

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

C.A. NO. 3:21CV30106-MGM

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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.	)

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO INTERVENE**

INTRODUCTION

Edward Whitaker, Tara Mason, Kate Peppard, Jesse and Kristen Weigand, Cory Mason, David and Mary Knott, Kevin Maloney, and Barry Adams (the “Intervenors”) submit this Memorandum of Law in support of their Motion to Intervene (the “Motion”). The Intervenors also submit a Complaint in Intervention (“CI”) herewith. The Motion seeks intervention as a matter of right, Fed. R. Civ. P. 24(a)(2), or, in the alternative, in the Court’s discretion, Fed. R. Civ. P. 24(b)(1)(B). The Intervenors’ land directly abuts or is in close proximity to the site of a cell tower proposed by Plaintiff which is the subject matter of this litigation. The cell tower will negatively affect the Intervenors’ use, enjoyment, and value of their respective properties. The existing parties to this litigation cannot adequately protect the Intervenors’ interests in this matter.

STATEMENT OF FACTS

The Intervenor owners own property in Heath, Massachusetts, which abuts or is in close proximity to 0 Rowe Road, Heath, Massachusetts (the “Site”). CI ¶ 1. On or about March 15, 2021, Plaintiff New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“Plaintiff”) applied to the Town of Heath’s (the “Town”) Planning Board (the “Planning Board”) for a special permit to construct a 180-foot cell tower at the Site. CI ¶ 2. The Planning Board held a series of public hearings at which local residents objected to the proposed cell tower. CI ¶ 3-4 and Exhibits A and B. On September 16, 2021, the Planning Board denied the application and issued a written decision, CI ¶¶ 6-7 and Exhibit C.

Rather than pursue the appeal process set forth in Mass. Gen. Laws c. 40A, § 17, on October 15, 2021, Plaintiff filed this action seeking to void the Planning Board’s decision pursuant to 47 U.S.C. § 332(c)(7)(B)(v) (the Telecommunications Act of 1996 or “TCA”). CI ¶¶ 8-9. Shortly thereafter, the Intervenor owners hired attorney Andrew J. Campanelli (“Campanelli”) to represent their interests in this litigation. CI ¶ 11. Campanelli worked for the Planning Board during Plaintiff’s application process, thus a conflict waiver from the Town was required before Campanelli could take any action on behalf of the Intervenor owners. CI ¶¶ 11, 24.

On December 1, 2021, Campanelli requested that the Town waive the conflict. CI ¶ 12. The Town informed Campanelli on December 6, 2021, that it would approve the waiver but first needed Campanelli to submit a disclosure and waiver form. CI ¶¶ 14. On December 17, 2021, Campanelli submitted the requested disclosure and waiver form. CI ¶ 16. The Town took no action on the requested waiver for several weeks thereafter. CI ¶ 17.

Meanwhile, throughout December 2021, Defendants apparently engaged in private settlement discussions with Plaintiff. CI ¶ 15. On December 15, 2021, Plaintiff and Defendant

filed an Agreement for Judgment ("AFJ"). CI ¶ 17; Paper # 17. Intervenors were not included in the settlement discussions and were not aware of the AFJ at the time it was agreed to or filed. CI ¶¶ 22. On December 21, 2021, the Court denied the AFJ without prejudice. CI ¶ 19.

On December 21, 2021, the Select Board held an executive session that was recorded and publicly available. CI ¶ 18. The Select Board discussed the waiver of conflict request and revealed their strategy of making it seem as though they received the waiver request *after* they had already filed the AFJ, notwithstanding that Campanelli first requested the waiver on December 1, 2021. CI ¶¶ 12, 18. On January 10, 2022, the Intervenors first learned of the recording, and that Plaintiff and Defendants had reached a settlement. CI ¶ 22.

On January 11, 2022, the Intervenors learned from Campanelli that the Select Board had still not executed the waiver, thus he still could not take action on behalf of the Intervenors. CI ¶ 24. The Intervenors immediately set out to hire new counsel and, on January 13, 2022, executed an engagement agreement with undersigned counsel. CI ¶ 25. On January 14, 2022, the Select Board executed the Campanelli waiver. CI ¶ 26.

On December 22, 2021, Plaintiff and Defendants submitted a Joint Motion to Approve Consent Judgment to this Court. CI ¶ 21; Paper # 19. On January 5, 2022, the Court denied the motion without prejudice. CI ¶ 21. On January 10, 2022, Plaintiff and Defendants submitted a Joint Status Report indicating their intent to renew their Joint Motion to Approve Consent Judgment at a future date. CI ¶ 23; Paper # 21.

## ARGUMENT

### **I. Intervention Should be Allowed as of Right.**

Intervention as a matter of right is warranted where (1) the motion to intervene is timely filed; (2) the party requesting intervention can prove an interest in the underlying issue which is

the subject of the litigation; (3) the result of the legal action may impose an impairment or obstacle in protecting that party's interest; and (4) the current parties to the litigation may not provide adequate representation of the intervening party's interest. See Fed. R. Civ. P. 24(a)(2); Varsity Wireless, LLC v. Town of Boxford ("Boxford"), No. 15-11833-MLW, 2016 WL 11004357 at \*5 (D. Mass. 2016) (listing criteria for intervention as of right). Intervention is routinely granted where aggrieved abutters are not included as parties in an action alleging TCA claims by a cellular service provider against a municipality. See, e.g., Boxford, 2016 WL 11004357 at \*6 (intervenors were entitled to intervene both as of right and in court's discretion); Smith Communications, LLC v. Washington County, Arkansas, No. 13-5152, 2013 WL 12365273 at \*2 (W.D. Ark. Aug. 26, 2013) (allowing abutters to intervene as of right "as the outcome of this action may impair or impede their property interests and because no other party to this action represents the exact interests" of abutters).

*A. The Motion to Intervene is Timely.*

The Intervenors' Motion is timely. As set forth in the Complaint in Intervention, CI ¶¶ 11-25, the Intervenors promptly hired Campanelli to represent their interests in this litigation, but Defendants stonewalled Intervenors by refusing to act on their request for a conflict waiver. On January 10, 2022, when Intervenors learned that Plaintiff and Defendants reached a settlement, the Intervenors quickly hired new counsel, and filed this Motion to Intervene on January 18, 2022. See Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227, 1231 (1st Cir. 1992) (obligation to seek intervention is triggered, not when litigation begins, but when intervenor becomes aware that its interest in the case would no longer be protected by the existing parties). Plaintiff and Defendants have not engaged in any discovery or motion practice in this litigation, thus the timing of this Motion does not cause undue prejudice for either party

and will not unduly delay this litigation. In the absence of any undue prejudice and where the Intervenor acted swiftly in moving to intervene upon learning of the settlement agreement, their motion is timely. See Boxford, 2016 WL 11004357 at \*3 (intervenor's motion was timely where it was filed two weeks after learning of parties' settlement efforts).

*B. The Intervenor Has a Protectible Interest in the Issues Underlying the Litigation and a Settlement Awarding Judgment to Plaintiff Would Impair Intervenor's Ability to Protect Their Interests.*

The second and third criteria for establishing an entitlement to intervention, namely, that the movant has an interest in the issues underlying the litigation and the outcome of the litigation may impair the movant's ability to protect that interest, are readily met here. See Nextel Communications of Mid-Atlantic, Inc. v. Town of Hanson ("Hanson"), 311 F. Supp. 2d 142, 150 (D. Mass. 2004) (second and third elements were clearly met where abutters had concerns about safety of proposed cell tower, the aesthetics of the tower, and the tower's impact on their property values).

The Intervenor's use and enjoyment of their respective properties will be negatively impacted by the settlement agreement proposed by Plaintiff and Defendants. Specifically, the proposed cell tower will negatively impact the scenic ridgeline and rural character of the area. CI ¶ 7. It may also lead to a reduction in the Intervenor's property values. CI ¶ 7. See Hanson, 311 F. Supp. 2d at 150, citing Butts v. Zoning Bd. of Appeals of Falmouth, 18 Mass. App. Ct. 249, 253-254 (1984) (abutter has interest in preventing expansion of non-conforming use on abutting property and preserving view). In opposing the special permit, Heath residents also protested that Plaintiff had not done sufficient wetland and environmental assessments, conducted inadequate visual impact assessments, and submitted cell coverage reports that were outdated and

inaccurate.<sup>1</sup> See CI Exhibit A. Residents also raised concerns about noise disturbances that would be caused by the cell tower's generators. See id. These concerns are sufficient to demonstrate that this litigation involves a threat to the Intervenor's protectable interests.

*C. The Existing Parties Are Not Adequately Representing the Intervenor's Interests.*

The Intervenor has established that the existing parties to this litigation are not adequately protecting the Intervenor's interests. See B. Fernandez & Hnos, Inc. v. Kellogg, USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006) (intervenor need only offer an adequate explanation as to why named party may not sufficiently represent intervenor's interests); Hanson, 311 F. Supp. 2d at 153 ("The First Circuit has hinted . . . that abutting landowners should, as a general matter, be permitted to intervene in federal actions brought under the TCA.").

The Intervenor, unlike Defendants, are negatively impacted by the proposed cell tower because their scenic views will be disrupted and property values negatively impacted by the cell tower. The Defendants, in contrast, "might change or soften [their] position based on [their] broader geographic and institutional interests." Hanson, 311 F. Supp. 2d at 153. In fact, the proposed settlement agreement promises certain advantages to Defendants, such as space in the cell tower for the Town's public safety agencies, in exchange for permitting Plaintiff to build the cell tower up to a height of 140 feet, in violation of the Town's zoning bylaw 6.3.3.4. Paper # 17, "Agreement for Judgment," at 2-3; CI Exhibit D. Thus, the Intervenor's interests differ in both kind and degree from those of the Defendants. See B. Fernandez & Hnos, Inc., 440 F.3d at 546

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<sup>1</sup> Although these concerns were not specifically addressed in the Planning Board's written decision, this Court will be entitled to consider them in reviewing the merits of Plaintiff's TCA claim. See VWI Towers, LLC v. Town of North Andover Planning Bd., 404 F. Supp. 3d 456, 467 (D. Mass. 2019) (review of TCA claim may rely on evidence outside the administrative record compiled by local board).

(where intervenor's interests differ in kind or degree from those of named party, intervenor has met burden of showing inadequate representation by named party).

Furthermore, the Select Board's attempts to block intervention by quietly settling with Plaintiff while delaying approval of the Campanelli waiver demonstrates that Defendants' and Intervenor's interests have diverged. Accordingly, neither Plaintiff nor Defendants will adequately represent the Intervenor's interests in this litigation. See Smith Communications, 2013 WL 12365273 at \*2 (neither existing party would act in intervenor's interest).

## **II. The Intervenor's Should Be Permitted to Intervene in the Court's Discretion.**

In the alternative, this Court may grant intervention where the movant has a claim or defense that shares a common question of law or fact with the main action. See Fed. R. Civ. P. 24(b)(1)(B); Industrial Communications and Electronics, Inc. v. Town of Alton ("Alton"), 646 F.3d 76, 78 (1st Cir. 2011) (on similar facts, abutters intervened with trial court's permission). If the Heath Planning Board's denial is reversed and the special permit issues, the Intervenor would be "aggrieved person[s]" under Massachusetts law. See Mass. Gen. Laws c. 40A, § 17; 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012) (abutters are entitled to rebuttable presumption that they are "aggrieved" persons under c. 40A, § 17). Intervenor would, therefore, have standing to litigate the grant of the special permit in Massachusetts Superior Court. See G.L. c. 40A, § 17. Accordingly, the Intervenor's claims share common questions of law and fact with this matter.

## **III. The Intervenor's Have Standing to Intervene.**

The Intervenor's have standing to require Plaintiff to prove the TCA violation alleged in Plaintiff's complaint. See Alton, 646 F.3d at 80. In Alton, the First Circuit held that intervening abutters had standing to require the plaintiff to prove that the defendant town's conduct violated

the TCA, notwithstanding the town's desire to settle the litigation. Id. at 80. The court reasoned that the proposed settlement would result in a decree overriding state law and the abutters' rights under state law. Id. The First Circuit, therefore, remanded the case to the trial court to address the merits of the plaintiff's TCA claims. Id. at 81. The same reasoning applies here.

CONCLUSION

Based on the foregoing, this Court should grant the Intervenor's Motion to Intervene as a matter of right and/or in the Court's discretion.

Dated: January 18, 2022

Respectfully submitted,

EDWARD WHITAKER, TARA  
MASON, KATE PEPPARD, JESSE and  
KRISTEN WEIGAND, CORY MASON,  
DAVID and MARY KNOTT, KEVIN  
MALONEY, and BARRY ADAMS

By their attorneys,

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused this document to be filed through the ECF system and that it will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper and/or electronic copies will be sent to those indicated as non-registered participants.

*/s/ Alan D. Rose, Jr.* \_\_\_\_\_  
Alan D. Rose, Jr.

Date: January 18, 2022