

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

NEW CINGULAR WIRELESS PCS, LLC d/b/a AT&T MOBILITY,)
Plaintiff,)
v.)
TOWN OF HEATH, TOWN OF HEATH PLANNING BOARD, and DOUG MASON, BILL GRAN, JO TRAVIS, ROBERT VIARENGO, and PETER CHAROW, in their capacities as members of the Town of Heath Planning Board,)
Defendants.)

COMPLAINT

This action arises out of the unlawful denial by the Town of Heath Planning Board (the “Board”) of an application by New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T”), to install, operate, and maintain a wireless communications facility (the “Facility”) at 0 Rowe Road, Heath, Massachusetts (the “Property”).¹ The Board’s decision effectively prohibits the provision of personal wireless services and was not based on substantial evidence. The decision therefore violates Section 332(c)(7)(B) of the Federal Communications Act (the “Act”), 47 U.S.C. § 332(c)(7)(B).

PARTIES

1. Plaintiff AT&T is a limited liability company organized under Delaware law with its principal place of business at 1025 Lenox Park Boulevard NE, Atlanta, Georgia 30319.

¹ AT&T’s application to the Board initially identified the address of the Property as 43 Knott Road, which was erroneous. AT&T subsequently corrected the address on the application to the correct address of 0 Rowe Road. The Board’s decision on the application identified the address as 0 Rowe Road (43 Knott Road) to account for this discrepancy.

AT&T is a provider of “personal wireless services” as that term is defined by federal statute, 47 U.S.C. § 332(c)(7)(C)(i).

2. Upon information and belief, the Defendant Town of Heath (the “Town”) is a duly authorized municipality constituted and existing under the laws of the Commonwealth of Massachusetts.

3. The Defendant Town of Heath Planning Board has been delegated the authority by the Town to, among other things, approve applications for special permits under the Town of Heath Protective Zoning Bylaws (the “Bylaws”).

4. Defendants Doug Mason, Bill Gran, Jo Travis, Robert Viarengo, and Peter Charow are each residents of the Town who together serve as the Board that denied AT&T’s request for a special permit at issue in this action. The individual members of the Board are named herein solely in their official capacity as members of the Board.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331, because this action arises under the laws of the United States, specifically Section 332(c)(7)(B) of the Act, 47 U.S.C. § 332(c).

6. Venue is proper in this Court under 28 U.S.C. § 1391(b). The Town is in this judicial district, and the events and/or omissions giving rise to this action occurred in this district.

FACTS

I. Personal Wireless Communications

7. AT&T is a provider of personal wireless services pursuant to licenses issued by the Federal Communications Commission (the “FCC”).

8. Section 151 of the Act establishes a national policy to “make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151.

9. To help meet these policy goals, AT&T provides service to local businesses, public safety entities, and the general public. To advance the national policies enumerated under 47 U.S.C. § 151, AT&T creates a network of “cell sites,” each of which consists of antennas and related equipment designed to send and receive radio signals.

10. The radio signals used by AT&T to provide services are subject to disruption caused by topography, foliage, and man-made structures, as well as to range limitations inherent in the use of low-powered signals that permit frequency reuse.

11. Reliable access to AT&T’s services from inside structures by means of wireless devices (“in-building service”) is crucial, as over half of all households nationally no longer utilize landline telephone service. Additionally, the work from home and remote schooling initiatives used to control the spread of COVID-19 during the pandemic State of Emergency rely heavily on reliable in-building service.

12. Reliable in-building service is also crucial to 911 and Enhanced 911 (E911) services, as over 70% of 911 calls are made from wireless devices.

13. Further accentuating the public safety significance of reliable access to AT&T’s services, a portion of the frequencies licensed to AT&T are used to support FirstNet, a national public safety broadband network for first responders pursuant to a statutorily and congressionally mandated public-private partnership between AT&T and the First Responder Network Authority.

Under the FirstNet program, AT&T constructs the facilities for and provides cell service to first responders in rural areas of Massachusetts with currently little or no cell service.

14. To determine the appropriate location of cell sites, engineers use complex computer programs to complete propagation studies. These propagation studies are based, in part, on the boundaries of the existing and planned coverage, the topography of the surrounding land, the presence or absence of structures, and other factors. To provide reliable wireless service to users, coverage from cell sites must overlap in a grid pattern resembling a honeycomb. For a wireless network to perform, cell sites must be located, constructed, and operated so that reliable service can be achieved. If there is no functioning cell site within a given area, or if the cell sites around an area lack sufficient capacity to handle the amount of customer demand for limited wireless spectrum, there will not be reliable service for customers within that area. Customers who live or travel in the area will have no service at all or experience an unacceptable level of dropped calls and call connection failures.

15. Upon information and belief, the Town has no towers or cell sites within its borders for the provision of personal wireless services. Unsurprisingly, the results of a radio frequency propagation study revealed a substantial and significant gap in wireless service coverage in the vicinity of the Property. To remedy AT&T's significant gap in service, a cell site in the Town is required.

16. Radio frequency engineers identified a search area within which a new Facility would need to be constructed to remedy the significant gap in service. AT&T undertook an investigation of the area to find feasible locations for installation of a personal wireless facility to remedy the significant gap in service. As a result of that investigation, AT&T identified the

Property as the appropriate and available location for the installation of a wireless telecommunications facility to fill the substantial and significant gap in wireless service.

II. Federal Statutory Control Over Wireless Siting

17. Section 332(c)(7) of the Act, 47 U.S.C. § 332(c), governs federal, state, and local government regulation of the siting of “personal wireless service” facilities such as the Facility proposed by AT&T. It provides, in relevant part, that:

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

* * *

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

* * *

- (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.

47 U.S.C. § 332(c)(7)(B).

18. The Act further provides that any person adversely affected by a state or local government’s act, or failure to act, that is inconsistent with § 332(c)(7) may seek review in the federal courts, and the court “shall hear and decide such action on an expedited basis.” 47 U.S.C. § 332(c)(7)(B)(v).

III. Action By The Town

19. On or about March 15, 2021, AT&T applied to the Board for a special permit pursuant to Section 6.1, *et seq.* of the Bylaws to construct and install a 180’ monopole tower, together with antennas and related ground equipment, at the Property (the “Application”).

20. Public hearings were held by the Board with respect to the Application on April 29, May 24, June 28, and August 23, 2021.

21. At a meeting on September 9, 2021, the Board deliberated and voted to deny the Application.

22. The Board issued a written decision reflecting its denial of the Application on or about September 16, 2021. A true and accurate copy of that decision is attached hereto as Exhibit A.

23. The Act imposes limits on the decisions of state or local governments regarding the location, construction, and modification of personal wireless facilities. 47 U.S.C. § 332(c)(7)(B)(i)-(iv). Among other things, “[i]f a [municipal] decision is not supported by substantial evidence, § 332(c)(7)(B)(iii), or it if effectively prohibits the provision of wireless service, § 332(c)(7)(B)(i)(II), then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the [Act]’s national policy goals.” Second Generation Props. L.P. v. City of Pelham, 313 F.3d 620, 627 (1st Cir. 2002).

24. The Board’s denial of AT&T’s Application has the effect of prohibiting the provision of personal wireless services in violation of the Act because it materially inhibits the provision of “personal wireless services” as defined in the Act.

25. Moreover, the Board’s decision is not supported by substantial evidence. The uncontroverted evidence before the Board establishes it was appropriate for the Board to grant the Application given the existing wireless coverage gap in the vicinity of the Property.

26. The Board’s denial of AT&T’s Application is therefore in clear contravention of Section 332(c)(7)(B).

27. AT&T has suffered and will continue to suffer irreparable harm by reason of the Board's actions, which prevent AT&T from providing wireless services and competing in the wireless communications market in the area of the Property.

28. Such irreparable harm will continue unless the violations are enjoined by this Court. Further, AT&T is otherwise without an adequate legal remedy to prevent such violations.

29. This complaint is timely filed pursuant to 47 U.S.C. § 332(c)(7)(B)(v).

COUNT I

(Violation of 47 U.S.C. § 332(c)(7)(B)(i)(II) – Effective Prohibition Of Service)

30. AT&T hereby adopts and incorporates by reference as if fully stated herein the allegations contained in paragraphs 1 through 24.

31. Article VI, Clause 2 of the United States Constitution, commonly known as the Supremacy Clause, provides, in relevant part, that “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.”

32. The Act governs the regulation of the placement, construction, and modification of personal wireless service facilities, and under the Supremacy Clause, preempts other laws, regulations, ordinances, or by-laws affecting such facilities to the extent that such laws, regulations, ordinances, and by-laws conflict with federal law.

33. The Application constitutes a request to provide “personal wireless services” within the meaning of the Act, and, as such, is entitled to the protection of Section 332(c)(7)(B).

34. Pursuant to 47 U.S.C. § 332(c)(7)(B)(i)(II), “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local

government of instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II).

35. There is a significant gap in personal wireless service in the area surrounding the Property.

36. There is no existing structure or property in or near in the vicinity of the Property that is both reasonably available and technologically feasible to remedy the significant gap in personal wireless service in the area.

37. The proposed Facility is the only feasible alternative to remedy the significant gap in personal wireless service.

38. The Board’s denial of the Application effectively prohibits AT&T from providing personal wireless service in the significant gap area.

39. The Board’s denial of the Application also materially inhibits the provision of wireless services, including the ability to introduce new services or otherwise improve existing services.

40. Consequently, the Board’s denial of the Application is in violation of, and preempted by, Section 332(c)(7)(B)(i)(II) of the Act, and should be set aside and enjoined by the Court on that basis. Further, this Court should exercise its power to issue an order directing the Town to approve the Application and all other permits and approvals necessary to construct, maintain, and operate the Facility at the Site.

COUNT II

(Violation of 47 U.S.C. § 332(c)(7)(B)(iii) – Substantial Evidence)

41. Plaintiff incorporates by reference and re-alleges the foregoing factual allegations in paragraphs 1 through 35 as if fully set forth herein.

42. Pursuant to 47 U.S.C. § 332(c)(7)(B)(iii), “[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.”

43. The Board’s decision denying the Application is not supported by substantial evidence contained in a written record.

44. Consequently, the Board’s action is in violation of, and preempted by, Section 332(c)(7)(B)(iii) of the Act, and should be set aside and enjoined by the Court on that basis. Further, this Court should exercise its power to issue an order directing the Board to approve the Application and all other permits and approvals necessary to construct, maintain, and operate the Facility at the Site.

PRAYERS FOR RELIEF

WHEREFORE, AT&T respectfully requests:

- A. A declaration and judgment that the Board’s actions violated Section 332(c)(7)(B) of the Act and are therefore void and invalid;
- B. A declaration and judgment that the Board’s actions are preempted by Section 332(c)(7)(B) of the Act and are therefore void and invalid;
- C. A declaration of the respective rights and obligations of the parties;
- D. An order mandating that the Town grant approval of the Application and all other permits and approvals necessary to construct, maintain, and operate the Facility at the Site;
- E. An expedited review of the matters set forth in this Complaint pursuant to 47 U.S.C. § 332(c)(7)(B)(v);
- F. An award of AT&T’s costs of suit; and
- G. Such other and further relief as the Court deems just and proper.

Dated: October 15, 2021

Respectfully submitted,

NEW CINGULAR WIRELESS PCS, LLC

By its attorneys,

/s/ Brian M. Alosco

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