adverse effect. (A. 245).

MR. ROBERT HYLAND: I also spoke with the developer, [Blair 57 lot subdivision] and they are against this tower. But, they also need the support of the water department. It would be a conflict of interest. (A. 245).

MR. PAUL BOTTIS: In the by-law it states, minimizing adverse impacts of wireless communication facilities on adjacent properties. You can't tell me there isn't going to be an adverse impact on property values. (A. 258).

MR. HATAHAWAY: We are hearing this based on the article that was passed at the Town Meeting, I would like to read one of the comments which is: "The applicant shall successfully demonstrate to the Board that the proposed facility will have minimal visual impact." (quotation marks supplied). Which is an interesting twist then what we are hearing. (A. 247).

MR. TODD: Given that there is a development that is in the works up there, it's going to happen. If there is concern now, and we are developing more

residential in that area. I can't see the concern lessoened [*sic*]. (A. 248).

Ms. Sonya Radzik: I'm a potential resident of the subdivision near the tower. On minimal visual impact, speaking for the 51 units that are going to be potentially built, we are talking 200 to 300 feet away from these residences in an open field. I would think that addresses the minimal visual impact. To me personally, it is directly 200 feet behind my backyard. With night lights on going every night, directly in my bedroom window. To me, minimal visual impact is not being addressed. (A. 261).

Mr. Joseph Hyland: In the by-law it says minimal visual impact. I can't think of anything else in this town that would bring 25% of the town's population to see this every single day. (A. 258).

Ms. Marilyn Hyland: Thinking of 150 Paxton Street with a 150-foot tower in an open field, painted red and white, with shrubs 10 feet high. I'm going to see it Spring, Winter, Summer, I'm going to see it. The people who are building homes in that area, they have more affect than any one else. No matter where their house is placed, the tower is in their backyard. Your by-law says minimum visual affect [*sic*]. There is no way you can tell me that 150 foot tower surrounded by 10 foot trees is going to be minimal visual. (A. 268).

The Board acknowledged this tide of citizen concern and at the close of the August 1998 hearing, Mr. Todd summarized:

> . . . It's certainly demonstrated through the concern of people here that, it's a matter of impact. There have been all kinds of expressions of some impacts that are most unlikely, and some, the visual impact, being one, that for better or worse is going to be there. Our by-law addresses that . . .

(A. 263).

The comment before the Board was that the locus was:

- scenic
- in an open field
- in the backyard of a residential subdivision development
- visible to 25% of the Town
- in close proximity to residential and established neighborhoods
- at an elevated portion of the Town

On this locus, the Board learned that:

Cellular One intends to place a 150-foot lattice tower,

- painted red and white
- with at least two beacon lights
- there was strident opposition to the placement of the tower on aesthetic grounds.

Additionally, this Court should bear in mind that the Board members were residents of the Town and, given the central location of the locus, were themselves very familiar with locus. The existence, location, nature and visual character of the locus were facts of such notoriety that the Board could properly take notice of them. The comments of the Board throughout the record indicate familiarity with the locus. This is particularly evident when the Board compares the comparable properties in the Haskell report with the lo-

cus. The Board finds the report particularly unhelpful in determining the extent of impact, visual or otherwise:

> MR. TODD:
>
> I also visited the three towers in that report regarding the property values [Haskell Report] and visual impacts. One of the towers had been there for 30 years, I don't think that is a fair comparison. There is another tower in Northboro, there are no houses around. The nearest house I saw, was on the other side of the road that ran into Northboro Center. Then the other in Shrewsbury, there must be some property near that you could see the tower from. . . . My point is that these were towers we were given information about. I didn't see anything out in an open field, I didn't see anything next to a house or a school, within 200 feet. I have to assume that an effort was put in to find sites that are within this kind of area. . . . Frankly what I see is an inappropriate site to put it. . . .

(A. 268).

From the community testimony, their own observations and comparisons with other sites, the Board had sufficient evidence to believe that the proposed tower would be a visual intrusion on the locus; that Cellular One could not meet the requirement of "minimal visual impact" under the by-law. The opinion of the Board was unanimous in this regard. It would be difficult to deny the Board the right to form the conclusion that the proposed tower failed to meet the requirement of "minimal visual impact" in the face of the evidence.

In a remarkable case decided on facts which were less visually intrusive than the present case, the Fourth Circuit Court of Appeals reasoned that the local zoning board in

Winston-Salem, North Carolina had substantial, material and competent evidence to deny a tower permit on the basis of a local zoning by-law requiring the use to "be in harmony with the area in which it is to be located and in general conformity with Vision 2005 (a local planning document)." The Winston-Salem board had before it lay testimony from the community voicing concern that the neighborhood would be less desirable, property values would decline and the tower would be aesthetically objectionable. AT&T, the applicant, just as in this case, presented a real estate appraiser with a study concluding property values would not be impacted and further presented engineering studies and photographs indicating the tower would not be visible. The Winston-Salem board evaluated all the evidence and chose to discount the AT&T offerings in favor of the community testimony and the board's subjective review of the site. The Fourth Circuit affirmed the judgment of the Winston-Salem board. *AT&T Wireless PCS* v. *Winston-Salem*, 172 F.3d 307, 315 (4th Cir. 1999).

It is a mischaracterization of the record and all the inferences, which can be reasonably drawn there from for Cellular One to suggest that the evidence consisted of "generalized concerns" and "hollow generalities". The stark presence of a 150-foot tower painted red and white with beacon lights situated 200 feet from a preexisting residential development

is hardly a "hollow generality". The visual intrusion of the same two colored blinking tower elevated against the horizon in the central portion of the Town cannot reasonably be interpreted as a "generalized concern". This mischaracterization comes from Cellular One's misplaced reliance on two Circuit Court opinions, which were decided on a record and local law different from the instant case.

In *Omnipoint* v. *Zoning Hearing Board of Pine Grove*, 181 F.3d 403 (3rd Cir. 1999) cited throughout Cellular One's brief, the record disclosed the locus in Pennsylvania was encircled by trees 80 to 90 feet high. The tower would be a monopole 114 feet high in a "sparsely populated, mountainous region of the Town" and the closest abuttor was 600 feet distant. Testimony from the abuttors centered around health concerns and possible visual impact. There is no comparison with the instant record. The Third Circuit Court held that given the nature of the locus and the casual nature of the objections, the Board had no substantial evidence of negative impact. Similarly, in *Cellular Telephone Co.* v. *Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999) cited throughout Cellular One's brief, the record in *Oyster Bay* disclosed that the vast majority of comment was directed to the perceived health concerns coming from radio frequency signals emitted from the tower; there were minimal comments on the aesthetics because

the tower was wrapped around the catwalk on an existing water tower — no lofty structure was proposed. It was not clear whether anyone would be able to see the wireless antenna let alone be visually impacted by it. The Court also noted that those commenting on the aesthetics were not familiar with the basic design or placement of the antennae. These cases are instructive as to the meaning of "generalized concerns" and "hollow generalities" but quickly lose their value as precedent for this Court in the face of the more detailed and specific objections to the tower in the record before this Court.

There is a significant loss to the overall perspective of this record when Cellular One refuses to acknowledge and address the concerns of the Board and the abuttors regarding the 57 lot residential subdivision, which rings the locus on the north and east. It would be impossible to say that Cellular One was unaware of this development at the time they submitted their application. The bounds of the development and their locus are so contiguous that Cellular One drew their site plan using the construction plan filed of record by the developer. (A. 62, 275). See also Footnote 1, *supra*. From the very first hearing, the Board was concerned with the close location of the preexisting residential subdivision and a 150 foot two colored tower. This concern was repeated and evalu-

ated in light of an appraisal report to which the Board gave little credence largely because the report compared this locus with noncomparable sites in other towns. The visual impact would be a dramatic intrusion on the 57 planned homes and the Board had every right to so conclude.

Cellular One argues that the only evidence before the Board was the evidence supplied by Cellular One, which militates for adoption of Cellular One's position and issuance of the permit. Cellular One's position today is blind to the extensive comment before the board, the unique characteristics of the locus known to the Board and the Board's own investigation into this matter. In its statement of fact, Cellular One continues to ignore the contiguous residential uses and the open and barren character of the locus. Their position implies that the Board must operate in a vacuum with only the self serving reports, affidavits and statements of Cellular One on which to base a decision and further implies the this Court must likewise follow the same path in arriving at its decision. Cellular One's position today is the same as the position taken unsuccessfully by AT&T in *AT & T Wireless PCS v. City Council of Virginia Beach, supra* at 431:

> In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act [TCA] so as always to thwart av-

erage, non-expert citizens; that is, to thwart democracy. The District Court dismissed citizen opposition as "generalized concerns". 979 F.Supp. at 430. Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.

An interesting question arises regarding the availability of other locations suitable for Cellular One's purpose. Although Cellular One states in its brief (Cellular One brief 23-24) that this locus is the only acceptable locus available to it after searching the Town for a year and a half and has made similar statements to the Board on the record, one wonders how diligently they looked for a site when they overlooked the most prominent site (and allegedly the site providing the best cellular coverage) in the Town until it was offered to them by a public agency: the water district found them, they didn't find the water district. (A. 29, 345). The question becomes more confused when they argue that this is the only site that suits their needs but cannot represent that it is categorically the only site: there may be other landowners willing to lease them space and they will continue

communication in the Town. Cellular One's position is similar to Omnipoint's position:

> Omnipoint did not present serious alternatives to the town. . . . This one-proposal strategy may have been a sound business gamble, but it does not prove that the town has in effect banned personal wireless communication.

*Omnipoint* v. *Amherst*, 173 F.3d 9, 15 (1st Cir. 1999).

Cellular One argues that the purpose of the Town's by-law[4] (Add. 35-39) is to minimize adverse impact on adjacent properties; that where there is insufficient evidence of economic impact on adjoining property (loss of property value) there is no adverse impact and Cellular One has demonstrated the requirement that the facility will have minimal visual im-

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[4] The legislative purpose of the by-law states:

> Purpose - The purpose of these regulations include minimizing *adverse impacts* of wireless communication facilities on adjacent properties, historic areas and residential neighborhoods. . . . (emphasis supplied).

and further reads:

> General Requirements
> A tower shall be of monopole or similarly unimposing design. The applicant shall successfully demonstrate to the satisfaction of the Board that the proposed facility will have *minimal visual impact* and constructed so it is reasonably able to accommodate other users. . . .(emphasis supplied).

pact.[5] This reading of the by-law is incorrect for the following reasons:

1. Cellular One assumes that the only type of adverse impact is economic impact. It is well settled that zoning by-laws, such as this by-law, may consider the aesthetic impact of the structure distinct and apart from its economic impact. *Aegerter* v. *Delafield Wis.*, *supra* at 891 (". . . and we note that aesthetic harmony is a prominent goal underlying almost every such code.") q.v. *Sprint* v. *Willoth*, 176 F.3d 630 (2nd Cir 1999).

2. The legislative purpose clause of the by-law speaks of "minimizing adverse impacts". The language does not limit the purpose to "economic" impact. Well-settled principles of statutory construction prohibit such a limitation in the absence of clear language of limitation.

3. The by-law reflects the Congressional intent that local authority retains control over visual, aesthetic and safety concerns. H.R. Conf. Rep. No.104-458, *supra*, by requiring the applicant to demonstrate "minimal visual impact" as an aesthetic goal additional to the adverse impact on adjacent properties.

4. Cellular One in its argument (Cellular One Brief, pp. 22, 25 *et seq.*) impermissibly replaces the phrase *adverse impacts (. . . on adjacent properties, historic areas and residential neighborhoods)* in the legislative purpose clause of the by-law with the phrase *minimal visual impact* from the Requirements clause of the by-law and in argument juxtaposes *minimal visual impact* with *adjacent properties, historic areas and residential neighborhoods* suggesting that minimal visual

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[5] Nowhere in this appeal or in the lower court proceedings does Cellular One attack the legitimacy of the by-law. The authority of the Town to regulate wireless communication facilities under this specific by-law is not an issue here.

impact is a goal only in relation to adjoining properties. There is no such limitation in the text of the by-law.

## II. A FEDERAL COURT ORDER TO A LOCAL ZONING BOARD IS PREMATURE AND IMPROPER WHEN, AS HERE, ONLY ONE SITE HAS BEEN ADVANCED FOR CONSIDERATION, SIGNIFICANT CONTROVERSY SURROUNDS THE SITE AND NO REASONABLE ALTERNATIVES HAVE BEEN GIVEN TO THE TOWN.

Cellular One requests this Court to order the Board to issue a special permit for the proposed tower. This request is improper when, as here, Cellular One has failed to present any reasonable alternatives to the Town. Cellular One was given a site — a spectacular site — and now seeks to force the Town to accept this site, indifferent to zoning requirements and unwilling to discuss alternative sites.[6] In this case, Federal intervention under these conditions will terminate any further negotiations and the concerns of the community will be overlooked. In the larger context, the decision to order a local board to grant the siting permit will send the unfortunate message that telecommunications/wireless carriers are not required to negotiate with local boards, that the community has no voice. Constitutional law, Congressional

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[6] This case is unique in that Cellular One did not select the locus — it was offered to them by a water district. This is different from the ordinary course of events where a carrier seeking to build first reviews the applicable zoning and then selects the locus based on compliance with zoning. Here, Cellular One was given the locus and now seeks to make the zoning comply with locus.

intent and the decisions of this Circuit forbid such a conclusion.

**1. The Preservation of Local Authority**

At the heart of the police powers reserved to the states under Article IV, Section 4 of the United States Constitution and The Tenth Amendment to the United States Constitution (Add. 32) is the zoning function. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 390 (1926). It is the "quintessential state activity". *FERC* v. *Mississippi*, 456 U.S. 742, 768, n.30 (1982). As in the previous discussion, the legislative history of the TCA recognizes this reserved power. H.R. Conf. Rep. No.104-458, *supra*. The TCA in clear language states in Section 332(7)(a):

> 7) *Preservation of Local Zoning Authority-*
>
> (A) General Authority — Except as provided in this paragraph, nothing in this Act 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.

For centuries, the law has recognized that land is unique and that land use issues are indigenously local issues, hence the deference afforded local zoning boards by the Federal Courts and the statement of preservation of local zoning authority in the TCA.

**2. No Clear Language of Preemption**

It is well-settled that any intention to override the reserved powers of the states requires the " clear and manifest purpose of Congress ". *Arthur D. Little, Inc.* v. *Cambridge*, 395 Mass. 535, 549 (1985) citing *Pacific Gas and Electric Co.* v. *State Energy Resources*, 461 U.S. 190, 206 (1983). See *also Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 369 (1986) ("critical question in any preemption analysis is always whether Congress intended the Federal regulation supersedes State law"). Deference to state law is particularly evident in zoning and land use cases. *Jones* v. *Rath Packing*, 430 U.S. 519, 525 (1977), *San Diego Building Trades* v. *Garmon*, 359 U.S. 236, 243 (1959). The above authority forms the central discussion of the Massachusetts Supreme Judicial Court's opinion that the TCA does not preempt state court review of local zoning board decisions made under the TCA. *Roberts* v. *Southwestern Bell*, 429 Mass. 478, 486-487 (1999).

This Court in particular has avoided any notion of Federal preemption, *Omnipoint* v. *Amherst, supra*, and has chosen to define the TCA as a "refreshing experiment in Federalism":

> The statute's balance of local autonomy subject to Federal limitations does not offer a single "cookie cutter" solution for diverse local situations, and it imposes an unusual burden on the Courts. But Congress conceived that this course would produce

> (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in Federalism does not work, Congress can always alter the law.

*Omnipoint* v. *Amherst, supra* at 17.

**3. Mandamus On these Facts Violates the Balance Envisioned in the TCA.**

One can hardly envision a more preemptive measure, a measure of extreme insensitivity to states rights and reserved powers, than for a Federal Court to order a local zoning board to issue a zoning permit when, as here:

> the locus is geophysically spectacular;
>
> there is considerable debate over the impact on the surrounding neighborhoods and community at large;
>
> the nature of locus and proximity to an airfield requires the facility to be two colored and lighted;
>
> the locus was given to the applicant — who now seeks to force the locus into the zoning;
>
> the locus is the first and only one advanced for consideration by the applicant;
>
> judicial precedent in the Circuit favors local zoning autonomy subject to limitations.

Cellular One argues that remand to the Board will not provide a sufficient remedy; the Board agrees. The nature of the locus and surrounding neighborhoods will not change on remand. The visual impact of the tower is also unlikely to

change even if co-location is sacrificed and the tower is reduced to 73 feet in height, the lowest feasible height alleged by Cellular One. (A. 270). However, Cellular One is not without a remedy. If this Court affirms the judgment of the District Court, Cellular One is free to submit a new application or multiple applications for such site or sites, as Cellular One deems appropriate. Cellular One suffers no prejudice. This was the intent of the District Court:

> That leaves it open to the appellate [*sic*] here to get a site that does have minimal visual impact, but insofar as the matter now is before me, I believe there is substantial evidence to support a conclusion that this proposed facility do not meet the by-law requirement, that's having minimal visual impact.

(A. 364).

Cellular One fears repeated denials of its applications for siting towers. These fears are unfounded and do not reflect the reality of the permitting process. As a matter of strategy and business practice, Cellular One and other carriers choose to advance for consideration *one* locus at a time. With a single application on one preferred site, the odds of obtaining approval on that site either at the local level or on appeal are greater than an application offering a choice of several sites. A carrier will not voluntarily give to the permit granting authority or the reviewing tribunal the option of selecting another site — this is a deliberate prac-

tice. At the end of the day, when all appeals are exhausted, denial of the most preferred site is but the introduction of the second preferred site with no prejudice to the carrier. If this Court, in the face of only one application from Cellular One and on these facts, issues an order requiring the Town to grant the zoning permit, there will never be any incentive for Cellular One or any carrier to negotiate with the Town over a choice of locations and the wisdom of this Court articulating "a balance of local autonomy subject to Federal limitation" is lost.

**CONCLUSION**

The judgment of the District Court should be affirmed.

Respectfully Submitted,

Laurence M. Todd, Vaughn M. Hathaway, James T. Buckley, Linda G. Finan, Dennis E. Hennessey as they are Members of and Constitute the Board of Appeals of the Town of Leicester, Worcester County, Commonwealth of Massachusetts

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# STATUTORY ADDENDUM

## Relevant Constitutional and Statutory Provisions

## UNITED STATES CONSTITUTION

### Article IV

### (States Relations)

. . . . .

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

### Tenth Amendment

### (Reserved Powers)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## JUDICIAL CODE

## UNITED STATES CODE

### Title 28

**§ 1361. Action to compel an officer of the United States to perform his duty.**

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

## COMMUNICATIONS ACT OF 1934

### Title III - Provisions Relating to Radio

. . . . .

**Sec. 322. [47 U.S.C. § 332] Mobile Services.**

. . . . .

(c)(7) PRESERVATION OF LOCAL ZONING AUTHORITY.--

A) GENERAL AUTHORITY.-- Except as provided in this paragraph, nothing in this Act 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.

(B) LIMITATIONS.--

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any 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.

(iv) No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of he environmental effects of radio frequency emissions to

the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) DEFINITIONS.--For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

. . . . .

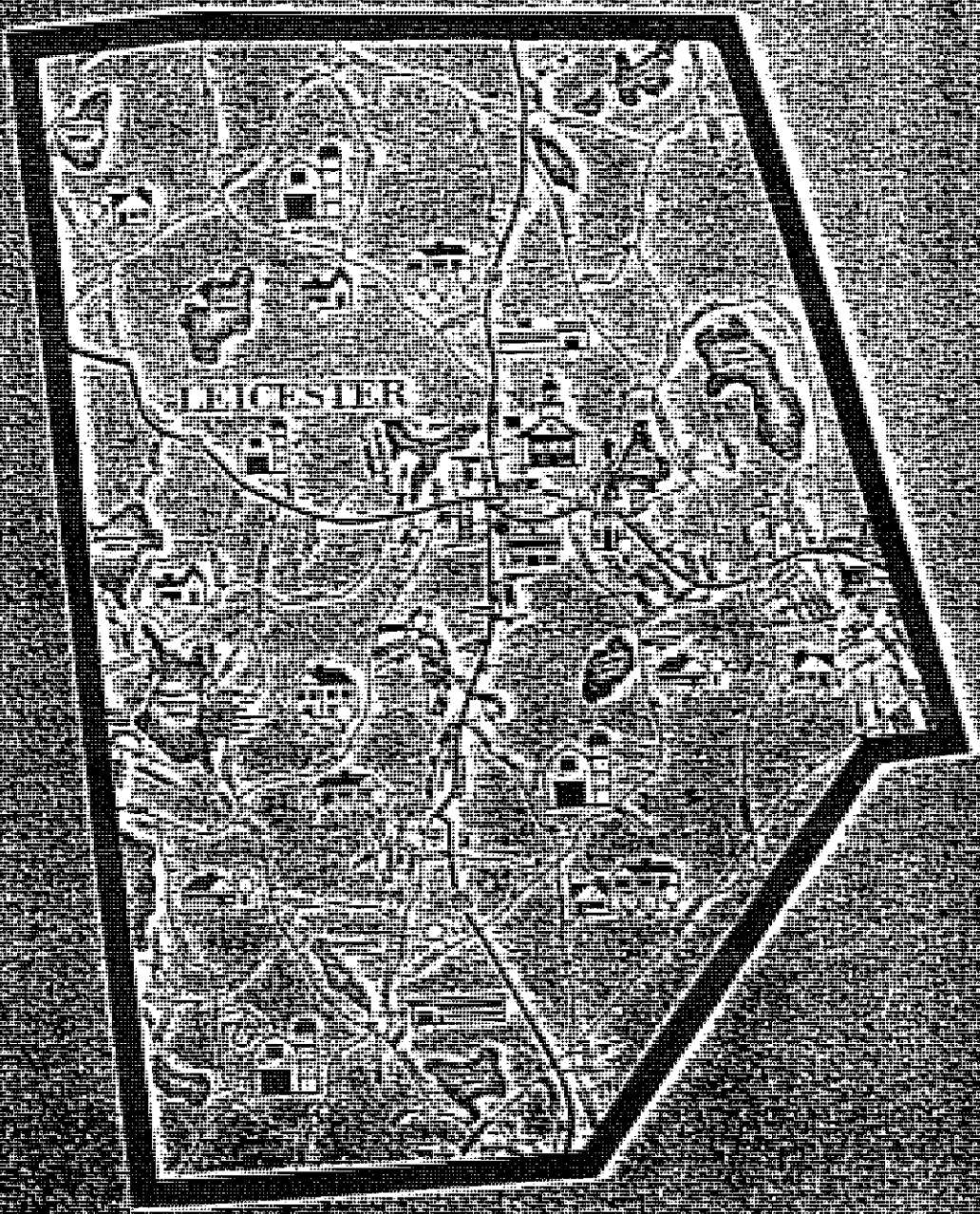
(d) DEFINITIONS.--For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 3 [47 U.S.C. §153]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.

. . . . .

(3) the term "private mobile service" means any mobile service (as defined in section 3) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

# Town of Leicester
# Zoning By-Laws



2. Any encroachment meeting the above standards shall comply with the floodplain requirement of the State Building Code.

5.3. USES PROHIBITED IN ALL DISTRICTS

5.3.01 Dumping of other than clean fill. Dumping of refuse, contaminated or combustible materials except as a municipal function.

5.3.02 The keeping of a trailer on any lot within the Town for the use as a dwelling, except during the construction of a residence on the property and then with a time limit of one (1) year. This time may be extended for one (1) year periods under conditions by Special Permit, Section 6.4.02.

5.3.03 A cellar hole dwelling.

5.3.04 The stripping and removal of topsoil for use outside of the Town of Leicester boundaries.

Section 5.4 "WIRELESS COMMUNICATION BYLAW"

Purpose - The purpose of these regulations include minimizing adverse impacts of wireless communication facilities on adjacent properties, historic areas and residential neighborhoods, minimize the overall number and height of such facilities to only what is essential, to encourage co-location on a single structure, and avoid damage to adjacent properties from facility failure through engineering and careful siting of facilities.

Definitions - A "wireless communication facility" shall mean transmitters, structures (including but not limited to towers) and other types of installations including but not limited to antennae and accessory structures used for the provisions of wireless services, including but not limited to all commercial mobile services. This section does not apply to "direct to home" satellite services or other similar antennae which are no greater than six feet in diameter.

A wireless communication facility may be allowed in zoning districts SA, RB, RA, B-2, BR-1, BI-A, B, I, & RIB upon the issuance of a special permit by the Zoning Board of Appeals. The special permit may be issued upon the following terms and conditions:

Submittal Requirements - In addition to the submittal requirements of the site plan review under section of the zoning bylaw, the following items are required to be submitted at the time of application:

- The number and type of antennae proposed.
- A description of the proposed antenna and all related fixtures, structures, and apparatus, including height, material, color and lighting.
- A description of proposed antenna function and purpose.
- Direction of maximum lobes.
- An evaluation of the feasibility of attaching the proposed facility to existing buildings or utilizing existing facilities for the proposed facility.
- Copies of all applicable permits including but not limited to all State and Federal permits required for this project and a certification of compliance with the terms and provision of the license issued for this purpose by the Federal Communications Commission.
- Site Justification Statement including a description of the narrowing process that eliminated other potential sites.

General Requirements:

- A tower shall be of monopole or similarly unimposing design. The applicant shall successfully demonstrate to the satisfaction of the Board that the proposed facility will have minimal visual impact and constructed so it is reasonably capable of accommodating other users including other wireless communication companies and local police; fire and ambulance companies unless it is determined to be technically infeasible based on the Board's evaluation of information submitted.
- No interference to existing television, cable television or radio signals including emergency systems and public safety communication shall be permitted from the tower or components thereon. If interference occurs, it shall be the responsibility of the site owner to immediately remedy it.
- Unless otherwise required by the Federal Communication Commission or the Federal Aviation Administration, towers shall be painted a non-contrasting color or camouflaged with some other treatment deemed acceptable by the Board.
- No advertising or signage, except no trespassing signs, shall be permitted on the facility.
- A security fence of at least 6 feet in height shall be placed around the base of the facility to control access.
- Night lighting of towers shall be prohibited unless required by the Federal Aviation Administration.

- Structures shall be removed within one year of cessation of use. Town of Leicester fire, police and emergency companies such as ambulance has the right to take over use of tower after abandonment by owner.

Prior to the issuance of a building permit for wireless communication usage, the applicant shall post and submit a bond or other financial surety acceptable to the Town in an amount sufficient to cover the cost of demolishing and/or removing the facility in the event the Building Inspector condemns the property or deems it to have been abandoned or vacant for more than one year. The amount of the bond shall be certified by an engineer, architect or other qualified professional. In the event the bond amount does not cover the cost of removal, the Town may place a lien upon the property covering the difference in cost according to statute.

The Zoning Board of Appeals may modify any provision of the forgoing standards and conditions when in the Zoning Board's discretion it is technically infeasible to meet the standards or conditions or when the strict adherence to the standards and conditions impedes the legitimate purposes of this Bylaw.

The Zoning Board of Appeals shall be the permit granting authority herein and may from time to time adopt such further regulations and interpretive statements and policies as to promote the legitimate purposes of this Bylaw. Such regulations, policies, statements and interpretive statements shall be in writing and by adopted by the Planning Board consistent with general law.

## SECTION 6
## ADMINISTRATION

### 6.1 ENFORCEMENT

This by-law shall be enforced by the Zoning Enforcement Officer under the authority of Section 7 of Chapter 40-A of the Massachusetts General Laws.

### 6.2 BUILDING PERMITS

No building permit shall be issued until the construction or alteration of a building or structure, as proposed, shall comply in all respects with the provisions of this by-law or with a decision rendered by the Board of Appeals. Any application for such a permit shall be accompanied by a plan accurately drawn, showing the actual shape and dimensions of the lot to be built upon, the exact location and size of all buildings or structures already on the lot, the location of the new buildings to be constructed, together with the lines within which all buildings and structures are to be erected, the existing and intended use of each building or structure and such other information as may be necessary to provide for the execution and enforcement of this by-law.

### 6.2.01 PHASED GROWTH ZONING BYLAW

1.) Intent and Purpose

1.0. The Town of Leicester wishes to ensure and encourage a steady, manageable growth rate in the community while avoiding extreme fluctuations in the growth rate; and:

1.1. To relate the timing of future residential development to the community's ability to provide services to such development such as fire and police protection and adequate educational facilities;

1.2. To preserve and enhance the existing community character.

2.) Regulations

2.0 No building permit for a new residential dwelling unit or units shall be issued unless in accordance with this bylaw.

This bylaw shall apply to all definitive subdivision plans, divisions of land pursuant to M.G.L. Chapter 41, Section 81P (hereafter called "A-N-R division") variances and special permits which would result in the creation of a new dwelling unit or units. Dwelling units shall be considered as part of a single development; for all purposes of this section if located either on a single parcel or contiguous parcels of land, which have been in the same ownership at any time subsequent to the date of adoption of this bylaw.

3.) Planned Growth Rate

3.0 All authorizations shall count toward the planned growth rate permitted by this bylaw. Building permits shall not be issued under any development schedule approved under Section 5 during periods when said building permit issuance would result in authorizations of more than 100 dwelling units over a 24 month (2 year) period.

3.1 For the purposes of implementing the 100 dwelling unit limitation, the Building Inspector on the first business day of each month shall total the number of building permits issued during the previous 24 months. If the number of dwelling units for which new building permits have been issued during the previous 24 months meets or exceeds 100 in number, then the Building Inspector shall not issue building permits for any additional dwelling unit or units in the then current month, except as permitted by Section 3.2.

its jurisdiction under this by-law in the manner prescribed in Chapter 40-A of the General Laws. The Board of Appeals shall have the following powers:

6.4.01 APPEALS To hear and decide an appeal taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official under the provisions of Chapter 40-A of the General Laws, or by any officer or board of the Town, or by any person aggrieved by any order or decision of the Inspector of Buildings or other administrative official in violation of any provision of Chapter 40-A, General Laws or of this by-law.

6.4.02 SPECIAL PERMITS Certain uses, structures or conditions are designated as subject to the issuance of a Special Permit as provided in Section 3.2 and elsewhere in this by-law. Upon application duly made to the Board of Appeals by first filing with the Town Clerk, the Board may, in appropriate cases and subject to the appropriate conditions and safeguards, grant a Special Permit.

1. APPLICATIONS Written application shall be made to the Board for such permit containing a statement of the proposed use or uses, a site plan showing the proposed site development, and such other related information concerning the proposed use of the premises as the Board shall require.

2. HEARING, ACTION The hearing of the Board shall be conducted in accordance with the provisions of M.G.L. Chapter 40-A, Section 8.

3. CONDITIONS. Special permits shall be granted only upon the concurring vote of four (4) or more members, and only after a consideration by the Building Inspector of the specific site as an appropriate location for the use or structure; the adequacy of public sewage and water facilities, or the suitability of soils for on-lot sewage and water systems; the use developed as a possible adverse effect on the neighborhood, undue nuisance or serious hazard to vehicles or pedestrians; and adequate and appropriate facilities to ensure the proper operation of the proposed use, structure or condition. The Board may also provide for any other conditions or safeguards it deems necessary.

4. If the rights authorized by a Special Permit are not exercised within one (1) year of the date of such Special Permit, they shall lapse, and may be re-established only after notice and new hearing and regulated under Chapter 40-A of the General Laws.

6.4.03 VARIANCES

(A) The Board of Appeals shall have the power, after a public hearing as provided in Section 11 of the Zoning Act, to grant upon appeal or upon petition regarding land or structures, a variance from the terms of any applicable section of this By-Law. However, the Board of Appeals shall not grant a variance relating to the use of land or structures.

(B) An application for a variance shall be filed with the Town Clerk, who shall within two (2) business days, transmit a copy of the application to the Board of Appeals.

(C) The decision of the Zoning Board of Appeals shall be rendered within seventy-five (75) days of the filing of the application with the Town Clerk. Failure of the Zoning Board of Appeals to act within said seventy-five (75) days shall be deemed to be the grant of the relief sought in the application, subject to an applicable judicial appeal as provided for in the Zoning Act.

(D) The Zoning Board of Appeals shall not grant a Variance unless it specifically finds that each of the following conditions are fulfilled:

(1) That owing to the circumstances relating to the soil conditions, shape, or topography of the land or structure involved and especially affecting such land or structure but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this Zoning By-Law would involve substantial hardship, financial or otherwise, to the applicant: and

(2) That desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of this Zoning By-Law.

(E) The Zoning Board of Appeals may impose conditions, safeguards and limitations, both of time and of use, including the continued existence of any particular structure, but excluding any condition, safeguard or limitation based upon continued ownership.

(F) Upon the granting of a Variance, or an extension, modification or renewal thereof, the Zoning Board of Appeals shall issue to the owner and to the applicant, if other than the owner, a copy of its decision, certified by the Zoning Board Of Appeals, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such Variance and certifying that copies of the decision and all plans referred to in the decision have been filed with the Town Clerk.

(G) No variance or extension, modification or renewal thereof shall take effect until a copy of the decision bearing the certification of the Town Clerk that twenty (20) days have elapsed and no appeal has been filed, or that if an appeal has been filed, it has been dismissed or denied, is recorded in the Worcester County Registry of Deeds and indexed in the grantor index under the name of the owner of record, or is recorded and noted on the owner's certificate of title. The recording or registration shall be the responsibility of the owner or applicant who

# United States Court of Appeals
FOR THE FIRST CIRCUIT

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## CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

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No. 00-1164

SOUTHWESTERN BELL MOBILE SYSTEMS, D/B/A CELLULAR ONE

*v.*

LAURENCE M. TODD, ET AL.

TO BE INCLUDED IMMEDIATELY BEFORE THE CERTIFICATE OF SERVICE FOR ALL BRIEFS FILED IN THIS COURT

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RITA L. HEMENWAY

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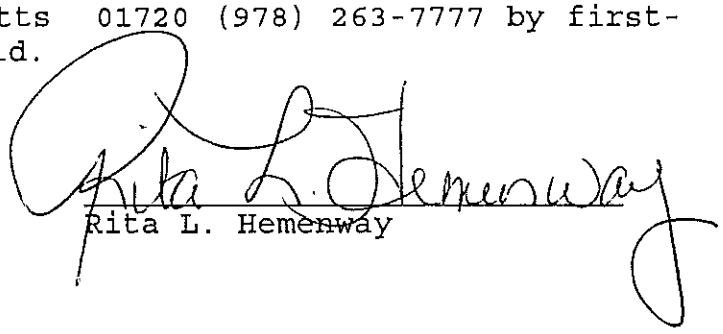
I, Rita L. Hemenway, hereby certify that on this tenth day of May 2000, I have served two (2) copies of the foregoing Brief upon Louis N. Levine, Esquire, F. Alex Parra, Esquire, D'Agostine, Levine, Parra & Netburn, P.C., 268 Main Street, Acton, Massachusetts 01720 (978) 263-7777 by first-class mail, postage prepaid.



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