

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

NEW CINGULAR WIRELESS PCS, LLC d/b/a)
AT&T MOBILITY,)

Plaintiff,)

v.)

Civil Action No. 3:21-cv-30106-MGM

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.)

JOINT MEMORANDUM IN SUPPORT OF AGREEMENT FOR JUDGMENT

For the reasons stated herein, Plaintiff New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T” or “Plaintiff”) and Defendants 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 (collectively, the “Town” or “Defendants” and together with Plaintiff, the “Parties”) respectfully request that the Court enter the proposed Agreement for Judgment filed on December 22, 2021, ECF No. 19-1 (the “Agreement”).

LEGAL STANDARD

“A consent decree ‘embodies an agreement of the parties’ and is also ‘an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.’” *Aronov v. Napolitano*, 562 F.3d 84, 90-91 (1st Cir. 2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 437 (2004)). To be enforceable, courts require that, as a general matter, consent decrees must: (1) resolve a dispute within a court’s subject-matter jurisdiction; (2) come within the general scope of the case made by

the pleadings; and (3) further the objectives of the law upon which the complaint was based. *See Frew*, 540 U.S. at 437; *see also Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993) (same).

“In assessing a proposed consent decree, the district court ‘must review [it] to ensure that it is fair, adequate and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; and that it is consistent with the objectives of Congress.’” *Varsity Wireless Invs., LLC v. Town of Hamilton*, 370 F. Supp. 3d 292, 300 (D. Mass. 2019) (quoting *Conservation Law Found.*, 989 F.2d at 58) (applying this standard to proposed agreement for judgment resolving claim for violation of Telecommunications Act of 1996). In making this inquiry, the court’s “discretion is restrained by the clear policy in favor of encouraging settlements.” *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (citation omitted).

ARGUMENT

The Parties respectfully submit that this Agreement satisfies the threshold criteria set forth in *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). First, the Agreement arises from, and will resolve, federal claims within the Court’s subject-matter jurisdiction arising under the federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (the “TCA” or the “Act”). The Agreement also resolves claims within the general scope of the case alleged by AT&T in its Complaint (ECF No. 1), namely, the alleged violations of the TCA caused by the Town of Heath Planning Board’s denial of AT&T’s application (the “Application”) to install, operate, and maintain a wireless communications facility at 0 Rowe Road, Heath, Massachusetts (the “Property”). In addition, the Agreement will further the objectives of the laws upon which Plaintiff’s claims are based by making wireless communication service available to the Town of Heath. *See* 47 U.S.C. § 151.

The Parties also respectfully submit that the Agreement meets the further criteria that the First Circuit has delineated in *Conservation Law Found*, 989 F.2d at 58.

First, the Agreement is fair, adequate, and reasonable. The Agreement is fair to the Town of Heath and to its taxpayers, weighing the challenges associated with continued litigation and the costs thereof against what has been achieved through arms-length negotiations, *i.e.* a reasonable consent decree allowing AT&T's wireless communication facility to proceed. *Provost-Carlson Aff.*, ¶ 12. Indeed, AT&T recently conducted a drive test to demonstrate to the Town that the proposed Facility would address existing significant gaps in coverage in the Town of Heath. *Id.* at ¶¶ 8-9; *Leyden Aff.*, ¶¶ 8-9. This evidence of existing gaps in coverage supports the Town's decision to settle this dispute rather than engage in contentious and expensive litigation that is unlikely to ultimately succeed. Likewise, at the Town's request, AT&T considered and analyzed an alternative location in the Town of Heath to determine whether the alternative location could resolve the significant gaps in AT&T's network coverage. *Provost-Carlson Aff.*, ¶ 10; *Leyden Aff.*, ¶ 10. AT&T provided the Town with the analysis that said alternative location would not resolve the significant gaps. *Provost-Carlson Aff.*, ¶ 11; *Leyden Aff.*, ¶ 11.

Moreover, the parties engaged in arms-length negotiations with respect to the Agreement. *Provost-Carlson Aff.*, ¶ 7. Through these negotiations, the Town was able to obtain significant concessions from AT&T that will benefit the Town. *See Varsity*, 370 F. Supp. 3d at 300 (approving agreement for judgment because it "includes multiple concessions by Varsity that will benefit the Town"). For example, the height of the Facility will be reduced from 180 feet as proposed in the Application, which could result in a 199 foot tower in accordance with the provisions of the Act, to a maximum of 140 feet, allowing for an increase of only ten feet above what is effectively allowed by the Town's Zoning Bylaws. *See Agreement*, § 3(a); *Provost-Carlson Aff.*, ¶ 14. Additionally, any potential extension in the height of the Facility would require

approval by the Town. Agreement, § 3(a); Provost-Carlson Aff., ¶ 14. The Town will also be permitted to install equipment for its public safety agencies, which will provide safety benefits to the residents of the Town of Heath. Agreement, § 3(b); Provost-Carlson Aff., ¶ 15. The Town will not incur the costs of installing the Town's equipment when the Facility is constructed, saving the Town significant costs. Agreement, § 3(b); Provost-Carlson Aff., ¶ 15; Leyden Aff., ¶ 16. The Town will also be reimbursed for consulting fees expended. Agreement, § 3(c); Provost-Carlson Aff., ¶ 16. The Town would not receive these benefits if it were to defend this litigation through trial whether it would have won or lost. The Agreement is also fair to AT&T because the proposed Facility will be allowed to proceed to address the existing significant gaps in coverage. Leyden Aff., ¶ 14.

Second, the Agreement will not violate the Constitution, a statute, or any other authority. Rather, it is entirely consistent with the TCA. In suits under the TCA, defendant municipalities are permitted to decline to settle or decline to defend litigation on whatever terms are they deem most favorable. *Brehmer v. Planning Bd. of Wellfleet*, 238 F.3d 117, 118-21 (1st Cir. 2001) (“[I]t is not unreasonable for the board to settle with the applicant on the terms most favorable to the town rather than to engage in litigation doomed from the start. As we have previously noted, such settlements are fully consistent with the TCA’s aims.” (citing *Town of Amherst, N.H. v. Omnipoint Comm’ns Enterprises, Inc.*, 173 F.3d 9, 17 (1st Cir. 1999)); *Indus. Comm. and Electronics, Inc. v. Town of Alton, N.H.*, 656 F.3d 76 (1st Cir. 2011) (“[A] government entity is free as a defendant to decline to defend or to settle on the best terms it can get.”) (citing *Negron Gaztambide v. Hernandez Torres*, 145 F.3d 410, 416 n. 7 (1st Cir. 1998)). This is true even if doing so is inconsistent with state or local procedural requirements. *Wellfleet*, 238 F.3d at 120–21 (finding that to the extent the procedural requirements of state or local law might prevent a federal court from implementing a settlement designed to remedy violations of the TCA through an order

requiring that the wrongfully withheld permit issue, those requirements are preempted); *Patterson*, 122 F.Supp.2d at 223. The Agreement is well within the bounds of statutory authority.

The Agreement is consistent with the intent of Congress, and the public interest weighs in favor of entering a judgment incorporating the terms set forth in the Agreement. As this Court stated in *Varsity*: “As the Supreme Court has written, the ‘primary purpose’ of the TCA is to ‘reduce regulation and encourage the rapid deployment of new telecommunications technologies.’” *Varsity*, 370 F. Supp. 3d at 300 (citing *Reno v. ACLU*, 521 U.S. 844, 857 (1997)). “Courts in this district have repeatedly emphasized that court approval of settlement agreements in TCA disputes is consistent with this public purpose.” *Id.* (collecting cases). The Agreement will resolve this dispute in its entirety. *See id.* at 301 (approving agreement for judgment because it “fully resolves protracted and expensive litigation”). Accordingly, it furthers both the intent of Congress and the public interest.

Finally, the parties are aware that a group of abutters to the Site have filed a motion with the Court seeking intervenor status in this case; however, the Town’s Select Board represents the Town as a whole and has determined that the Agreement is in the best interest of the Town. *Provost-Carlson Aff.*, ¶ 18.

CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court enter the Agreement for Judgment, ECF No. 19-1.

Respectfully Submitted,

**NEW CINGULAR WIRELESS PCS, LLC
d/b/a AT&T MOBILITY**

By their attorneys,

/s/ Brian M. Alosco

Wayne F. Dennison (BBO No. 558879)

**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**

wdennison@brownrudnick.com
Brian M. Alosco (BBO No. 693899)
balosco@brownrudnick.com
Edward D. Pare, Jr. (BBO No. 638813)
epare@brownrudnick.com
Brown Rudnick LLP
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8200
Facsimile: (617) 856-8201

Dated: January 21, 2022

By their attorneys,

/s/ Mark R. Reich

Mark R. Reich (BBO No. 553212)
mreich@k-plaw.com
Robin Stein (BBO No. 654829)
rstein@k-plaw.com
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
Telephone: 617-556-0007
Facsimile: 617-654-1735

CERTIFICATE OF SERVICE

I, Brian M. Alosco, hereby certify that this document filed through the ECF System will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants, on this 21st day of January, 2022.

/s/ Brian M. Alosco

Brian M. Alosco

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Plaintiff,)	
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v.)	Civil Action No. 3:21-cv-30106-MGM
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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.)	

**AFFIDAVIT OF ROBYN PROVOST-CARLSON
IN SUPPORT OF AGREEMENT FOR JUDGMENT**

I, Robyn Provost-Carlson, declare as follows:

1. I presently serve as the Chair of the Select Board of the Town of Heath, Massachusetts (the "Town"). I have been a member of the Select Board since 2016.
2. I have personal knowledge of the following facts and could and would testify competently thereto if called as a witness.
3. As the chief executive body for the Town of Heath, the Select Board has the authority and responsibility to represent the Town and its boards in litigation.
4. Plaintiff New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("Plaintiff" or "AT&T") filed an application with the Town of Heath Planning Board (the "Planning Board") for a special permit and associated zoning relief to allow for the construction and installation of a wireless telecommunications facility (the "Facility") as depicted on the plans entitled "AT&T, Site Number: MA4795, Site Name: Heath Knott Road, FA Code 14510277, Pace ID: MRCTB049410,

Project NSB” prepared by Hudson Design Group LLC and last revised on 6/23/21 (the “Plans”) at 0 Rowe Road, Heath, Massachusetts (the “Site”).

5. The Planning Board denied AT&T’s Application (the “Decision”) based upon its good faith interpretation and application of the Town’s Protective Zoning Bylaws (the “Bylaws”).

6. AT&T subsequently commenced the present lawsuit, alleging that the Decision violated the Telecommunications Act of 1996 (the “Act”) by effectively prohibiting the provision of personal wireless services and because it was not based on substantial evidence in the record.

7. Following the commencement of this litigation, AT&T and the Town, both represented by legal counsel, engaged in arms-length negotiations to potentially resolve the parties’ dispute.

8. The Select Board requested that AT&T conduct a drive test regarding Plaintiff’s claims of existing significant gaps in its network coverage in the Town of Heath around the Site and along state highway 8A.

9. AT&T conducted the requested drive test and delivered the results to the Select Board.

10. The Select Board also requested that AT&T consider and analyze an alternative location in the Town of Heath to determine whether the alternative location could resolve the significant gaps in AT&T’s network coverage.

11. AT&T provided the Select Board with its analysis of the alternative location.

12. Upon reviewing the results of the drive test and analysis of the alternative location, and balancing the best interests of the Town of Heath as a whole against the realities and cost of litigation and perceived odds of success in defending the Decision of the Planning Board, the Select Board determined that settling this litigation pursuant to the terms of the proposed Agreement for Judgment, Dkt. 19-1 (the “Agreement”), would be a fair and reasonable resolution of the case.

13. Through the parties' arms-length negotiations, the Town obtained significant concessions from AT&T for the benefit of the Town.

14. First, the height of the Facility will be reduced from 180 feet, as proposed in the Application, which could result in a 199 foot tower in accordance with the provisions of the Act, to 120 feet, allowing for a maximum of 140 feet. *See* Agreement, § 3(a). This compromise allows for an increase of only ten feet above what is effectively allowed by the Town's Zoning Bylaws. The Town will also maintain the authority to review any potential extension of the height of the Facility. *Id.*

15. Second, the Town will be permitted to install equipment for public safety agencies, which will provide safety benefits to the residents of the Town of Heath. *See* Agreement, § 3(b). AT&T has agreed to pay the costs of installing the Town's equipment when the Facility is constructed, saving the Town significant costs. *Id.*

16. Third, the Town will be reimbursed for consulting fees expended in connection with the Application. *See* Agreement, § 3(c).

17. Finally, in addition to these concessions, the Town and its taxpayers avoid the costly expense of continuing to litigate these proceedings.


18. The Board is aware that a group of abutters to the Site have filed a motion with the Court seeking intervener status in this case; however, the Board, in representing the Town as a whole, has determined that the Agreement is in the best interest of the Town.

19. The above statements generally represent the discussions had by the Select Board and its counsel on the Agreement for Judgment, which resulted in a vote to authorize its execution.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

EXECUTED this ^{21st} 10th day of January 2022.


Robyn Provest-Carlson


Commission expires
5/12/22

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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.

Civil Action No. 3:21-cv-30106-MGM

**AFFIDAVIT OF BRIAN LEYDEN
IN SUPPORT OF AGREEMENT FOR JUDGMENT**

I, Brian Leyden, declare as follows:

1. I am a Manager of Network Implementation at New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T”). I am responsible for locating and designing wireless facilities for AT&T in Massachusetts. I have been employed in this role since 2020.

2. I am familiar with the circumstances of, and giving rise to, the above-captioned litigation, and I have personal knowledge of the following facts and could and would testify competently thereto if called as a witness.

3. AT&T identified existing significant gaps in personal wireless services coverage around the Town of Heath, Massachusetts (the “Town”). AT&T thereafter analyzed potential locations in or around the Town for the potential construction of a wireless telecommunications facility.

4. To address the existing gaps in coverage, AT&T filed an application with the Town of Heath Planning Board (the “Planning Board”) for a special permit and associated zoning relief

to allow for the construction and installation of a wireless telecommunications facility (the “Facility”) as depicted on the plans entitled “AT&T, Site Number: MA4795, Site Name: Heath Knott Road, FA Code 14510277, Pace ID: MRCTB049410, Project NSB” prepared by Hudson Design Group LLC and last revised on 6/23/21 (the “Plans”) at 0 Rowe Road, Heath, Massachusetts (the “Site”).

5. The Planning Board denied AT&T’s Application (the “Decision”).

6. AT&T subsequently commenced the present lawsuit, alleging that the Decision violated the Telecommunications Act of 1996 by effectively prohibiting the provision of personal wireless services and because it was not based on substantial evidence in the record.

7. Following the commencement of this litigation, AT&T and the Town, both represented by legal counsel, engaged in arms-length negotiations to potentially resolve the parties’ dispute.

8. The Town of Heath Select Board requested that AT&T conduct a drive test regarding Plaintiff’s claims of existing significant gaps in its network coverage in the Town of Heath around the Site and along state highway 8A.

9. AT&T conducted the requested drive test and delivered the results, which demonstrated the existing significant coverage gaps, to the Select Board.

10. The Select Board also requested that AT&T consider and analyze an alternative location in the Town of Heath to determine whether the alternative location could resolve the significant gaps in AT&T’s network coverage.

11. AT&T provided the Select Board with its analysis of the alternative location, which demonstrated that the alternative location would not address the existing significant coverage gaps.

12. Following the results of the drive test and analysis of the alternative location, the parties negotiated the terms of the proposed Agreement for Judgment, Dkt. 19-1 (the "Agreement").

13. Although AT&T believes it would ultimately prevail, considering the cost of continued litigation and the terms upon which the Town has agreed to allow for the construction of the Facility, AT&T determined that the Agreement would constitute a fair and reasonable resolution of this case.

14. The Agreement is fair to AT&T because AT&T will be permitted to proceed with construction of the Facility and address the existing significant gaps in coverage. AT&T has determined that the reduction of the height of the Facility from 180' to 140' would still allow the Facility to address AT&T's gaps in coverage.

15. AT&T would require further approval from the Town before increasing the height of the Facility. *See* Agreement, § 3(a).

16. In exchange for the Town permitting AT&T to construct the Facility, AT&T has agreed to permit the installation of equipment for public safety agencies, and the costs of any such installation would be paid by AT&T. *See* Agreement, § 3(b).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

EXECUTED this 20th day of January 2022.



Brian Leyden

Before me Brian Leyden
January 20, 2022

Colin M. Redding
Notary my commission expires 9/30/22