

**NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. d/b/a Nextel Communications vs.**

**TOWN OF PROVINCETOWN, PLANNING BOARD OF THE TOWN OF PROVINCETOWN, ANNIE HOWARD, BARNETT ADLER, ELLEN BATTAGLINI, ALBERT BOWEN, JR., HOWARD BURCHMAN, ZONING BOARD OF APPEALS, GARY REINHARDT, PETER BEZ, PETER PAGE, LARRY MAHAN, STEVEN MELAMED, Defendants.**

USDC (Mass.) CIVIL ACTION NO. 02-11646-DPW n1

n1 The two cases comprising this litigation, Civil Action No. 02-11646-DPW and Civil Action No. 02-12406-DPW, were consolidated by order dated January 16, 2003, as a result of which Civil Action No. 02-11646-DPW was designated the lead action.

U.S. DISTRICT COURT (MASSACHUSETTS)  
2003 U.S. Dist. LEXIS 10932 / June 26, 2003, Decided

DISPOSITION: [\*1] Nextel's motion for summary judgment GRANTED.  
Defendants' cross-motion for summary judgment DENIED.

CORE TERMS: wireless, by-law, site, variance, effective, tower, coverage, substantial evidence, gap, regulation, zoning, antenna, summary judgment, cell, carrier, resident, network, feasible, cupola, monitoring, hardship, radio frequency, water, telecommunication, special permit, indemnification, installation, height, siting, locality

COUNSEL: For Provincetown, Town of, Zoning Board of Appeals, Gary Reinhardt, Larry Mahan, Peter Bez, Peter Page, Steven Melamed, Defendants: Katharine Goree Doyle,  
LEAD ATTORNEY, Ilana M. Quirk,  
LEAD ATTORNEY, Kopelman & Paige, PC, Boston, MA.

For Nextel Communications of the Mid-Atlantic, Inc., Plaintiff: Steven E. Grill,  
LEAD ATTORNEY, Pamela Nancy Morales,  
LEAD ATTORNEY, Devine, Millimet & Branch, Manchester, NH.

JUDGES: DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE.  
OPINION BY: DOUGLAS P. WOODLOCK  
OPINION: MEMORANDUM AND ORDER  
June 26, 2003

In this litigation, Nextel Communications challenges certain actions of the Town of Provincetown, its Planning Board, Zoning Board of Appeals (ZBA), and individual members of the ZBA, (collectively, "Defendants," "Provincetown," "Town") in denying Nextel's request to place a wireless communications facility ("WCF") in the cupola of a private home. Nextel alleges chiefly that the Defendants' actions were not based on substantial evidence in a written record and constitute effective prohibition of wireless services in violation of the Telecommunications[\*2] Act of 1996, 47 U.S.C. || 332 et seq, (TCA). Nextel moves for summary judgment.

The Defendants have filed a cross-motion for summary judgment upholding the Town's refusal to allow construction of the Nextel facility. The Defendants claim that the rejection of Nextel's WCF was supported by substantial evidence and that neither the Town's decision nor the aggregate effect of its zoning by-laws constitute effective prohibition of wireless services. Moreover, they argue that subsequent action by Town meeting has raised the prospect of relaxation of some of the limitations on wireless service by the Plaintiff in Provincetown. For the reasons set forth below, I will grant Nextel's motion for summary judgment and deny the Defendants' cross-motion.

## I. BACKGROUND

The following undisputed facts are derived from the administrative record submitted by Nextel in support of its applications for special permits and other approvals before the Provincetown Zoning Board of Appeal and the Provincetown Planning Board.

### A. The Parties

Nextel Communications ("Nextel," "Company") is a Delaware corporation with a regional office in Lexington, Massachusetts. Nextel[\*3] is licensed by the Federal Communications Commission to provide "personal wireless services" in Massachusetts. Nextel provides commercial mobile radio services that fall within the definition of personal wireless services set out in Section 704 of the Telecommunications Act of 1996, 47 U.S.C. | 332 (c) (7) (C) (i).

The Planning Board and Zoning Board of Appeals ("ZBA") are agencies or instrumentalities of the Town of Provincetown, charged with responsibility for making the land use, zoning and planning decisions at issue in this case. The individual defendants are named in their official capacities as members of the ZBA and Planning Board.

### B. Factual History

#### 1. Nextel's Operations Generally

Nextel operates a personal wireless service network throughout the country and in Massachusetts. The network requires the deployment of wireless communication facilities, including antennas, throughout the area to be covered. The areas covered by a given antenna and its related receivers and transmitters are known as "cells." Nextel's portable wireless telephones operate by sending low-powered radio frequency transmissions to and from these cells. Sophisticated [\*4] switching equipment operated by Nextel links these wireless transmissions to ground telephone lines, making it possible for a user of Nextel's wireless services to have, at least in theory, a seamless connection to the entire available network of telephone service. The size and efficiency of a given cell is determined by factors including the number of antennas used, the height of the antennas, the topography and vegetation of the terrain of the cell, as well as the presence of man-made or naturally occurring obstacles in the area.

The efficiency of a wireless network, such as Nextel's, is dependent on the radio frequency coverage and consequently the geographic scope of the antenna network. In other words, a Nextel customer's ability to use the Nextel network efficiently is dependent on the existence of overlapping cells in a given area so as to effectuate uninterrupted hand-offs of calls from

cell to cell. As a consequence, Nextel's WCFs must be located so as to insure adequate overlap of cells and adequate propagation of radio frequency signals; antennas must be placed above trees, buildings and other obstacles that may hinder the radio signals. Areas without a comprehensive antenna[\*5] network are likely to have substandard wireless service leading to dropped calls or an inability to place or receive calls.

## 2. Nextel on Cape Cod

Nextel is licensed by the federal government to provide wireless services to Cape Cod. Certain geographic and cultural features of the Cape Cod area make the siting of WCFs problematic however. Specifically, Cape Cod's attraction as a tourist destination is dependent in large part on the appearance of the environment of the area, including its beaches, ponds, and national parks. Since 1990, development of Cape Cod has been overseen by the Cape Cod Commission (CCC), which is charged by the Massachusetts legislature with the authority to approve or deny any "development" of Cape Cod which poses a possibility "of regional impact" ("DRI") (emphasis supplied). Any new wireless facility taller than 35 feet high is considered a DRI. CCC regulations prohibit towers in excess of 150-feet tall. The CCC is authorized to reject any new WCF if an existing structure, which is not a DRI, is available.

## 3. Nextel in Provincetown

Nextel identified a coverage gap in its network in the Provincetown area in 1997. n2 To correct this coverage[\*6] gap, engineers employed by Nextel used computer models to identify a search ring, consisting of potential locations on which a WCF could be sited. Nextel determined that a site in Provincetown would need to be significantly north of the neighboring town of Truro to provide adequate coverage to Provincetown and avoid signal redundancy.

- - - - -Footnotes- - - - -  
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n2 Nextel currently provides limited coverage to a small portion of the Town by means of a Nextel WCF in neighboring Truro.

- - - - -End Footnotes- - - - -  
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At the Annual town meeting in April 1999, Provincetown enacted a zoning by-law regulating telecommunications facilities ("By-law," "Article 7"). Article 7 contained a number of requirements, including setbacks for WCFs, insurance and indemnification, radio-frequency monitoring, and permit renewal requirements, in addition to sundry technical and procedural filing requirements.

In or around June 1999, Nextel obtained a lease to a portion of property located at 20 Provincetown Road in Provincetown, but was ultimately unable to build its WCF at this location. [\*7] Nextel then investigated the viability of other locations, including sites within the Cape Cod National Seashore, as well as property owned by the state of Massachusetts and the Town itself. Nextel understood that each of these sites it had identified would constitute DRIs requiring CCC approval and substantial zoning relief from the Town.

In November, 2000, David Maxson issued a report on behalf of the Cape Cod Commission which analyzed the Provincetown By-Law enacted the prior year. The Maxson Report identified the restrictive nature of the Provincetown By-law as making the Town an "area of critical concern" for the installation of wireless facilities in lower Cape Cod. Specifically, the Maxson Report concluded that the By-law had the effect of limiting the installation of wireless facilities to only five "permissible areas," all of which were near environmentally sensitive locations or which were vulnerable to negative visual impacts from the siting of WCFs. To address the dearth of potential WCF sites, Maxson recommended that Provincetown end its restriction on the siting of WCFs on municipal water towers, warning that, unless it did so, Provincetown risked a court finding that [\*8] it had effectively prohibited wireless service.

In addition to sites on public land, Nextel also explored the possibility of locating its antennas on existing structures within the Town, including the Pilgrim Monument, the Provincetown Town Hall, the Mount Gilboa water tank, certain water tanks on Winslow Street, and the Unitarian Universalist Meeting House. Nextel determined however that each of these possible sites, even if available, would not satisfy the Company's signal propagation requirements. Further weighing against these locations, in Nextel's view, was the fact that these sites would also require substantial zoning relief before they would be approved by the Town.

#### 4. Nextel at Bradford Street

On or around October 5, 2001, Nextel obtained permission from Richard Wrigley, the owner of a five acre parcel located at 232-236R Bradford Street in Provincetown, to construct an antenna facility within a cupola to be built atop Wrigley's residence. The proposed antenna facility would be enclosed entirely within and concealed by the cupola, a structure which itself could be constructed as a matter of right within the zoning district. The antennas in the cupola would be connected[\*9] to switching facilities concealed in an underground room near the residence. As proposed, the Bradford Street facility would not require approval by the CCC because it did not constitute a DRI. However, the facility did not conform to the setback rules described in Article 7 of the By-law which required that a WCF be at least 500 feet from any dwelling units, schools, municipal water supply towers, child care facilities, and housing for the elderly.

#### 5. Nextel's Applications

On or around August 5, 2002 Nextel submitted a joint application to Provincetown's ZBA and its Planning Board requesting land use and zoning relief in order to install its WCF at the Bradford Street site. Specifically, Nextel requested relief from the setback requirements of | 7070(L) & (M), from the radio frequency monitoring regulation of | 7110, from the indemnification insurance requirements of | 7130 and from the licensing term requirement of | 7140. In support of its application, Nextel submitted a description of its site selection process, including an analysis provided by Nextel Radio frequency engineer Tammy Smith describing the signal propagation gap in Provincetown and the characteristics[\*10] of various alternative sites considered by the Company. Nextel also included a wide variety of supporting materials, including a study of the likely real estate impact of the WCF, certification that the proposed facility posed no danger to aircraft, a structural engineering analysis, and statements from the Massachusetts Historical Commission and Wampanoag Indian Tribe that the facility posed "no

adverse impact" to historical or cultural resources. Finally, Nextel submitted extensive reports, maps, photographs and design specifications, as well as visual impact tests including photo simulations of the cupola.

## 6. The Hearing Process

a. The ZBA - The ZBA held a public hearing on Nextel's application on September 19, 2002. At the hearing, Nextel proffered testimony and documentary evidence describing the gap in its coverage, its site selection process, its design for the proposed WCF, and the implications of federal law for local zoning authorities. At the hearing, the ZBA acknowledged receiving seventeen letters from Town residents opposed to the facility. Approximately twenty residents attended the public hearing, a small number of whom spoke against the proposal.

At the[\*11] conclusion of Nextel's presentation at the hearing, ZBA Chairman Gary Reinhardt disputed the Company's contention that it would be impossible for Nextel to locate its WCF at any of the five alternative sites it had identified. Reinhardt stated that while the other sites may have created more difficulty for the company in siting a facility, such difficulty did not amount to a hardship requiring the grant of a variance from the setback requirements stated in the By-law. An attorney for Nextel responded by pointing out that Nextel had received notice from the United States Department of Interior that locating a WCF within the Cape Cod National Seashore was contrary to the purposes for which the Seashore was established, thus effectively eliminating one of the five sites mentioned by Reinhardt. Moreover, of the remaining four sites identified by Reinhardt, Nextel's attorney stated, two were on town-owned property requiring "requests for proposals" (RFPs) which had not been issued, while the remaining two sites would require the construction of a free standing tower which would be likely to create a greater negative visual impact and generate more public criticism than the proposed Bradford[\*12] Street facility.

Chairman Reinhardt replied that, notwithstanding the limitations supposedly created by the By-law, Nextel did not face a hardship attributable to the land itself, such as "soil conditions, shape or topography of land or structures" which, he claimed, was the only basis on which a variance could be granted. Reinhardt stated: "it's clear to us that the issue you have is with the By-law and it's not - we can't overturn the By-law. Only a court can do that." ZBA member Melamed stated that he felt that Nextel had not demonstrated a hardship sufficient to merit a variance but declared, "I love the proposal, it's wonderful."

Chairman Reinhardt then conducted a straw poll of audience members and found that twenty people opposed the proposal. Resident Patrick Patrick spoke against the Nextel proposal on the grounds that an installation at Bradford Street would "harm real estate values," and the purported health risks of electromagnetic radiation from cell phones; Patrick also challenged Nextel's inability to find an alternative site, given the fact, he said, that other wireless carriers had coverage in Provincetown. Resident Salvador Del Deo opposed the Nextel installation[\*13] because "the proliferation of cell phone towers in communities everywhere is also a recognized diminution of the quality of life. People live here, among many reasons, but to escape the impact of all such superficial paraphernalia of the technological age." At the conclusion of the hearing, the ZBA voted unanimously to deny the Nextel application.

The ZBA issued its formal written decision denying Nextel's application on October 4, 2002. The ZBA based its denial on its finding that Nextel did not in fact suffer from a hardship caused by the land itself, but rather by virtue of its attempt to locate its WCF in a location heavily regulated by the By-law. The ZBA also rejected Nextel's request for relief from the insurance, licensing period, and radiation monitoring requirements of the By-law, concluding that Nextel was attempting to have these sections of the By-law nullified.

b. The Planning Board - In spite of the ZBA's denial of its application, Nextel proceeded with its application to the Provincetown Planning Board, filed in August, 2002. Nextel sought issuance from the Planning Board of a special permit required by | 5300 and Article 7 of the By-law, waivers from the By-law [\*14]restrictions Nextel had sought, unsuccessfully, from the ZBA, and other minor changes to the building plans. In reviewing the Nextel application, the Planning Board received a report prepared by Mark Hutchins, a certified radio-frequency engineer retained by the Town, who agreed with Nextel's contention that denial of its application to construct a facility at the Bradford Street site could well result in a finding that the Town was effectively prohibiting wireless service in violation of the TCA. The Planning Board conducted two public hearings on Nextel's amended site plan on October 2, and October 16, 2002. At these public hearings, Nextel submitted documentary evidence and testimony in support of its application; the Board also heard opposition from Town residents.

The Planning Board approved Nextel's amended site plan at the October 2, 2002 hearing. In reviewing the application for the special permit, the Planning Board found that Nextel was not able to provide adequate coverage in the Town, and that no existing structures in the town could be modified to correct this gap. The Board also found that the proposed cupola facility would not have an adverse impact on real estate values, [\*15] historical and cultural resources, or scenic or natural beauty of the Provincetown area. The Board also determined that the proposed site would be less detrimental than a freestanding facility would be. The Planning Board stated that the proposal was "at the highest level in order of site acceptability" but acknowledged that Nextel had nevertheless failed to receive a variance from the ZBA required for construction, noting that Nextel was challenging that denial in federal court. Upon these and related factual findings, the Planning Board voted unanimously to grant Nextel's request for a special permit, subject to the condition that Nextel either comply with or receive a variance from By-law | 7070(L). The Planning Board denied Nextel's request for waivers of the other conditions of the By-law, namely the insurance/indemnification, monitoring, and licensing term requirements, claiming that it lacked the authority to grant such waivers.

### C. Procedural History of this Litigation

On or about August 15, 2002, Nextel filed an action assigned Civil Action No. 02-11646 in this court seeking a declaration that Article 7, "Wireless Telecommunications Towers and Facilities," of the[\*16] Town's zoning by-laws, as amended at a Town meeting on April 5, 1999, had the effect of prohibiting wireless services and that the Town's regulatory scheme was facially invalid under state law. In this original complaint, Nextel sought a permanent injunction restraining enforcement of the By-law, as well as any rules, regulations, policies or guidelines promulgated thereunder.

The ZBA issued its decision denying Nextel's application for four variances from the By-law on October 4 2002 and Nextel amended its complaint in response.

When, following the ZBA's denial of Nextel's variance application, the Planning Board granted a special permit for the Bradford street facility but refused to waive the variance requirements previously relied upon by the ZBA, Nextel initiated another action, assigned Civil Action No. 02-12406. This action was brought against Provincetown and the Planning Board alleging that the Planning Board's failure to waive the variance requirements amounted to effective prohibition of wireless services in Provincetown. Nextel sought an injunction requiring the Town and its instrumentalities to issue the special permit, building permit "and all other approvals and permits[\*17] necessary to allow construction of the proposed facilities to begin without further delay." The cases have been consolidated under Civil Action No. 02-11646. See Note 1 supra.

## II. DISCUSSION

Nextel seeks summary judgment alleging that the denial of its variance application by the ZBA was not based on substantial evidence and that, in any event, the overall effect of Provincetown's By-law is the effective prohibition of Nextel's wireless services in Provincetown. Nextel also requests summary judgment that the conditions which the Planning Board attached to its approval of the Special Permit constitute effective prohibition of its wireless services. Provincetown disputes these characterizations and moves for summary judgment approving its denial of the Nextel application.

The claims in this dispute arise out of the TCA, which provides that "anyone adversely affected by any final action or failure to act by local government that is inconsistent with the limitations [of the TCA] may seek review in any court of competent jurisdiction and the court shall hear and decide such action on an expedited basis." *Nat'l Tower v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 17 (1st Cir. 2002);[\*18] *Town of Amherst, New Hampshire v. Omnipoint Communications Enters.*, 173 F.3d 9, 12 (1st Cir. 1999) (quoting 47 U.S.C. || 332(c)(7)(B)(ii),(iii),(v)).

The First Circuit has described the TCA as "an exercise in cooperative federalism and represents a dramatic shift in the nature of telecommunications regulation." *Nat'l Tower*, 297 F.3d at 19. Section 332(c)(7) of the TCA reflects a "deliberate compromise" between two competing aims: facilitating the national growth of wireless telephone service while maintaining substantial local control over the siting of WCFs. See *Amherst*, 173 F.3d at 13; *Omnipoint Communications, M.B. Operations LLC v. Town of Lincoln*, 107 F. Supp.2d 108, 114 (D. Mass. 2000) ("[The] TCA [was] passed in order to provide a pro-competitive policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition.") (internal quotations and citations omitted.) "Accordingly, the TCA significantly limits the ability of state and local authorities[\*19] to apply zoning regulations to wireless telecommunications." *Telecorp Realty, LLC v. Town of Edgartown*, 81 F. Supp.2d 257, 259 (D. Mass. 2000). See *Lincoln*, 107 F. Supp.2d at 114.

The "cooperative federalism" of the TCA is embodied in its effort to insure state and local authority over the placement and construction of wireless facilities while subjecting this authority to five limitations, two of which form the subject of this dispute: the requirement that decisions pertaining to wireless communications facilities be based on substantial evidence in a written record, and that such decisions not demonstrate effective prohibition of a carrier's wireless services. See *Second Generation Props. v. Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002); *Nat'l Tower*, 297 F.3d at 19. "If a board decision is not supported by substantial evidence... or if it effectively prohibits the provision of wireless service,... then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the TCA's national policy goals." *Second Generation*, 313 F.3d at 627 (internal citations omitted). [\*20] I first consider Nextel's substantial evidence claim before turning to Nextel's claim that Provincetown's zoning by-laws and decisions constitute effective prohibition of its wireless services.

#### A. Substantial Evidence

The TCA requires that the decisions of local authorities attempting to regulate wireless carriers be based on substantial evidence contained in a written record. See, e.g., *Second Generation Props.*, 313 F.3d at 627; *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., *Todd*, 244 F.3d at 58. While a reviewing court must take into account any contradictory evidence in the record, the First Circuit has stated that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Penobscot Air Services, Ltd. v. F.A.A.*, 164 F.3d 713 (1st Cir. 1999) quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).[\*21]

Where the issue presented for judicial review is whether a written decision is supported by substantial evidence, the reviewing court is confined to the administrative record, barring a claim of procedural irregularity. See *Nat'l Tower*, 297 F.3d at 22; *Omnipoint Communications, Inc. v. City of White Plains*, 175 F. Supp.2d 697, 711 (S.D.N.Y. 2001). Application of the substantial evidence standard invokes a rule of deference; if the question presented in a given lawsuit is "simply one of whether the Board's decision is supported by substantial evidence, the courts defer to the decision of a local authority, provided that the local board picks between reasonable inferences from the record before it." See *Nat'l Tower*, 297 F.3d at 22-23. See also, *Second Generation*, 313 F.3d at 627.

Although the "substantial evidence" standard is deferential, it is not a rubber stamp. See *Todd*, 244 F.3d at 59. Thus, while it is true that a district court generally defers to a zoning board's decision and will not substitute its judgment for that of the board, it must overturn the board's decision the substantial[\*22] evidence standard if it cannot conscientiously find that the evidence supporting the decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the board's view. See *White Plains*, 175 F. Supp.2d at 711. Evidence opposed to the town's view must be considered. See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494-95 (2d Cir. 1999); *Nextel Communications, Inc. v. Manchester-by-the-Sea*, 115 F. Supp.2d 65, 66-67 (D.Mass. 2000). The question here is whether the evidence was adequate in the

mind of a reasonable person to support the ZBA's conclusion. See Todd, 244 F.3d at 58.

Nextel bases its substantial evidence claim on two grounds. First, the Company contends that the recent decision by Judge Keeton in *Nextel Communications v. Town of Wayland*, 231 F. Supp. 2d 396, 406-07 (D.Mass. 2001), holding that under the TCA a zoning board may not deny a request for a variance "if in so doing it would have the effect of prohibiting wireless services," requires the grant of the variance where it can be shown, as Nextel claims is the[\*23] case here, that it was impossible for Nextel to find another feasible site within the strictures of the By-law for its facility sufficient to address its coverage needs. Second, Nextel claims that the ZBA's determination that Nextel should have sought to construct the facility at a site which would not require a variance is not based on substantial evidence because, Nextel argues, the record clearly demonstrates that no such sites were in fact available.

Wayland considered a scenario similar in many ways to that described in the administrative record here. 231 F.3d at 406-07. The Zoning Board of Appeals in Wayland based its denial of the plaintiff's request for a variance on the ground that the applicant had not demonstrated the existence of "unique circumstances relating to soil condition, shape or topography of the location that would cause substantial hardship." 231 F. Supp.2d at 406. According to the Wayland ZBA, its authority to grant a variance was limited to cases in which such a showing of hardship was demonstrated. See *id.*

Judge Keeton disagreed, holding that "although the Board's statement may be a correct statement of the general law[\*24] in Massachusetts regarding variances," the ZBA nevertheless failed to give due consideration to the requirements of the TCA which controlled in the "special case" of wireless communications facilities. See *Wayland*, 231 F. Supp.2d at 406-07. He held that under the TCA, a zoning board cannot deny a variance if in so doing it would have the effect of prohibiting wireless services. See *id.* at 406. Wayland held that a wireless carrier's need to close a significant gap in coverage, "in order to avoid an effective prohibition of wireless services," constitutes another "unique circumstance" when a zoning variance is required. See *id.* In other words, the possibility that a zoning decision might violate the TCA is evidence which a local zoning authority must take into account. See *id.* See also, *Oyster Bay*, 166 F.3d at 495; *Manchester-by-the Sea*, 115 F. Supp.2d at 66-67; *White Plains*, 175 F. Supp.2d at 711.

This reasoning applies in force to the instant dispute, where I find, as I discuss below in detail, that the denial of the requested variances, in light of the substantial regulation of WCFs by Article[\*25] 7, effectively prohibits Nextel from offering its wireless services to its customers in Provincetown. Indeed, as was true in Wayland, the Defendants here seem not to have attended to their obligations in conforming to the TCA, notwithstanding the fact that Article 7 was adopted with the express intent that it be consistent federal law. Because the ZBA did not fully consider the possibility that enforcement of § 7070 might violate the TCA, its decision was not based on substantial evidence. See *Oyster Bay*, 166 F.3d at 495; *Wayland*, 231 F. Supp.2d at 406-07; *Manchester-by-the-Sea*, 115 F. Supp.2d at 66-67; *White Plains*, 175 F. Supp.2d at 711.

Moreover, even if the ZBA need not have attended to the likelihood of effective prohibition of Nextel's wireless services in reaching its decision to deny the variance requests, I find that the particular grounds on which

the denials were based were not supported by substantial evidence. The record shows that the ZBA premised its determination in large part on the unsubstantiated conclusion that Nextel's hardship was "self imposed" in that it had chosen the Bradford Street[\*26] site as opposed to alternative sites "that would not require the granting of a variance by the ZBA." In particular, the ZBA cited the fact that Nextel's application referred to the Bradford Street site as a "perfect" location, one which made a "good location" for a WCF, as tending to show that Nextel faced no real hardship because of the land itself, but was attempting to use the variance process to secure for itself an optimal location.

Based on a careful review of the record, however, I conclude that the ZBA's claim that Nextel could have sited the WCF in a location not requiring a variance to be without merit. Of the five potential sites identified by Chairman Reinhardt that appeared to conform to the By-law, one was on land in the Cape Cod National Seashore controlled by the Department of the Interior which would not allow the construction of the Nextel facility. Two of the remaining four sites were on town-owned land for which no requests for proposals had been issued. The remaining two sites were not feasible because they would require the construction of towers which, as DRIs, would require the approval of the CCC as well as variances from the By-law. In short, neither the[\*27] record nor the reasons offered for the ZBA's denial demonstrate substantial evidence supporting the Board's conclusion that other sites which would not require a variance were available to Nextel. For these reasons, I conclude that the ZBA decision denying Nextel's variance application violated | 322(c) (7) (B) (iii).

#### B. Effective Prohibition

I also find that even if they had been based on substantial evidence, the ZBA and Planning Board decisions to deny Nextel's applications constitute effective prohibition of wireless services. Section 322(c) (7) (B) of the TCA provides that "the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof... shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. | 322(c) (7) (B) (i) (II). Interpreting this provision of the statute, the First Circuit has held that the anti-prohibition clause is not restricted to "blanket bans" on cell towers imposed by towns. See *Second Generation*, 313 F.3d at 629; *Amherst*, 173 F.3d at 14. To establish[\*28] an effective prohibition challenge to a zoning ordinance or decision, a carrier must "show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." See *Amherst*, 173 F.3d at 14.

The First Circuit has identified two sets of circumstances in which zoning board action, short of a blanket ban, may nevertheless constitute effective prohibition of wireless services. See *Second Generation*, 313 F.3d at 630. The first circumstance arises when a town "sets or administers criteria which are impossible for any applicant to meet." See *id.*, citing *Nat'l Tower*, 297 F.3d at 23-25. The second effective prohibition circumstance arises where the plaintiff's existing application is the only feasible plan, in which case the denial of a plaintiff's application might amount to a prohibition. See *id.*, citing *Amherst*, 173 F.3d at 14.

Based on the record before me, I conclude that Article 7 of the zoning By-law, as created and administered by Provincetown, constitutes effective

prohibition of wireless services in[\*29] the Town. Specifically, the ZBA's claim that it lacks authority to issue variances from Article 7, in conjunction with the stringent geographical requirements of the By-law itself, make it virtually impossible for a wireless carrier to locate a wireless facility in or around Provincetown. See Nat'l Tower, 297 F.3d at 23; Amherst, 173 F.3d at 14. Moreover, I conclude that an effective prohibition determination is warranted here because, in rejecting the Nextel proposal for the Bradford Street site, the ZBA denied the only feasible plan under which Nextel could provide wireless services to Provincetown. See Second Generation, 313 F.3d at 630; Amherst, 173 F.3d at 14.

As a threshold matter, I note that there is no evidence in the record which would show any genuine dispute about the existence of a significant coverage gap in Nextel's network in Provincetown. See Second Generation, 313 F.3d at 631-33; (rejecting rule that any coverage by any carrier disproves significant coverage gap); Nat'l Tower, 297 F.3d at 20. Nextel provided unrefuted testamentary and documentary evidence[\*30] of a gap in its coverage comprising virtually all of Provincetown. Instead, distilled to its essence, the dispute here concerns whether Provincetown would allow Nextel to construct any wireless facility which would actually address this coverage gap.

Section 7070(L) of the By-law requires that a WCF be located no closer than "500 feet horizontally from dwellings, public or private schools, municipal water supply towers, child care facilities and housing for the elderly and infirm." While seemingly innocuous on its face, this provision of the By-law makes the installation of a WCF in or around Provincetown for all intents and purposes impossible. As Nextel has demonstrated, the effect of this setback provision is to require that wireless facilities be located on parcels of approximately one million square feet, or twenty-two acres. As stated in Nextel's application for the permit, given the density of development in Provincetown, there are only four parcels of land meeting these dimensional requirements within the Town, three of which are owned by the Town itself, and one by the state of Massachusetts; none was available to Nextel. As CCC consultant Maxson stated, the By-law restrictions[\*31] imposed by Provincetown "significantly reduce the number of lots on which a wireless structure could be located." In this respect, Provincetown's elimination of water towers and other existing structures from use as WCF sites virtually compels carriers to propose the construction of free-standing towers, which would be antithetical to the declared purposes of the By-law and, moreover, would be unlikely to receive either local or regional approval from the Town or the CCC in any case. As Maxson stressed, the conjunction of Provincetown's zoning requirements with the state mandate regarding the regulation of DRIs across the Cape Cod region further diminishes the likelihood that a wireless carrier would be able to locate a WCF so as to correct its coverage gaps.

The potential availability of "alternative sites" which are, in fact, neither available nor technically feasible will not forestall an effective prohibition claim. See, e.g., Nat'l Tower, 297 F.3d at 23; Nextel Communications v. Town of Sudbury, 2003 U.S. Dist. LEXIS 2642, 2003 WL 543383, \*13 (D.Mass. 2003) (existence of overlay district does not immunize locality from effective prohibition challenge where sites in district[\*32] were unavailable or would not rectify coverage gap); Wayland, 231 F. Supp.2d at 408 ("The alternative sites, even if technically feasible in the abstract, do not overcome the undisputed evidence in the record of the Town's hostility to the provision of wireless services"); Omnipoint Holdings v. Town of Westford, 206 F. Supp.2d 166, 172 (D.Mass 2002) ("fixed hostility" of Board

suggests that further applications would be futile). As the Court in National Tower explained, "Setting out criteria under the zoning law that no one could ever meet is an example of effective prohibition." 297 F.3d at 23. Under such circumstances, to suggest, as Chairman Reinhardt did, that Nextel could have chosen another site which for which a variance would not have been necessary was an idle offer; Provincetown, as a practical matter, had no such sites to offer.

Likewise, the record provides ample support for the conclusion that Nextel's Bradford Street proposal was the only feasible alternative under the circumstances. The comments of two members of the ZBA at the September 19, 2002 hearing, to the effect that they "liked" and even "loved" the proposal, [\*33]while not dispositive, strongly suggest that the Bradford Street plan had appeal for some members of the Provincetown community. In particular, the fact that the antennas and other equipment were entirely invisible within the cupola, which was itself relatively unobtrusive (according to photo simulations submitted with the application), demonstrates that the facility had been designed in order to cause minimal visual impact to Provincetown and Cape Cod.

Indeed, based on my review of the Plans submitted with the application, it is hard to see how Nextel could have designed a facility more attuned to the stated goals of the Provincetown bylaws, namely "to preserve and protect historic and scenic vistas as well as the environmental, natural, or man made resources of the community in order to safeguard the welfare of residents and visitors to the community..." To put this another way, the attempt to locate the facility in the cupola rather than in a free-standing tower, which would be highly likely to run afoul of the stated goals of the By-law and Cape Cod Commission regulations, strongly supports the inference that Nextel's Bradford Street proposal was the only feasible plan that would[\*34] rectify the undisputed coverage gap. See Second Generation, 313 F.3d at 630.

In short, Nextel has demonstrated the absence of any alternative locations, not requiring a variance or other extraordinary relief, which would correct its coverage gap. The Defendants have failed to refute or, for that matter even meaningfully to challenge, Nextel's evidence regarding the lack of feasible alternative locations. Moreover, Nextel has shown that, given the express terms of Article 7 and its enforcement by the ZBA and Planning Board, it is unlikely that the Town would approve any other proposal because any other feasible plan would require the construction of a tower, which the record shows, would pose a significant negative visual impact. As a consequence, I find that the Defendants have effectively prohibited wireless service in Provincetown. Summary judgment in Nextel's favor is therefore warranted.

### C. Post Hoc Developments

Provincetown contends that recent action by the Town, taken after the summary judgment briefing in this case, militates against granting summary judgment to Nextel. Specifically, Provincetown contends that recent amendments to the By-law, and[\*35] the Planning Board's authority thereunder, may make it easier for Nextel to find a suitable site for its WCF, thus obviating the need for court action at least until such possibilities have been explored.

The Defendants refer to the annual town meeting on April 7, 2003. At this meeting however, among other actions bearing on these cases, the residents of

Provincetown specifically rejected a proposal which would have amended Article 7 to permit the installation of WCFs on the Town's water tanks. Warrant Article 19, which would have permitted use of the water tanks, was in fact amended at the Meeting by replacing the words "water tanks" in the proposed article with the "Old Burn Dump," or "wastewater treatment plant property." As I discuss below, while it is true that in hearings before the ZBA, Nextel expressed interest in locating its facility on one of the water tanks, the fact that this option was rejected by Provincetown residents at the Town meeting does not assist Provincetown in showing that the Town does not effectively prohibit wireless services.

Warrant Articles 22 and 23, which would have eased certain restrictions on the siting of WCFs in Provincetown, were also rejected[\*36] by residents at the Annual Meeting. Article 22 would have created a "Telecommunications Overlay District" which could, in theory, have made additional sites available for WCFs. Article 23 would have liberalized the Town's regulation of "stealth" wireless facilities, such as that at issue here.

To be sure, Warrant Article 21, an amendment to § 7030 of the By-law, was approved at the Annual Meeting. Article 21 provides that the Planning Board may, in its discretion, waive particular provisions of the Zoning By-Law if it finds that the enforcement of that provision would prohibit or have the effect of prohibiting wireless services in the Town. In short, Article 21 permits the Planning Board to act, in its discretion, on some future finding of the type the Town has contested in this litigation.

I have already made the finding of effective prohibition. Waiting upon Provincetown to offer supererogatory agreement and act on it only prolongs the violations of the TCA the Town has engaged in. Indeed, the fact that the residents of Provincetown have granted the Planning Board discretion to waive provisions of the By-law to the extent that they conflict with federal telecommunications law[\*37] does not alter the regulatory landscape because, as the First Circuit has consistently held, **local zoning boards are already under an obligation to ensure that local regulations do not constitute effective prohibition of wireless services.** See, e.g., *Brehmer v. Planning Bd. of Wellfleet*, 238 F.3d 117 (1st Cir. 2001) (under TCA, local zoning ordinances apply only to the extent they do not interfere with TCA); *Amherst*, 173 F.3d at 15-16 ("strictures of New Hampshire and Amherst law are preempted, under the Supremacy Clause of the Constitution, if they are read and applied so as effectively to preclude personal wireless service"); *Wayland*, 231 F. Supp.2d at 406-07 (notwithstanding provisions of Massachusetts Zoning Enabling Act, Mass. Gen. Laws Ch. 40A § 6, under federal law, the need for closing significant coverage gap, in order to avoid effective prohibition of wireless service, is "another unique circumstance" calling for a variance).

Likewise, Provincetown's belated issuance of a Request for Proposals for the Old Burn Dump Site is an insufficient basis on which to conclude that summary judgment is not warranted at this time. Record[\*38] evidence shows that a WCF at this site faces many obstacles.

First, as Nextel has shown, locating its WCF at the Old Burn Dump Site would require Nextel to build a tower as much as 170 feet tall. However, as Nextel's engineer stated, a tower of this height would create significant interference problems for Nextel subscribers.

Second, Nextel produced evidence tending to show that a tower of this height, located within a mile of the Provincetown airport, would run afoul of FAA regulations which limit the height of towers in that proximity to the airport to 158 feet. Similarly, FAA guidelines require that a tower of this specification at the Old Burn Dump Site be painted red and white, with permanent red flashing lights mounted to the top. These requirements would demonstrably increase the negative visual impact of the facility.

Third, a tower of this height would likely be rejected by the Cape Cod Commission, which prohibits towers in excess of 150 feet. The study of the Provincetown's wireless policies conducted by David Maxson on behalf of the CCC found that a tower even as high as eighty-feet at the Old Burn Dump site would cause a significant negative impact to a visually sensitive[\*39] area, namely the National Seashore, Route 6 and Provincetown Dune areas. And, even if the CCC were ultimately to approve the tower - after a process which could take as long as six months - Nextel would be still be obligated to return to the Planning and Zoning Boards to request a variance and a permit for construction because | 7070(F) (2) of the By-law limits the height of towers in Provincetown to 150 feet.

Given these circumstances, I conclude that delaying resolution of this matter would not conform to the terms of | 332 (c) (7) (B) (v) of the TCA requiring expeditious resolution of disputes. Speculation that Provincetown, if given another chance, might approve a suitable Nextel facility is at best simply that: hopeful speculation the Town will belatedly come into compliance with the law. The First Circuit's reasoning in National Tower is apposite:

The statutory requirements that the board act within 'a reasonable period of time,' and that the reviewing court hear and decide the action 'on an expedited basis,' indicate that Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, [\*40] if it chooses, to proffer another. Instead, in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order... instructing the board to authorize construction. ...In short, a board's decision may not present a moving target and a board will not ordinarily receive a second chance.

297 F.3d at 21-22.

Having found that the decisions of the ZBA and the Planning Board not to grant variances from the By-law were not based on substantial evidence and constitute effective prohibition of wireless service in violation of federal law, I conclude that the proper course is to grant summary judgment to Nextel and to issue an order directing that all necessary permits and approvals for construction of Nextel's WCF at the Bradford Street site be granted forthwith. n3

- - - - -Footnotes- - - - -  
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n3 Although Nextel originally requested variances from the By-law's insurance/indemnification, electromagnetic radiation monitoring and term of permit requirements, Nextel has not argued here that the denial of these requests constitutes an independent grounds for finding that the ZBA or Planning Board decisions were not based on substantial evidence or demonstrate effective prohibition of wireless service. Moreover, neither party has briefed the validity of these additional provisions of the By-law.



**NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. d/ b/ a  
NEXTEL COMMUNICATIONS, Plaintiff**

**vs.**

**TOWN OF SUDBURY, MASSACHUSETTS, ZONING BOARD OF APPEALS of the TOWN OF  
SUDBURY, MASSACHUSETTS and PATRICK J. DELANEY, III, LAUREN S. O'BRIEN, THOMAS  
W.H. PHELPS, MELINDA M. BERMAN and JONATHAN G. GOSSELS in their individual  
capacities as Members of the Zoning Board of Appeals of the Town of Sudbury,  
Massachusetts, Defendants.**

USDC Mass. CIVIL ACTION NO. 01-11754-DPW  
2003 U.S. Dist. LEXIS 2642  
February 26, 2003, Decided

DISPOSITION: Plaintiff's motion for summary judgment GRANTED as to Count I.

CORE TERMS: coverage, site, tower, wireless, substantial evidence, antenna,  
special permit, zoning, carrier, parcel, minutes, variance, radio frequency,  
bylaw, network, cell, gap, aesthetic, written record, resident, provider,  
visual impact, overlay, town-owned, engineer, monopole, telecommunication,  
nuisance, visual, maps

COUNSEL:

For NEXTEL COMMUNICATIONS OF THE MID ATLANTIC, INC.  
Plaintiff: Matthew R. Johnson, Steven E. Grill, Esq.,  
Devine, Millimet & Branch, Manchester, NH.

For TOWN OF SUDBURY, ZONING BOARD OF APPEALS OF THE TOWN OF SUDBURY,  
MASSACHUSETTS, PATRICK J. DELANEY, LAUREN S. O'BRIEN, THOMAS W.H. PHELPS,  
MELINDA M. BERMAN, JONATHAN G. GOSSELS, Defendants:  
Paul L. Kenny, Medford, MA.

JUDGES: DOUGLAS P. WOODLOCK, US DISTRICT JUDGE.  
OPINIONBY: DOUGLAS P. WOODLOCK  
OPINION: MEMORANDUM AND ORDER  
February 26, 2003

Nextel Communications brings this suit against the Town of Sudbury,  
Massachusetts and its land use authorities alleging violations of the  
Telecommunications Act of 1996, 47 U.S.C. | 332(c)(7) et seq., in the  
Town's denial of Nextel's applications for variances and special permits  
sought for the construction of a wireless antenna facility. Before me is  
Nextel's motion for summary judgment.

## I. BACKGROUND

### A. The Parties

The plaintiff, Nextel Communications of the Mid-Atlantic, Inc., doing  
business under the name Nextel Communications, ("Nextel," "Company") is a  
Delaware corporation with a regional[\*2] office in Lexington, Massachusetts.  
It is a provider of enhanced specialized mobile radio services, a type of  
commercial mobile radio service ("CMRS"), which fall within the definition of  
"personal wireless services" ("PWS") as set forth in 47 U.S.C. | 332  
(c)(7)

(i). Nextel is licensed to provide CMRS in Massachusetts, among other  
locations, by the Federal Communications Commission.

The Town of Sudbury is a municipal corporation of the Commonwealth of Massachusetts. The Zoning Board of Appeals ("ZBA" "Board") is an instrumentality of the Town of Sudbury. Patrick J. Delaney, III (Delaney), Lauren S. O'Brien (O'Brien), Thomas W.H. Phelps (Phelps), Melinda M. Berman (Berman), and Jonathan G. Gossels (Gossels) are residents of Massachusetts and are sued in their individual capacities as members of the ZBA. n1

- - - - -Footnotes- - - - -

n1 The Town of Sudbury, ZBA, and individual named defendants will be identified collectively in this Memorandum as "Defendants", "Town," "ZBA," except as otherwise noted.

- - - - -End Footnotes- - - - -

B. Factual [\*3] History

Nextel operates a personal wireless service network throughout the country and in Massachusetts. The Company's network is entirely digital and employs a technology called "time division multiple access" ("TDMA") which permits multiple users to share a given radio frequency simultaneously. The network requires the deployment of wireless communication facilities (WCFs), including antennas, throughout the area to be covered. The areas covered by a given antenna and its related receivers and transmitters are known as "cells." Nextel's portable wireless telephones operate by sending low powered radio frequency transmissions to and from these cells. Switching equipment operated by Nextel links these wireless transmissions to ground telephone lines, making it possible for a user of Nextel's wireless services to have, at least in theory, a seamless connection to the entire available network of telephone service. The size and efficiency of a given cell is determined by factors including the number of antennas used, the height of the antennas, the topography and vegetation of the terrain of the cell, as well as the presence of man-made or naturally occurring obstacles in the area. [\*4]

The efficiency of a wireless network, such as Nextel's, is dependent on the radio frequency coverage and, therefore, the geographic scope of the antenna network. Because subscribers to these personal wireless services commonly use them while traveling, it is essential that wireless carriers provide radio frequency coverage in all the territory in which their customers are located or travel. To facilitate this use, Nextel employs sophisticated electronic switching equipment which automatically "hands-off" the radio signal as a customer travels from one cell to another without interrupting service. However, in order for this hand-off to happen without service interruption-without the call being "dropped"-there must be overlapping coverage between cells. As a consequence, Nextel's WCFs must be located so as to insure adequate overlap of cells and propagation of radio frequency signals. Antennas must therefore be placed above trees, buildings and other obstacles that may hinder the radio signals. Areas without a comprehensive antenna network are likely to have substandard wireless service leading to dropped calls or an inability to place or receive calls.

The deployment of wireless communication[\*5] facilities in Sudbury is regulated by Chapter 4300 of the Sudbury zoning by-laws (the "Bylaw"). The Bylaw establishes, and limits construction of wireless antennas to, a zoning "Overlay District" comprising five town-owned properties, as well as "all properties within Business, Limited Business, Industrial, Limited Industrial, Industrial Park and Research Districts" established by the zoning regulations. n2 Id.

-Footnotes-

n2 Bylaw sections 4331-4335 set out the town-owned parcels within the overlay district. They are: Sudbury Landfill; Former Melone Property; Sudbury Water District Borrow Pit; Raymond Road well field, "Feeley Park area"; and Highway Department property.

-End Footnotes-

The Bylaw provides that certain facilities, such as "interior mounted wireless communications," certain roof-mounted, and facade-mounted equipment may also be constructed within the Overlay District "as of right." Id. at || 4340-4345. The Bylaw provides that other equipment, such as "free-standing monopoles," may be installed pursuant to the issuance[\*6] of a special permit, and are subject to certain other restrictions and limitations, including a license period of five years, and obligatory co-location, "upon commercially reasonable terms," of the equipment of other wireless providers. Id. at || 4350-4355. However, notwithstanding the fact that the Overlay District includes essentially all of the non-residential zones in Sudbury, | 4351 expressly limits the construction of free-standing monopoles to the five town-owned sites within the district. Id. at 65. Section 4350 also imposes height and setback requirements for freestanding monopoles: the height of antenna facilities is limited to a maximum of 100 feet above grade; the facility must be located 125 feet from any property line. Id. at || 4352-4353. Additional setback requirements of 1000 feet from "any school building" and 500 feet from a residential lot line are applicable to all wireless facilities, except "small transceiver sites." Id. at | 4363.

Under state law, before a wireless service provider may build a facility at one of the town-owned parcels within the Overlay District, the town must first issue a "request for proposals" ("RFP") for the particular[\*7] parcel. Thus, for a wireless service provider such as Nextel to receive a special permit to construct a free-standing monopole facility on any of the specified town-owned parcels, Sudbury must first issue an RFP.

In or about February 2000, Nextel determined that it needed to install an antenna or antennas in Sudbury in order to provide coverage to its customers in the Town as well as along Massachusetts Route 27. Radio frequency engineers employed by Nextel studied the Sudbury area, paying particular attention to the need for facilities that would provide coverage to the town center area. Nextel's engineers determined that only one of the five town-owned sites, the "Willis Hill" parcel, fell within Nextel's "search ring," the boundary within which an antenna must be located to fill the Company's existing coverage gap in the center of town.

Around this time the Town issued an RFP for the Willis Hill parcel. The Town's RFP for Willis Hill required a minimum bid of \$ 300,000 for the five year lease. n3 The RFP also required the successful bidder to attach its equipment to an existing fifty foot high water tower rather than build a new tower. AT&T Wireless PCS (AT&T), one of Nextel's[\*8] competitors, was the highest bidder but, departing from the stated terms of the RFP, proposed the construction of a new tower. As a consequence, in spite of having won the RFP, AT&T also needed a "special permit" for its plan to build a new tower on the site. The ZBA subsequently denied AT&T's special permit application.

-Footnotes-

n3 Nextel contends that the rent specified in the RFP is more than double the rent usually charged in the market for such installations and is

therefore commercially unreasonable. Nextel does not substantiate this allegation with evidence of what it contends would be a reasonable market rate for rentals, however.

- - - - -End Footnotes- - - - -

At some point prior to the Town's issuance of the Willis Hill RFP, AT&T and the Town had been involved in litigation in this court. n4 In May 2000, approximately three months after the Willis Hill RFP, AT&T and Sudbury agreed to settle the outstanding litigation as well as all outstanding claims arising out of the ZBA's denial of the special permit. The Consent Decree and Final Judgment [\*9] in the suit allowed AT&T to construct an eighty foot tower with internally mounted antennas on the parcel. Furthermore, the Consent Decree provided that AT&T's single carrier facility could be converted into a multi-carrier facility upon issuance of either an additional award from the February RFP or a new RFP by the Town.

- - - - -Footnotes- - - - -

n4 AT&T Wireless PCS v. Board of Selectmen of the Town of Sudbury, et. al. 98-CV-10713-NG.

- - - - -End Footnotes- - - - -

Following the settlement, Nextel representative John J. Keene, Jr. ("Keene"), among others at the Company, made written and oral inquiries of Town officials about possible locations for a wireless facility which would achieve Nextel's coverage objective for the center of Sudbury. According to Keene's uncontroverted affidavit, n5 he was told by town officials that no further RFPs would be issued for the Willis Hill parcel, or for any other location within Nextel's search ring. In particular, in a letter dated January 9, 2001 to Keene, Sudbury Town Manager Maureen Valente stated that the Town would[\*10] not make the Fire Station site available to Nextel for a wireless facility because it was "sufficiently encumbered." Valente also stated that because "the Town has not addressed utilization of its various properties for some time" she expected that the Town would soon start developing a "master plan", one element of which could conceivably include the installation of additional wireless facilities such as Nextel was requesting. Valente concluded that, due to these and other factors, "it does not appear that the Town will be addressing the use of its property for additional cell towers in the near future."

- - - - -Footnotes- - - - -

n5 The defendants have moved to strike the Keene Affidavit but I deny that motion. His affidavit is a proper vehicle upon which to present the relevant administrative record and the affidavit fully identifies the basis upon which to conclude that the information contained would be admissible at trial.

- - - - -End Footnotes- - - - -

According to Keene, these statements from Town officials induced Nextel to search for sites outside of the five[\*11] town owned sites and the Overlay District that would accommodate a monopole antenna facility and satisfy the Company's coverage objectives. In documents later submitted to the ZBA with its special permit and variance applications, Nextel described its search for suitable sites in and around the Sudbury area.

Nextel had made the determination by approximately 1997 that it would have to have three cells in the Sudbury environs—generally north, south and center—to achieve complete coverage in the Town. In the course of trying to find an appropriate location for its center cell, Nextel examined twenty one alternative locations. As noted above, Nextel could not gain access to its preferred site, having failed to win either the RFP or a co-location position on the AT&T tower at Willis Hill. Nextel also analyzed the possibility of locating on Highway Department property south of the center of Sudbury but concluded that the site was too far south to meet the Company's coverage objectives. Nextel was also unable to locate on several parcels because the Town refused to offer RFPs for these sites, including the Fire Station property and a parcel of town-owned property at 30 Hudson Road, which[\*12] was immediately adjacent to the site ultimately proposed by the Company.

Nextel encountered topographical obstacles at other of the alternative sites it investigated, such as at the Fairbanks Community Center, the Mauri Service Station, and the Sudbury Regional High School. Nextel was also hindered by an unwillingness of a number of property owners to consider leasing their property to the Company for a tower. Several of the alternative sites Nextel investigated, including church steeples, another water tank and the Sudbury Town Hall, were simply too low to provide the requisite coverage. Finally, Nextel ruled out other locations, such as the Peter Noyes Elementary School and the Mt. Pleasant Cemetery, on the grounds that locating the Company's proposed tower at these sites would have considerable negative visual impact on the Town because the site was in an historic district or other prominent location.

Nextel ultimately settled on a site at 36 Hudson Road ("Hudson Road" the "Site") as meeting its coverage requirements and being less disruptive to the Town. One portion of the Site was located within Sudbury's zoned Business District # 7 and the remainder in the Residential Zone. [\*13] A commercial building housing "Ti Sales," a water/ sewer supply company, occupied a portion of the Site. The Site's largest abutters were parcels of undeveloped property owned by the Town and by the Commonwealth of Massachusetts. Nextel obtained permission from the Site owner to construct an antenna facility on that section of the Site within the business district.

Because Hudson Road was not one of the five parcels designated for the construction of monopole antenna facilities under the Bylaw, Nextel was obligated to submit two applications to the ZBA. First, Nextel sought a special permit for the construction of the wireless facility pursuant to Bylaw | 4350. Nextel also sought four variances allowing construction of a monopole facility outside the overlay district; allowing location within 1000 feet of a day care center; and permitting departures from the setback requirements required by | 4353 and | 4363. In its variance application, Nextel proposed, among other things, that the design of the proposed pole include internally mounted antennas and permit co-location of up to two additional wireless carriers.

Nextel explained in its May 21 application that it was seeking the[\*14] variance and the special permit for the Hudson Road Site because it found no alternative site within a one-half mile that would meet its coverage objectives. Specifically, Nextel stated that the only structures which would "adequately fill Nextel's coverage gap would be the Willis Hill water tanks" or AT&T's proposed tower at the Willis Hill site. Nextel stated it was unable to co-locate on the AT&T tower however, because AT&T's tower was only

designed to accommodate one carrier. Nextel further stated that even if the Tower were designed to accommodate two carriers, as provided in the AT&T's settlement with the Town, it would not be able to locate on the tower because the rights to any eventual second position had already been claimed by Sprint PCS.

Finally, Nextel stated that it had been informed by the Sudbury Water District that the Water District would not be issuing RFPs, "nor entertain any further Wireless facilities on that site either on a tower or on the tanks." The Town had similarly stated that no more RFPs would be forthcoming.

In support of its application, Nextel submitted maps of Sudbury denoting existing and proposed wireless facilities and photographic simulations[\*15] of the proposed tower as it would look at the site. Nextel also submitted radio frequency coverage maps which, the company claimed, demonstrated the absence of adequate coverage in the center of Sudbury. Nextel also submitted the affidavit of John Dzialo, a Nextel radio frequency engineer, attesting to the "unique radio frequency characteristics of the Site," Nextel's diligence in investigating alternative sites, as well as the existence of a coverage gap in Sudbury. Finally, submitted a Memorandum describing its efforts to identify alternative sites which could provide the necessary coverage to the center of Sudbury.

The ZBA held public hearings on Nextel's Hudson Road application on July 10, 2001 and September 5, 2001. At the initial hearing on July 10, Keene described Nextel's investigation of sixteen other sites around Sudbury. He explained that Nextel had rejected these sites for a variety of reasons; for example, sites were rejected because they provided coverage that too closely overlapped existing coverage, did not fill the coverage gap in the center of Sudbury center, were not available because the owner was unwilling to lease space, or, in the case of several church steeples, [\*16] were too low to meet Nextel's coverage goals.

In the memorandum describing its search for alternative sites, Nextel summarized the advantages of the Hudson Road site over all the alternative locations the Company had considered:

First, [the site] is on a property that is currently used for commercial purposes and borders two unoccupied parcels, the Town Property and the former railroad property. Secondly, as demonstrated by the photo simulations, real estate impact study and other evidence the site would have no detrimental impact on the community ... Lastly, the subject property offered a reasonable location for construction of such a facility and had a willing landlord.

ZBA Chairperson Delaney read into the record the letter from the Sudbury Planning Board which had rejected Nextel's application primarily on grounds that the Site was within a zoned residential district and was not within the overlay district. Delaney also read into the record a letter from the Town Manager conveying the "strong feeling" of the Sudbury Board of Selectmen that all wireless facilities should be within the overlay district.

At one point in the July 10, 2001 ZBA meeting, Delaney questioned[\*17] why Nextel needed a 100 foot tower to reach the center of Sudbury whereas a Nextel competitor, Omnipoint, had been able to satisfy its coverage objectives for Sudbury by locating its equipment on a pole twelve feet above a building in the center of town. Keene replied that he could not speak to Omnipoint's coverage needs.

Delaney also inquired as to what Nextel's coverage objective for Sudbury was, asking what standard of coverage federal law required Nextel to provide. Keene stated that federal law required licensed carriers to provide "adequate or reliable" coverage, and to do so within a certain limited time frame. Cameron Syme, a Nextel radio frequency engineer attending the hearing, stated that, under current conditions, Sudbury center and the Route 27 area would be considered to have "less than adequate coverage." Nextel attorney Michael Rosen stated that the federal standard for coverage, as defined by federal precedent was service that is "comparable to land lines."

The ZBA repeatedly questioned Nextel as to the availability and suitability of other sites, including the Willis Hill site, and as to the extent of the alleged coverage gap in Sudbury center.

At one point, Lawrence[\*18] O'Brien, representing the Board of Selectmen, summarized the view of the Selectmen that the Town of Sudbury "has been more than gracious, flexible, and accommodating to all carriers requesting RFPs." Yet O'Brien also stated that "it is also the position of the current Board that ... the Selectmen feel no need or desire to issue more RFPs. We do not plan to accommodate every request of every cellular carrier that comes to the Town asking for coverage on monopoles." Later in the meeting, O'Brien stated that the Board of Selectmen did not feel that it was the obligation of the Town of Sudbury to "provide 100% coverage for 100% of the carriers." Toward the conclusion of the July 10 meeting, O'Brien reiterated this position, stating that it was not the obligation of the Town of Sudbury to provide "superior coverage" for every carrier that wished to come to town. The July 10 meeting was continued to September 5, 2001 without reaching a conclusion.

At the September 5, 2001 hearing, the ZBA focused to a significant degree on Nextel's alleged coverage gap in the center of Sudbury. Chairperson Delaney stated that he had conducted a "semi-scientific test" of Nextel coverage throughout Sudbury. [\*19] Delaney said that he had borrowed a Nextel phone from the Town and had driven around Sudbury placing calls from a variety of locations, and that all of the locations he had tried worked well. He stated that he was generally able to initiate and receive calls, with the exception of the area around Parker Street in Maynard where he said he was sometimes unable to initiate calls. He further stated that the signal strength meter on the phone's display had consistently shown strong signals. Delaney contrasted the reliability of this coverage with that at issue in the earlier AT&T Willis Hill application. Delaney stated that, based on his test, Nextel's coverage gap was not as severe as AT&T's had been.

At this hearing, Keene submitted to the ZBA overlay coverage maps depicting coverage from other sites, including the "highway garage" and "Village Green" sites. Keene claimed that, on the basis of the coverage areas illustrated by the maps, neither of these sites was sufficient to fill the gap in the center of the Town.

After the public portion of the meeting was concluded, the ZBA met to discuss and vote on Nextel's special permit and variance applications. Each element of Nextel's application[\*20] was denied by a unanimous vote of the ZBA.

The Board based its denial of the Special Permit on a number of grounds. The ZBA found that the grant of a Special Permit under the circumstances would "nullify and substantially derogate from the intent and purpose" of the

overlay district. The ZBA also stated that while the existing coverage was less than Nextel desired, the ZBA had not been persuaded that the company's desired degree of coverage was "a necessity to serve the public good and the requirements of the federal telecommunications act." The ZBA stated that it based this decision on the informal test of Nextel coverage carried out by Chairperson Delaney.

The ZBA also declared that it determined that the Town did not "unreasonably discriminate among providers of functionally equivalent services" in violation of the TCA, citing its prior approval of six applications of PCS providers. The reasons given for the ZBA's denial of Nextel's variance applications restated in all material respects the several reasons for the denial of the special permit.

The ZBA issued its formal "Notice of Decision" rejecting Nextel's applications on September 14, 2001. The Notice stated that the reasons[\*21] for the decision were to be "found in the minutes of the hearing ... which are incorporated herein and made a part hereof."

Nextel filed the instant complaint on October 12, 2001.

## II. DISCUSSION

The claims in this dispute center on 47 U.S.C. | 332 (C) (7) et seq. of the Telecommunications Act of 1996 ("TCA", "Act"), which provides that "anyone adversely affected by any final action or failure to act by local government that is inconsistent with the limitations [of the TCA] may seek review in any court of competent jurisdiction and the court shall hear and decide such action on an expedited basis." *National Tower v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 17 (1st Cir. 2002); *Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises*, 173 F.3d 9, 12 (1st Cir. 1999) (quoting 47 U.S.C. | | 332(c) (7) (B) (ii), (iii), (v)).

The First Circuit has described the TCA as "an exercise in cooperative federalism [which] represents a dramatic shift in the nature of telecommunications regulation." *National Tower*, 297 F.3d at 19. Section 332(c) (7) of the TCA reflects[\*22] a "deliberate compromise" between two competing aims: facilitating the national growth of wireless telephone service while maintaining substantial local control over the siting of WCFs. See *ATC Realty, LLC v. Town of Kingston, New Hampshire*, 303 F.3d 91, 94 (1st Cir. 2002) (TCA works "like a scale" that attempts to balance need to accelerate deployment of telecommunications technology and desire to preserve state and local control over zoning matters); *Amherst*, 173 F.3d at 13; *Omnipoint Communications, M.B. Operations LLC v. Town of Lincoln*, 107 F. Supp.2 108, 114 (D. Mass. 2000) ("[The] TCA [was] passed in order to provide a pro-competitive national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition.") (Internal quotations and citations omitted.) "Accordingly, the TCA significantly limits the ability of state and local authorities to apply zoning regulations to wireless telecommunications." *Telecorp Realty, LLC v. Town of Edgartown*, 81 F. Supp.2d 257, 259 (D. Mass. 2000).[\*23] See *Lincoln*, 107 F. Supp.2d at 14. The balancing effectuated by the TCA "strengthens the decision making authority of local zoning boards, while protecting wireless service providers from unsupported decisions that stymie the expansion of telecommunication technology." *ATC Realty*, 303 F.3d

at 94 (citing *Brehmer v. Planning Board of Wellfleet*, 238 F.3d 117, 122 (1st Cir. 2001)).

The "cooperative federalism" of the TCA is embodied in its effort to insure state and local authority over the placement and construction of wireless facilities while subjecting this authority to five limitations, three of which form the subject of this dispute. See *National Tower*, 297 F.3d at 19. In addition to these limitations of state and local authority, the TCA also specifies the terms of judicial review of local decision making. The First Circuit explained in *National Tower* that the terms of judicial review set forth in the TCA amount to nothing less than a further "allocation of decisional authority between the local boards and the federal courts." See *id.* However, as the National Tower Court pointed out, the TCA standard[\*24] of judicial review is not unitary, but instead "depends on the nature of the issue presented and the statutory limitation involved." See *id.* In other words, the scope of federal court review of a decision of a state or local authority is determined by the statutory limitation alleged to have been violated.

Because I find for Nextel on substantial evidence grounds alleged in Count I, I find no occasion to explore the appropriate standard of review in the context of the other particular violations alleged by Nextel. n6 The TCA provision upon which my judgment in this dispute turns requires that the denial of a request by a wireless provider to establish a wireless facility must be in writing and "supported by substantial evidence in a written record." 47 U.S.C. | 332 (c) (7) (b) (iii).

- - - - -Footnotes- - - - -

n6 In Count II, Nextel alleges that the Town effectively prohibits Nextel's wireless service and in Count III Nextel alleges that the Town unlawfully discriminated against it by denying zoning relief. Nextel also alleges that the Town violated the United States Constitution by favoring Town-owned land over similarly situated privately owned parcels (Count IV). Nextel moved for summary judgment only as to Counts I-III.

- - - - -End Footnotes- - - - -  
- [\*25]

A. Adequacy of the Written Record

Nextel first alleges that the Sudbury Zoning Board of Appeals violated the requirements of || (c) (7) (B) (iii) by providing no specific reasons for its denial of Nextel's variance and special permit applications in its report of decision on September 14, 2001. Nextel contends that the Board's incorporation of minutes of the July 10 and September 5 hearings as "the reasons for our decision" violated the act where the "reasons" in those meeting minutes were "simply general conclusions" or findings of fact not supported by the written record. The Town counters that its written decision and record support its denial of the Nextel application. Moreover, the Town asserts that under the deferential "substantial evidence" standard of review afforded to decisions of local authorities, its practices were appropriate.

The First Circuit has acknowledged that the TCA's provision requiring substantial evidence and a written record is a potential source of friction between state and local authorities and the national federal policy in favor of wireless services. See *National Tower*, 297 F.3d at 20-21. Thus, in

National Tower, the Court[\*26] recognized that, in light of the fact that local zoning boards composed of lay members and without substantial resources were compelled under the TCA to meet substantial procedural requirements, compliance with | | (c) (7) (B) (iii) did not require formal findings of fact or conclusions of law. 297 F.3d at 20. The National Tower Court also reiterated that a zoning board's written decision need not state every fact in the record that supports its decision. See *id.*, citing *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 59-60 (1st Cir. 2001) (requirement of formal findings of fact and conclusions of law has no basis in the language of the Act, noting contrast between | 332(c) (7) (B) (iii) and the express terms Administrative Procedures Act, as well as other sections of the TCA.) Instead, as the National Tower Court explained: "The Board's written denial must contain a sufficient explanation of the reasons to allow a reviewing court to evaluate the evidence in the record supporting those reasons." See *id.*

This standard flows not only from the policy considerations animating the Act, but from the use of the "substantial evidence" standard derived[\*27] from federal judicial review of the action of administrative agencies. See *National Tower*, 297 F.3d at 21, citing H.R. Conf. Rep. No. 104-458, at 208 (1996). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See e.g., *Todd*, 244 F.3d at 58. While a reviewing court must take into account any contradictory evidence in the record, the First Circuit has stated that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Penobscot Air Services, Ltd. v. F.A.A.*, 16 F.3d 713 (1st Cir. 1999), quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).

Where the issue presented for judicial review is whether a written decision is supported by substantial evidence, the reviewing court is confined to the administrative record, barring a claim of procedural regularity. See *ATC Realty*, 303 F.3d at 95; *National Tower*, 297 F.3d at 22; *Omnipoint Comms. v. City of White Plains*, 175 F. Supp.2d 697, 711 (S.D.N.Y. 2001).[\*28] The application of the substantial evidence standard is a rule of deference; in short, if the question presented in a given lawsuit is "simply whether the Board's decision is supported by substantial evidence," courts will defer to the decision of a local authority, provided however, "that the local board picks between reasonable inferences from the record before it." *National Tower*, 297 F.3d at 22-23.

Nextel cites the First Circuit's decision in *Southwestern Bell Mobile Systems v. Todd* in support of its argument that the mere incorporation of the hearing minutes into the Report of Decision in lieu of a more extensive description of the reasons for the denial violates | | (c) (7) (B) (iii). See *Todd*, 244 F.3d at 61. The "substantial evidence/ written record" dispute in *Todd* concerned the question whether the board's decision violated the TCA, where the stated reasons did not perfectly mirror or embody the range of reasons contemplated by the Board as evidenced in the minutes. See *id.* at 56. In particular, the *Todd* court determined that many of the facts offered in support of the Board's legal conclusions were not reproduced[\*29] in the written denial, and in fact, the factual underpinnings of these conclusions were far broader than the written decision indicated. See *id.* In spite of the brevity of the board's decision however, the *Todd* Court concluded that the decision did not violate the Act because the Board stated its decision "with

sufficient clarity to permit an assessment of the evidence in the record." See *id.* at 60.

This rule is applicable here. While it is true, as Nextel argues, that the written report of decision issued on September 14, 2001 offers no fully developed reasons for the denial, it is equally true that the minutes of the September 14 meeting, particularly the record of the votes taken that were incorporated into the decision, provide more than adequate explanations of the grounds for decision. See *National Tower*, 297 F.3d at 20-21; *Todd*, 244 F.3d at 60. For example, the record of the vote on Nextel's application for a special permit (like the record of the other votes) states as a reason for the denial the fact that the Nextel facility would derogate from the intent of the by-laws to limit wireless facilities to certain specified[\*30] districts and locations. The Board also stated that it denied the application because it disagreed with Nextel's assertion that its radio frequency coverage was not adequate in the center of town. The Board also reasoned that, upon evidence drawn from a "simulated crane test," the facility would constitute a "visual nuisance as an imposed background" for much of the year. Another reason provided by the Board for the denial was its opinion that other locations were available to Nextel which would not require zoning relief but would nevertheless achieve the Company's coverage goals.

These reasons are sufficient to satisfy the "written decision" requirement of

| | (c) (7) (B) (iii). First, I conclude that on the basis of the  
| | information provided in the September 5 meeting, Nextel was provided with enough information as to the reasons for the Board's denial for it to have a "fair chance to respond to the board's reasons." See *National Tower*, 297 F.3d at 22. The First Circuit has stated clearly that formal findings of fact and conclusions of law are not required. See *id.* at 20-21. Moreover, the mere fact that the written decision incorporated the Board's[\*31] reasons as they were stated at the time of the September 5 vote is not enough to deprive the Board of its entitlement to judicial deference. To impose a requirement that the local authority issue a separate statement of its reasons for the denial when the minutes are clear and demonstrate the final determination of the Board would be to impose a demanding burden on the local authority that would produce no commensurate benefits. See *Todd*, 244 F.3d at 60 (differentiating between statements which command support of entire board and those arguments put forth by individual members). In this respect, I bear in mind the First Circuit's observation that these Boards are composed of lay people who may have neither the time, experience, expertise or resources to provide procedurally perfect documentation.

This conclusion is not contrary to the First Circuit's comment in *Todd* that "even where the record reflects unmistakably the Board's reasons for denying a permit, allowing the written record to serve as the writing would contradict the language of the Act." See *Todd*, 244 F.3d at 60. The *Todd* court concluded that the TCA requires local boards to issue[\*32] "written denial separate from the written record" which denial "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." See *id.* (emphasis added). In other words, the crucial consideration in determining whether a Board's statement of decision complies with the TCA is whether the actual reasons underlying the Board's determination can be determined by a reviewing court. See *National Tower*, 297 F.3d at 21 (Board may not "hide the ball"); *Todd*, 244 F.3d at 60.

Admittedly, the situation here presents a hybrid aspect. The denial itself contains no statement of reasons or facts supporting its decision. However, the minutes which the "Notice of Decision" incorporates express clearly and comprehensively the Board's rationale for each decision. As will become clear from my discussion of that rationale below, I have had no difficulty in determining whether the Board's stated reasons arise from substantial evidence contained in the record. To reject the ZBA's procedures on this ground would be a victory of form over substance that is neither[\*33] required by nor attentive to the purposes of the Act.

## B. Substantial Evidence

Having concluded that the reasons contained within the minutes of the September 5 hearing as they were subsequently incorporated into the ZBA decision constitute a written decision in conformance with | (c)(7)(B)(iii), I now must consider whether these reasons were supported by substantial evidence in the written record. I conclude that they were not.

The "substantial evidence" standard, as I have noted, is deferential but it is not a rubber stamp. See *Todd*, 244 F.3d at 59 (internal quotations and citations omitted). On the other hand, the fact that the ZBA came to a conclusion differing from that proposed by Nextel on the basis of the evidence does not, in itself, mean that the decision was not based on substantial evidence. See e.g., *Todd*, 244 F.3d at 62 (quoting *Penobscot Air Servs.*, 164 F.3d at 718). Thus, while it is true that a court will generally defer to a zoning board's decision and not substitute its judgment for that of the Board, it must overturn the board's decision under the substantial evidence standard if it cannot conscientiously[\*34] find that the evidence supporting the decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the board's view. See *White Plains*, 175 F. Supp.2d 711 (internal quotations and citations omitted). Evidence opposed to the town's view must be considered. See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494-95 (2d Cir. 1999); *Nextel Comms. Inc. v. Manchester-by-the-Sea*, 115 F. Supp.2d 65, 66-67 (D.Mass. 2000). The question here is whether the evidence would be adequate in the mind of a reasonable person to support the Board's conclusion. See *Todd* 244 F.3d at 58.

The ZBA minutes for the September 5 hearing provide a number of reasons for the denial of Nextel's application. Chief among these reasons, and the primary subject of discussion at the meetings, was the contention that Nextel's existing coverage was sufficient. The Board also explained that the proposed tower would constitute a visual nuisance and that the proposal would derogate from the intent of the bylaws and the Overlay district. I will consider each of these reasons in turn. [\*35]

### 1. Coverage Gap

In support of its application for a special permit and variances, Nextel produced a comprehensive array of evidence that its network lacked coverage in the center of Sudbury. This evidence included several radio frequency coverage maps, the signed affidavit of Nextel radio frequency engineer John Dzialo, as well as statements by Cameron Syme, another Nextel engineer, at both hearings. In opposition to this Company evidence, the Board considered the "semi-scientific" test of ZBA chairperson Delaney who stated at the September 5 hearing that he had driven around Sudbury placing calls on a Nextel phone and had experienced no trouble initiating or receiving calls or

having calls dropped. Delaney stated that although this was not a "controlled test," "this was what people would consider coverage." Keene apparently responded that the issue was not the complete absence of coverage, but the existence of adequate or reliable coverage.

There is a threshold question presented as to whether Delaney's "drive around" test can be considered adequate evidence in the mind of a reasonable person to support the Board's conclusion. See *ATC Realty*, 303 F.3d at 94; [\*36]*Todd*, 244 F.3d at 58. The substantial evidence requirement plainly proscribes local government agencies from reaching decisions based on unsubstantiated conclusions. See *Telecorp Realty, LLC v. Town of Edgartown*, 81 F. Supp.2d 257, 260 (D. Mass. 2000) (finding no substantial evidence where Board based decision without conducting its own investigation); *White Plains*, 175 F. Supp.2d 715-16, n.7. Moreover, it seems but a corollary of this rule to say that a Board may not substantiate its conclusions by generating unscientific, anecdotal evidence. See *id.* As a counterweight to the record evidence provided by Nextel of the coverage gap, Delaney's test is clearly inadequate. See *id.*

To characterize Delaney's test as "semi-scientific" is overly generous. In fact, there was very little science to Delaney's experiment. The adequacy of Nextel's coverage was not examined in light of objective standards; rather it depends on Delaney's subjective impressions of how his borrowed phone functioned. Moreover, Delaney conducted his experiment on only one day. There is nothing to indicate that the day he chose wasn't simply a good day for cell [\*37]phone use. Delaney's statements do not indicate the time of day at which he placed the experimental calls. Simply put, there is nothing in the record to indicate that Delaney's test reflects the true state of the Nextel network in the center of Sudbury over any meaningful period of time. Indeed, the ZBA itself recognized that Delaney's "informal test" did not demonstrate that Nextel network coverage may not be less than desired, or even non-existent, under other circumstances. No reasonable person could conclude on the basis of several hours of use on one day measured against a subjective standard that coverage is or is not reliable or adequate.

By contrast, Nextel's evidence is credible, authoritative, and reasonable. See *White Plains*, 175 F. Supp.2d at 716. Its coverage maps clearly show areas corresponding to the center of Sudbury where signal strength is non-existent or, at best, minimal based on objective criteria. Such maps are commonly relied upon by wireless carriers, zoning boards, and courts to determine the extent of coverage in a given locality. See e.g., *Lincoln*, 107 F. Supp.2d at 119. Moreover, the credible testimony of Nextel's licensed[\*38] engineers provides compelling evidence that Nextel's coverage in the center of Sudbury was inadequate to meet the requirements of the TCA under Nextel's FCC license. The ZBA did not offer comparable evidence to rebut the Company's evidence. See *White Plains*, 175 F. Supp.2d at 716-17. While I acknowledge that the TCA requires deference to local authorities in most circumstances, I conclude that a reasonable person evaluating this evidence would find the ZBA's preference for Delaney's "semi-scientific test" over Nextel's evidence does not satisfy the substantial evidence standard. n7 See *Todd*, 244 F.3d at 58; *White Plains*, 175 F. Supp.2d at 716; *Group EMF, Inc. v. Coweta County*, 50 F. Supp.2d 1338, 1348 (N.D. Ga. 1999) (Board may disbelieve testimony by licensed radio frequency engineer that coverage gap exists which could not be rectified except by proposed facility, but substantial evidence must exist in record to support this belief).

- - - - -Footnotes- - - - -



## 2. Visual Impact

The ZBA's factual basis for its conclusion that the proposed tower would constitute a visual nuisance appears to be without a substantial basis in the evidence.

In the minutes to the September 5 Meeting stating the reasons for the denial of the permit and variances, the ZBA stated two factors which influenced its decision regarding the tower's visual impact: a nearby property owner had testified that the tower would constitute a visual nuisance, and the belief that much of the concealment of the tower would depend on seasonal leaf cover. Nextel counters that the ZBA provided no photographs or other evidence in support of this conclusion. Moreover, the absence of evidence supporting the ZBA's [\*42] conclusion is brought into sharp relief, Nextel contends, by the evidence proffered by the Company in its "View Shed Analysis" which, it claims, shows that the tower would not be visible from seven out of eight tested locations and is well-screened by the deciduous trees, even at times when the trees are leafless, such as in early Spring.

Aesthetic judgments against the construction or location of a wireless facility must be "grounded in the specifics of the case." See *Todd*, 244 F.3d at 61. While local zoning authorities are not obligated to provide evidence of adverse, quantifiable or economic impact, an adherence to generalized aesthetic norms may not be used to mask a de facto prohibition of wireless service. See *Nextel Communications Inc. v Manchester-by-the-Sea*, 115 F. Supp.2d 65, 71-72 (D. Mass. 2000) (generalized concerns about aesthetics not deemed substantial evidence where residents and Board opposing facility did not offer photographic evidence, property appraisal, or expert evidence with regard to aesthetics or possible injury to property values); *White Plains*, 175 F. Supp.2d at 716 (unsupported fears of local residents[\*43] not substantial evidence in light of "thorough and detailed" report of visual impact of facility including photo simulations).

Based on a reading of the minutes of two ZBA meetings at which the Nextel applications were discussed, I conclude that the record reveals almost no discussion of the "visual nuisance" allegedly created by the tower. The conversation of the ZBA members and Nextel's representatives in both hearings focused almost exclusively on the height of the proposed tower and the possibility of locating the facility on smaller towers; the only comment in the record relating to the visibility of the tower was that made by the one Sudbury resident who complained that the tower would be visible from his backyard. At the time, Keene responded that, notwithstanding the resident's comment, the photo simulations provided by Nextel demonstrated that the tower would be "virtually invisible" except when viewed from the access way to the facility. What is more, there is no discussion of the results of the crane test in the minutes of either hearing to which the stated reasons refer. In fact, there is no evidence at all in the hearing minutes as to when and how the alleged crane test[\*44] took place or who participated in this test.

Given the paucity of discussion of the aesthetic issues created by the tower, I conclude that the decision was not supported by substantial evidence on this ground. See *ATC Realty*, 303 F.3d at 97-98 (holding town planning board's decision to approve proposal supported by substantial evidence where nearly forty percent of residential abutters complained about effect of rejected facility whereas no one had complained about approved facility which

was virtually identical to rejected proposal in all other respects); Todd, 244 F.3d at 61 (noting cases in which aesthetic objections were "demonstrably without substance" because of evidence that facility or equipment were difficult to see or were aesthetically compatible with area); Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township, 181 F.3d 403, 407 (3d Cir. 1999); Manchester-by-the-Sea, 115 F. Supp.2d. at 72 (record includes significant evidence that tower design would blend in with masts of vessels in the area). In this case, the View Shed Analysis provided by Nextel provides compelling, and unchallenged, evidence[\*45] that the tower would be very difficult to see. Attempting to counter this evidence, the ZBA asserts that its "simulated crane test" demonstrated that the tower would not be hidden by leaf cover during much of the year. Given that there is no evidence in the record concerning the alleged "crane test," let alone that the results of the test were discussed, the "crane test" results are "demonstrably without substance" and fail to provide substantial evidence of negative visual impact. See Todd, 244 F.3d at 61. By contrast, Nextel's View Shed Analysis contains photo simulations which show that the tower is not visible, even at a time in which the surrounding trees have negligible, if any, leaf cover. See id.

Furthermore, the generalized objection of one resident that the tower would constitute a "visual nuisance" is insufficient evidence on which to base the denial. See ATC Realty, 303 F.3d at 97-98; Edgartown, 81 F. Supp.2d at 260-61 (testimony of a few residents not substantial evidence justifying denial of permit on aesthetic grounds); Manchester-by-the-Sea, 115 F. Supp.2d at 72 (general aesthetic objections of[\*46] eleven residents insufficient evidence for denial). Because aesthetic bases for denying a permit must correlate to the specifics of the case, the ZBA must have evidence rebutting particular features of Nextel's proposal to support its aesthetic objection. See Todd 244 F.3d at 61. The ZBA produced no such evidence.

### 3. Derogation of Intent and Purpose of By-Laws

The ZBA also bases its denial of the Nextel application on the grounds that approving the location of a wireless communication facility outside of the Overlay District would defeat the purpose of the zoning regulation. The ZBA states that the Nextel proposal is at odds with the variance requirements of the zoning regulations, as well as the Town's attempt to minimize the impact of wireless communication facilities. The ZBA stated:

The Board feels that this special permit application, along with the accompanying application for use variance and the third application for a variance constitutes an overall request for an extreme departure of the underlying intent of the Bylaw that wireless facilities be combined in pre-selected locations and be established so as to have minimal impact on adjoining properties[\*47] and the Town as a whole.

Of the several rationales offered by the ZBA in defense of its decision to deny the Nextel permits, the issue of the adherence to the town's plan for wireless facilities is the most compelling. However, I conclude that on the basis of the record in light of the demands of the TCA, the Town's stated commitment to its established plan as justification for the permit denial is not supported by substantial evidence.

A proper analysis of the Board's justification of its denial under the substantial evidence standard requires that I determine whether the particular purpose defined by the Bylaws is, in fact, nullified or derogated

by Nextel's proposal. On this basis, I conclude that there is no substantial evidence to support the Board's rationale. See *Cellco Partnership v. Town of Douglas*, 81 F. Supp.2d 170, 174 (D.Mass. 1999) (failure of town to provide particular evidence as to why proposed WCF "derogates and nullifies" zoning bylaw constitutes failure to demonstrate substantial evidence).

I turn to the text of the Sudbury zoning by-law, | 4300. The Bylaw defines its purpose as

to establish districts within Sudbury in which wireless[\*48] services may be provided with minimal harm to the public health, safety and general welfare of the inhabitants of Sudbury; and to regulate the installation of such facilities by 1) minimizing visual impact, 2) avoiding potential damage to adjacent properties, 3) by maximizing the use of existing towers and buildings, 4) by concealing new equipment to accommodate the needs of wireless communication in order to reduce the number of towers needed to serve the community and 5) promoting shared use of existing facilities.

| 4310 at 63. As applied to the facts of the Nextel application, the ZBA's denial may not be justified by resort to a desire to reduce visual impact because, as indicated above, the visual impact of the proposed tower was negligible. There was almost no indication, aside from the complaint of one resident, that adjacent properties were at risk of potential damage from the Nextel tower. Indeed, I note that at the July 10 hearing, the parties discussed a letter from Town Manager Valente to Nextel in which she expressed the view that "the parcel immediately adjacent" the site proposed by Nextel might be suitable for a wireless facility.

Adherence to the goal of[\*49] by "maximizing the use of existing towers and buildings," and "concealing wireless equipment to reduce the number of towers," while ostensibly valid justifications for the denial of a permit, is not supported by evidence in the record in this case. See *Cellco*, 81 F. Supp.2d at 174. In fact, the record clearly shows that the town was unwilling to issue further RFPs for the Willis Hill site, the only site in the overlay district from which Nextel could have achieved its coverage goals. Indeed, the ZBA seemed to be working actively against the express purpose of the Bylaw to promote "shared use of facilities" by refusing to issue RFPs that would make such shared use possible.

#### C. Summary

To summarize, I find that there is a written record adequate to conclude that the ZBA decision lacked substantial evidence. The ZBA's contention that adequate coverage by the Nextel network existed in the center of Sudbury, that the proposed tower constituted a visual nuisance, and that the proposed tower would "nullify and derogate" the purposes and intent of the bylaws are unsupported by evidence that a reasonable person would find adequate to support its decision. As a consequence, [\*50] Nextel's motion for summary judgment on Count I is granted.

#### III. CONCLUSION

For the reasons set forth above, the Plaintiff's motion for summary judgment is GRANTED as to Count I, and the Clerk is hereby directed to enter judgment for Nextel requiring the Town to issue the special permit, variances and all other approvals and permits necessary to allow construction of the proposed facility at 36 Hudson Road to begin without further delay.

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

**NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. d/b/a NEXTEL COMMUNICATIONS,  
Plaintiff**

**v.**

**THE TOWN OF WAYLAND MASSACHUSETTS, THE ZONING BOARD OF APPEALS of the TOWN OF  
WAYLAND, MASSACHUSETTS and LAWRENCE K. GLICK, ERIC GOLDBERG, JAMES GRUMBACH,  
CAROLYN KLEIN AND MARY L. LENTZ in their capacities as Members of the Zoning  
Board of Appeals of the Town of Wayland, Massachusetts, Defendants**

USDC (Mass.) CIVIL ACTION NO. 02-10260-REK  
231 F. Supp. 2d 396; 2002 U.S. Dist. LEXIS 22934  
November 22, 2002, Decided

DISPOSITION: [\*1]

Plaintiff's Motion for Summary Judgment was granted on Counts I and II and denied on Count III.

Defendants' Cross Motion for Summary Judgment was denied on Counts I and II and granted on Count III.

#### CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff provider of personal wireless services sought declaratory and injunctive relief against defendant town: the denial of permission to build an antenna was not supported by substantial evidence contained in a written record (Count I); the town's regulatory scheme prohibited the provider from providing services (Count II); and, the regulatory scheme was unlawful under state law (Count III). Both sides filed motions for summary judgment.

OVERVIEW: Eight years earlier, the town had denied the provider authorization to construct an antenna tower. The provider then obtained permission from an electrical company to attach antennas to an existing electric transmission tower. Since that time the town had delayed the construction by various means. The court held that defendant zoning board's decision failed to give due consideration to the requirements of the federal Telecommunications Act, 47 U.S.C.S. | 151 et seq., and more specifically violated 47 U.S.C.S. | 332(c)(7)(B)(iii). The court held that the provider met its burden of showing not just that a particular application had been rejected but that further reasonable efforts were so likely to be fruitless that it is a waste of time even to try due to the town's continued hostility to the provision of wireless services. The court found it would be appropriate to make an order requiring the zoning board to authorize the provider's construction of its antennas on the electric transmission tower, unless some intervening development required an order of somewhat different terms. The court lacked jurisdiction to consider whether the regulatory scheme violated state law.

OUTCOME: The provider's motion for summary judgment was granted on Counts I and II and denied on Count III. The defendants' cross motion for summary judgment was denied on Counts I and II and granted on Count III.

CORE TERMS: wireless, site, coverage, variance, antenna, tower, zoning, substantial evidence, by-law, height, dimensional, freeze, gap, bylaw, moratorium, Telecommunications Act, summary judgment, signal, planning board, plot, feet, dump, construct, hostility, provider, foot, authorization, cell, fruitless, genuine

CORE CONCEPTS -

Civil Procedure: Summary Judgment: Summary Judgment Standard Summary judgment should be granted only where the court, viewing the evidence in the light most favorable to the non-moving party, determines that no genuine dispute of material fact exists. Fed. R. Civ. P. 56.

Civil Procedure: Summary Judgment: Burdens of Production & Proof A summary judgment movant has the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record showing the absence of a genuine dispute of material fact. Then the non-moving party must demonstrate that every essential element of its claim or defense is at least trialworthy.

Civil Procedure: Summary Judgment: Summary Judgment Standard  
A dispute is genuine if it may reasonably be resolved in favor of either party. Facts are material if they possess the capacity to sway the outcome of litigation under the applicable law. The facts in genuine dispute must be significantly probative in order for summary judgment to be denied; conclusory allegations, improbable inferences, and unsupported speculation will not suffice.

Communications Law: Telephony: Cellular, Mobile & Wireless Carriers Wayland, Mass., Zoning Bylaw | 198-1503.1 provides that a wireless communications facility may be erected in the wireless communications services district (District) upon the issuance of a special permit by the planning board. Wayland, Mass., Zoning Bylaw | 198-1502 provides that the District encompasses certain parcels of land in the town, known as the old landfill site and the new landfill site and portions of the Massachusetts Bay Transportation Authority (MBTA) right-of-way.

Communications Law: Telephony: Cellular, Mobile & Wireless Carriers See Wayland, Mass., Zoning Bylaw | 198-1503.2.4.

Communications Law: Telephony: Cellular, Mobile & Wireless Carriers Wayland, Mass., Zoning Bylaw | 1503.2.5 establishes a maximum height of 55 feet for new free-standing towers, but Wayland, Mass., Zoning Bylaw | 15.03.2.14 allows antenna or equipment mounted on or attached to any of the Boston Edison Company (BECO) towers to extend up to 25 feet above the highest point of said towers.

Governments: Local Governments: Ordinances & Regulations  
Under Massachusetts law, the Attorney General must review and approve town bylaws.

Real & Personal Property Law: Zoning & Land Use: Statutory & Equitable Limits  
The submission of an "Approval Not Required Plan" (ANR plan) protects the land in question from a zoning change regulating the use of the land for three years under Mass. Gen. Laws ch. 40A, | 6.

Communications Law: Telephony: Cellular, Mobile & Wireless Carriers  
Communications Law: Federal Acts: Telecommunications Act Under the  
Telecommunications Act, 47 U.S.C.S. | 151 et seq., local governments retain  
control over decisions regarding the placement, construction, and  
modification of personal wireless service facilities. Nonetheless, this  
control is subject to several substantive and procedural limitations that  
subject local governments to an outer limit upon their ability to regulate  
personal wireless services land use issues. The Act places the following four  
requirements on localities making zoning decisions that involve the placement  
of personal wireless service facilities: (1) not to discriminate among  
providers of functionally equivalent services, 47 U.S.C.S. | 332(c)(7)  
(B)(i)(I); (2) not to prohibit or have the effect of prohibiting the  
provision of personal wireless services, 47 U.S.C.S. | 332(c)(7)  
(B)(i)(II); (3) to act on any request for authorization to place, construct,  
or modify personal wireless service facilities within a reasonable period of  
time, 47 U.S.C.S. | 332(c)(7)(B)(ii); and (4) to provide a decision in  
writing that is supported by substantial evidence, 47 U.S.C.S. | 332(c)(7)  
(B)(iii).

Real & Personal Property Law: Zoning & Land Use: Judicial Review  
Communications Law: Federal Acts: Telecommunications Act The "substantial  
evidence" standard of review is the same as that traditionally applicable to  
a review of an administrative agency's findings of fact. Judicial review  
under this standard, even at the summary judgment stage, is narrow. A court  
reviews the written record considered as a whole. More than one panel of the  
United States Court of Appeals for the First Circuit has defined "substantial  
evidence" as follows: Substantial evidence is such relevant evidence as a  
reasonable mind might accept as adequate to support a conclusion. The  
reviewing court must take into account contradictory evidence in the record.  
But the possibility of drawing two inconsistent conclusions from the evidence  
does not prevent an administrative agency's finding from being supported by  
substantial evidence. The writing required by the Telecommunications Act, 47  
U.S.C.S. | 151 et seq., must contain a sufficient explanation of the reasons  
for the permit denial to allow a reviewing court to evaluate the evidence in  
the record supporting those reasons. A court's review of that decision,  
however, is not limited only to the facts specifically offered in the written  
decision.

Real & Personal Property Law: Zoning & Land Use: Statutory & Equitable Limits  
Communications Law: Federal Acts: Telecommunications Act Under the  
Telecommunications Act, 47 U.S.C.S. | 151 et seq., a zoning board cannot deny  
a variance if in so doing it would have the effect of prohibiting  
wireless services. 47 U.S.C.S. | 332(c)(7)(B)(i)(II). In other words,  
the  
need for closing a significant gap in coverage, in order to avoid an  
effective prohibition of wireless services, constitutes another unique  
circumstance when a zoning variance is required.

Civil Procedure: Summary Judgment: Summary Judgment Standard Civil Procedure:  
Appeals: Standards of Review: De Novo Review Communications Law: Federal  
Acts: Telecommunications Act Determining whether a town has effectively  
prohibited the provision of wireless services involves federal limitations on  
state authority, presenting issues that a district court would resolve de  
novo and for which outside evidence may be essential. Because of this  
standard of review, such claims under the Telecommunications Act, 47 U.S.C.S.  
| 151 et seq., are treated no differently on summary judgment than any other  
claims litigated in the district court.

Communications Law: Federal Acts: Telecommunications Act

A wireless service provider claiming that a municipality has effectively prohibited it from providing wireless services carries the burden of proof and must demonstrate that a significant gap in coverage exists and must show from language or circumstances not just that a particular application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even try.

Real & Personal Property Law: Zoning & Land Use: Judicial Review

Communications Law: Federal Acts: Telecommunications Act In the majority of cases the proper remedy for a zoning board decision that violates the Telecommunications Act, 47 U.S.C.S. | 151 et seq., will be an order instructing the board to authorize construction. This is true because Congress did not intend multiple rounds of decisions and litigation and a board will not ordinarily receive a second chance.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Supplemental Jurisdiction Just as Congress can confer jurisdiction upon the federal courts by statute, however, Congress may also limit that jurisdiction. 28 U.S.C.S. | 1367(a).

Communications Law: Federal Acts: Telecommunications Act

See 47 U.S.C.S. | 332(c)(7)(A).

Communications Law: Federal Acts: Telecommunications Act Construed as favorably to federal jurisdiction as its text can be reasonably interpreted, the Telecommunications Act, 47 U.S.C.S. | 151 et seq., manifests only a limited scope of federal jurisdiction to review state and local zoning decisions. By limiting the federal courts' jurisdiction, Congress has manifestly limited federal intrusion into local zoning authority. That manifested limitation cannot be avoided by a purported exercise of supplemental jurisdiction.

COUNSEL:

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For Board of Appeals of the Town of Wayland, Massachusetts, Defendant:

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JUDGES: Robert E. Keeton, United States District Judge.

OPINION BY: Robert E. Keeton

OPINION: Opinion and Order / November 22, 2002

KEETON, District Judge

I. Pending Motions

Pending for decision are the following motions:

(1) Plaintiff's Motion for Summary Judgment (Docket No. 20, filed August 15, 2002). Defendants have filed an opposition. (Docket No. 29, filed September 18, 2002). [\*2]

(2) Defendants' Cross Motion for Summary Judgment (Docket No. 28, filed September 18, 2002). Plaintiffs have filed an opposition. (Docket No. 37, filed October 11, 2002).

## II. Relevant Factual and Procedural Background

Nextel is a provider of personal wireless services. In or about 1994, Nextel sought authorization from the Town of Wayland to construct a monopole antenna tower on a wooded parcel of land in the Town, but such authorization was denied. Nextel then obtained permission from Boston Edison Electric Company ("BECO") to attach antennas to an existing 97' tall electric transmission tower ("BECO 111"), with the goal of providing coverage to central Wayland. Nextel filed an application with the Wayland Planning Board for review of the proposed antenna facility. On June 2, 1998, the Board issued an "approval not required" determination ("ANR"), thereby "freezing" the applicable zoning regulations, making at least some types of future amendments to the zoning regulations inapplicable to the subject site.

On June 4, 1998, the Town enacted a twelve-month moratorium, banning new construction of telecommunications facilities, including Nextel's desired construction of antennas[\*3] on BECO 111, for that time period. This moratorium was later found to be unlawful by the Massachusetts Attorney general, but the Town responded on December 2, 1998 by enacting a six-month moratorium.

Three times the Town repealed its existing by-law provisions governing wireless communication facilities and replaced them with new or modified provisions. Nextel, whose application for the BECO site was still pending, continued to wait until the Town made these changes to its zoning by-laws. After the changes, the area in which the BECO site is located was no longer zoned for wireless communication facilities.

Nextel filed an application for a zoning variance from the general thirty-five foot height restriction contained in the new By-Law in order to install its antennas atop the existing 97' tower. The Wayland Zoning Board of Appeals ("ZBA" or "the Board") held five public hearings on Nextel's application, stretching over an eight-month period beginning on May 1, 2001, and ending on January 15, 2002. The ZBA voted to deny Nextel's application for the variance. This decision was reduced to writing and filed with the Town Clerk on January 29, 2002.

On February 15, 2002, Nextel filed[\*4] a complaint in this court seeking declaratory and injunctive relief based on three claims for relief: the denial of permission to build the proposed facility was not supported by substantial evidence contained in a written record (Count I); the Town's regulatory scheme, as applied by the ZBA, has the effect of prohibiting Nextel from providing wireless services (Count II); and, the Town's regulatory scheme, as applied by the ZBA, is arbitrary, capricious, unreasonable and in excess of the authority lawfully granted to the Town or its ZBA under the laws of the Commonwealth of Massachusetts (Count III). Both sides to this lawsuit now seek summary judgment on each of these Counts.

### III. Summary Judgment Standard.

Summary judgment should be granted only where the court, viewing the evidence in the light most favorable to the non-moving party, determines that no genuine dispute of material fact exists. See Fed. R. Civ. P. 56. The movant has the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).[\*5] Then the non-moving party must demonstrate that "every essential element of its claim or defense is at least trialworthy." *Price v. General Motors Corp.*, 931 F.2d 162, 164 (1st Cir. 1991) (*italics in original*).

A dispute is genuine if it "may reasonably be resolved in favor of either party." *Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir. 1997). Facts are "material" if they possess "the capacity to sway the outcome of litigation under the applicable law." *Id.* The facts in genuine dispute must be significantly probative in order for summary judgment to be denied; "conclusory allegations, improbable inferences, and unsupported speculation will not suffice." *Id.*

### IV. Undisputed Facts

Because plaintiff and defendants filed cross-motions for summary judgment, each filed a statement of undisputed facts. Those facts from each statement that have been admitted, or not properly disputed, are directly quoted as follows:

#### A. Nextel's undisputed facts, admitted by defendants.

1. [Nextel] is a provider of enhanced specialized mobile radio services, a type of commercial mobile radio services ("CMRS") which are within the definition [\*6]of "personal wireless services" (hereinafter "PWS") set forth at 47

U.S.C. | 332(c)(7)(C)(i).

2. Nextel is licensed by the Federal Communications Commission ("FCC") to provide CMRS in certain markets, including Massachusetts.

3. Nextel's PWS network is entirely digital and employs time division multiple access technology. The network requires deployment of antennas throughout the area to be covered, which are connected to receivers and transmitters that operate in a limited geographic area known as a "cell." Nextel's portable telephones operate by transmitting and receiving low power radio frequency signals to and from these cell sites. The signals are transferred to and from ground telephone lines and routed to their destinations by sophisticated electronic equipment.

4. The size of the area served by each cell site is dependent on several factors, including the number of antennas used, the height at which the antennas are deployed, the topography of the land, vegetative cover and natural or man-made obstruction in the area. As customers move throughout the service area, the transmission from the portable unit is automatically transferred to the [\*7]closest Nextel facility without interruption in service, provided that there is overlapping coverage from the cells. In order for Nextel's PWS network to function effectively, there must be some overlapping coverage between adjoining cells to allow for the transfer or

"hand-off" of calls from one cell to another and to avoid disconnection or "dropped" calls. In other words, Nextel's antennas must be strategically located within the targeted area in order to provide sufficient radio frequency coverage, connectivity with surrounding sites, and adequate service. Nextel's antennas also must be located high enough above ground level to allow transmission (or "propagation") of the radio frequency signals above trees, buildings and natural or man-made other structures that may obstruct the signals. Areas without adequate radio frequency coverage have substandard or no wireless service.

5. Nextel has had a need since at least 1994 for coverage in the central part of Wayland, an area which includes important commuter thoroughfares such as Routes 20 and 27. Nextel needs to install antenna facilities in this area in order to provide adequate service.

6. In or about 1994, Nextel sought[\*8] authorization from the Town to construct a monopole antenna tower on a wooded parcel of land in the Town, but such authorization was denied.

7. Nextel then obtained permission from Boston Edison Electric Company ("BECO") to attach antennas to an existing 97' tall electric transmission tower, with the goal of providing coverage to central Wayland while minimizing the visual impact caused by such a facility.

8. ...[Nextel filed an application with the Wayland Planning Board for review of the proposed antenna facility.] On June 2, 1998, the Planning Board issued an "approval not required" determination ("ANR"), which amounted to a determination that Nextel's proposal was exempt from subdivision regulations and also operated to "freeze" the applicable zoning regulations, i.e., to make at least certain types of future amendments to the land use regulations inapplicable to the subject site. On June 4, 1998, however, before Nextel could obtain final site plan approval, the Town enacted a twelve-month moratorium which banned all construction of wireless telecommunications facilities. This moratorium was later found to be unlawful by the Massachusetts Attorney General, but the Town [\*9]responded on December 2, 1998 by enacting a six-month moratorium, thus extending the ban on new construction of telecommunications facilities, even though Nextel and as many as three other wireless carriers were actively seeking to construct such facilities in Wayland at the time.

9. On May 3, 1999, the Town repealed its existing by-law provisions governing wireless communication facilities and replaced them with new provisions, which in turn were modified again on November 17, 1999 and yet again at the Town's Annual Town Meeting in 2000. Nextel, whose application for the BECO site was still pending, continued to wait while the Town made these changes to its zoning by-law and, although it had the right to do so, did not immediately challenge the Town-imposed delays.

10. [After the changes, the area in which the BECO site is located was no longer zoned for wireless telecommunications facilities.]

11. The Town has conceded that under Massachusetts law, Nextel's receipt of the ANR decision in June 1998 prevents the Town from subsequently designating the proposed Nextel antenna installation as an unlawful use. The Town, however, has taken the position that Nextel needs[\*10] to obtain a dimensional variance from the general thirty-five foot height restriction contained in the By-law in order to install its antennas atop the existing

97' tower. Although Nextel disputes this position, on or about February 20, 2001, Nextel attempted to address the Town's concerns by applying to the Wayland ZBA for a variance from the 35 foot height limitation.

12. The ZBA found it necessary to hold five public hearings on Nextel's application, stretching over an eight-month period beginning on May 1, 2001, and ending on January 15, 2002.

14. Nextel [during the hearing process] demonstrated the minimally intrusive nature of the proposed Nextel facility by presenting a number of photosimulations to the Board. During the November 13, 2001 hearing, a Board member suggested that the Board should deny Nextel's application and force Nextel to construct a new antenna tower on the Town-owned landfill site.

15. The ZBA voted to deny Nextel's application for a dimensional variance. This decision was reduced to writing and filed with the Town Clerk on January 29, 2002.

Docket No. 23 at 1-6.

#### **B. Defendants' undisputed facts, admitted by Nextel.**

1. [\*11] Wayland has adopted a Zoning Bylaw ("the Bylaw") regulating wireless communications facilities in the Town.

2. Since May 3, 1999, the Bylaw has provided, in | 198-1503.1 that "A wireless communications facility may be erected in the Wireless Communications Services District ["District"] upon the issuance of a special permit by the Planning Board...." Section 198-1502 provides that the District encompasses certain parcels of land in the Town, known as the "old landfill site" ("Old Landfill") and the "new landfill site" ("New Landfill") and portions of the "Massachusetts Bay Transportation Authority (MBTA) 'right-of-way.'" ["MBTA"]."

3. Section 198-1503.2.4 provides: "Any wireless communication facility erected [in the District on the MBTA right-of-way] shall be mounted on and attached to one of the Boston Edison Company (BECO) electric transmission towers located therein numbered 94 through 102, inclusive."

4. The Bylaw establishes a maximum height of 55 feet for new free-standing towers (| 1503.2.5), but allows "antenna or equipment mounted on or attached to any of the BECO towers" to "extend" up to "25 feet above the highest point of said towers" (| 15.03.2.14). [\*12]

5. The Old Landfill is located on the south side of Route 20 and the BECO transmission towers 94 through 102 are adjacent to the Old Landfill.

6. BECO 111 is not in the District.

7. On June 2, 1993 the Wayland Planning Board reported on a proposed zoning bylaw amendment to be considered at the June 4, 1998 Special Town Meeting.

8. The proposed amendment was to adopt a 12-month moratorium relating to wireless communications facilities to enable the Planning Board to "study and give appropriate consideration to the location and impacts of wireless communications facilities on inhabitants of the Town and to the overall

coordination of the various provisions presently in [the zoning bylaw] with respect to the short and long range future."

9. One June 4, 1998, the voters of the Town adopted this amendment. While the Attorney General disapproved the amendment (under Massachusetts law the Attorney General must review and approve town bylaws), the Town challenged that disapproval in state court, *Wayland v. Attorney General*, Middlesex Superior Court, No.MICV 1998-05297, and that litigation is still pending.

10. One June 2, 1998, Nextel filed an "Approval[\*13] Not Required Plan" ("ANR plan") under the Massachusetts Subdivision Control Law, G.L. c.41, | 81P, with the Town's Planning Board regarding BECO 111.

11. The submission of such an ANR plan protects the land in question from a zoning change regulating the use of the land for three years under G.L.c.40A, | 6 ("the use of land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan...for three years from the date of the endorsement of the planning board...." ).

12. The Planning Board endorsed the ANR plan on June 16, 1998.

13. On May 3, 1999 the Town adopted the District, limiting the District as described above. Subsequent amendments did not change the District in any material respect.

15. The ANR endorsement was challenged in *Patton et al. v. Wayland Planning Board, et al.*, Middlesex Superior Court, No. CIV 1998-03576, and is currently on appeal, Massachusetts Appeals Court, No.2002-P-0474.

16. On February 20, 2001,...Nextel filed the variance application that is the subject of the lawsuit.

19. The Board held its public hearing on Nextel's variance application[\*14] May 1, June 12, September 11 and November 13, 2001, and January 15, 2002.

21. Nextel did not object to these continuances and, indeed, agreed to them.

22. The unanimous decision denying the variance was issued on January 29, 2002. The Board noted that Nextel sought the variance because, without a facility at BECO 111 "it would be 'unable to adequately connect the Town of Wayland to its larger network.'" In other words, Nextel will suffer hardship because it will not be able to provide as much wireless coverage as it would like."

25. At no time has Nextel applied to the Planning Board for a special permit to locate a wireless communications facility in the District.

26. One June 4, 2002, the board of Selectmen of the Town wrote to Nextel (in response to a letter from the company) inviting the company to meet with Town officials to discuss proposals regarding locating a facility within the district. The Board of Selectmen stated: "We are fully prepared to entertain and support proposals from wireless providers that meet the current requirements of our by-law and are to be cited [sic] within the wireless overlay district. While we appreciate your suggestion that the[\*15] Town move forward with necessary procurement procedures by issuing an RFP on the Town-owned land in the district, we believe the more logical approach is to

address this process when one or more wireless providers present us with a specific proposal for use of Town-owned land."

27. Nextel did not ["follow-up on this request" or "respond to the Town's letter"].

28. ...The Town...proceeded to undertake the procedural steps necessary to formally make the Town-owned land...available to wireless service providers."

29. On August 2, 2002 the Town issued a "Request for Proposals" ("RFP") to solicit requests from wireless service providers and others to locate wireless communications facilities in the District and to use the Town-owned land at the Old Landfill to access BECO 94 through 102. The Town is awaiting responses to the RFP, which are due on September 20, 2002.

33. ...Nextel did not have a facility in the Town of Weston.

40. The three-color plots submitted with the RF Supplement depict computer-estimated coverage from three facility configurations. Two plots depict estimated coverage from antennas at the disputed BECO 111 site, one at 100 feet, the approximate[\*16] proposed antenna height, and the other at the zoning height limit of 35 feet. The third plot depicts computer estimated coverage from the "Dump" at the maximum height allowed for a new tower under the Wayland Zoning By-law - a height of 55 feet.

41. The "Dump" site shown on the plots appears to be described inaccurately in the RF Supplement as the "old Wayland Landfill, now the transfer station." The Old Wayland Landfill, described in the Bylaw | 198-1502.1, is south of Route 20 and is not the site shown on the Nextel "Dump" plot. The Wayland transfer station is situated north of Route 20, in Wayland, and is part of a parcel referred to as the New Landfill in the Bylaw. This site also appears not to be the site employed by Nextel in its plot of coverage from the "dump" site. The site marked "Dump" in the Nextel computer estimated coverage plot appears to be at the approximate location of the Sudbury transfer station, which is located on the Sudbury side of the Sudbury/Wayland town line north of Route 20. (In admitting this fact, Nextel states; "Nextel admits that it is true, but artfully worded to obscure the fact that the Dump Transfer Station and Old Landfill are all adjacent[\*17] or nearly adjacent to each other and the Sudbury "Dump" is a single parcel nearly surrounded by Wayland and, except for a small right of way.")

42. The site depicted as the "Dump" but which appears to be in Sudbury is about one mile from the BECO 111 tower.

44. The differences in ground elevation of the Old Landfill site, the BECO 111 site, and the BECO towers numbered 101 and 102 bordering the Old Landfill are less than ten feet.

45. The BECO towers in the District are visually identical to the BECO 111. (Nextel states; "Admitted, except that the towers in the District are taller and thus potentially more visible.")

50. The signal level chosen in the Plots as the apparent go/no-go value (threshold value) is negative 81 dBm. Signal levels shown in dBm are in decibels related to one milliwatt of power. Negative dBm figures represent

levels less than one milliwatt. A -101 dBm signal is weaker than a -81 dBm signal.

54. ...David Maxson of Broadcast Signal Lab conducted a drive test with a test signal emitted from the Old Landfill site.

56. East of BECO 111 the terrain rises from the valley and flood plain of the Sudbury River. Continuing east toward Weston, [\*18] the terrain takes a steep dip near Shir Tikva Temple ("the Temple") and rises again past Mahoney's Garden Center. The terrain levels out somewhat as one continues toward and beyond the Weston/Wayland boundary.

64. The Town of Weston bylaws permit wireless facilities concealed within religious or municipal structures already in existence. Antennas mounted within church steeples tend to be 40 to 60 feet in height above ground. Weston also permits 100- to 120-foot towers on certain parcels that do not include the Baptist Church. The Police Station on Route 20 is one such parcel. Nextel has testified that it is considering development of a facility on Weston police property.

Docket No. 30 at 2-18

## V. The Merits

### A. Introduction

Nextel is licensed by the Federal Communications Commission ("FCC") to provide enhanced specialized mobile radio services. These are types of commercial mobile radio services ("CMRS") that are within the definition of "personal wireless services" set forth at 47 U.S.C. | 332(c)(7)(C)(i).

Under the Telecommunications Act, 47 U.S.C. | 151 et seq., "local governments retain control 'over decisions[\*19] regarding the placement, construction, and modification of personal wireless service facilities.' Nonetheless, this control is now subject to several substantive and procedural limitations that subject local governments to an outer limit upon their ability to regulate personal wireless services land use issues." *Southwestern Bell Mobile Sys/, Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001). The Act places the following four requirements on localities making zoning decisions that involve the placement of "personal wireless service facilities:"

(1) not to discriminate among providers of functionally equivalent services, 47 U.S.C. | 332(c)(7)(B)(i)(I);

(2) not to prohibit or have the effect of prohibiting the provision of personal wireless services, *id.* at (B)(i)(II);

(3) to act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time, *id.* at (B)(ii); and

(4) to provide a decision in writing that is supported by "substantial evidence," *id.* at (B)(iii)

B. Count I - The ZBA's decision to deny the variance is in a writing that [\*20]is not supported by substantial evidence.

In Count I, Nextel claims that the Town violated 47 U.S.C. | 332(c)(7)(B)(iii) because the ZBA's denial of permission to build the proposed personal wireless service facility on BECO 111 was not supported by substantial evidence contained in a written record.

#### 1. Standard of review

"The 'substantial evidence' standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact. Judicial review under this standard, 'even at the summary judgment stage, is narrow.' [I] review the written record considered as a whole." Todd, 244 F.3d at 58 (quoting *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997)) (other internal citations omitted).

More than one panel of the First Circuit has defined "substantial evidence" as follows:

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The reviewing court must take into account contradictory evidence in the record. But the possibility of drawing two inconsistent conclusions from the evidence[\*21] does not prevent an administrative agency's finding from being supported by substantial evidence.

Id. (quoting *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 719 (1st Cir. 1999)).

The writing required by the Act "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." 244 F.3d at 60. My review of that decision, however, "is not limited...only to the facts specifically offered in the written decision." Id.

#### 2. Applying the standard of review to the Wayland Zoning Board of Appeal's written decision.

##### a. Introduction

The Zoning Board unanimously denied Nextel's application for variance. In a three page written decision, the Board presented a two-step set of reasons. The Board reasoned that (1) the ANR freeze did not require the variance, and (2) because such variance was not required by the ANR freeze, it would be required only if unique circumstances existed, relating to soil condition, shape, or topography of the location and those circumstances would cause substantial hardship. The Board found that such unique[\*22] circumstances were not present.

##### b. The first step in the Board's reasoning is based on substantial evidence.

First, the Board reasoned that the variance Nextel requested was a dimensional variance, not a use variance, and therefore was not protected by the "ANR freeze." In its decision, the Board admits that, under M.G.L. c. 40A | 6, the ANR endorsement that Nextel received freezes the applicable provisions of the zoning by-law in effect at the time of the submission of the ANR plan. The Board, however, stated that "the scope of this freeze of

the applicable provisions of the zoning by-laws is expressly limited in M.G.L. c. 40A, | 6 to the 'use of the land shown on the plan.'" Quoting *Bellows Farms v. Building Inspector of Acton*, 364 Mass. 253, 260, 303 N.E.2d 728 (1973), the Board stated that the freeze 'gives...protection only against the elimination of or reduction in the kinds of uses which were permitted when the plan was submitted to the planning board.' It does not, however, give protection against amendments to zoning by-laws relative to dimensional requirements, unless such amendments 'amount to a total or virtual prohibition of the use of[\*23] the locus' or 'impede the reasonable use of the...land' as permitted at the time of the of the [sic] submission of the ANR plan to the Planning Board.

(Proia Aff., Ex. J at 2).

According to the Board, the current height limitation is 35 feet, and therefore Nextel's proposal to build a tower on top of the 97' BECO 111 would violate the Zoning By Law. The Board acknowledged Nextel's claim that a 35-foot tower on that spot would not provide as much coverage as Nextel would like. Despite this, the Board stated, "under these circumstances, the board finds that the 35-foot height limitation does not either amount to a virtual prohibition of the use or impede the reasonable use of the Locus for a WTF [wireless telecommunication facility]."

In evaluating whether substantial evidence is in the record to support this reason, I first note that Nextel and the Town agree on three important pieces of evidence: (1) an ANR designation operates to freeze zoning provisions regarding allowed uses of the location, not dimensions, (2) the proposed facility would exceed the dimensional requirements of the current Zoning By-Laws, and (3) Nextel can receive some coverage from a tower built on[\*24] the location in compliance with the current zoning dimensional requirements.

The parties disagreement is about whether the denial of the dimensional variance constitutes denial of the use. In other words, the disputed issue is whether the 35-foot height restriction so interferes with the use that it renders the use prohibited. This disagreement is more accurately described as a dispute, not over whether substantial evidence exists, but over the correct interpretation of "impede the reasonable use of the...land."

The Board based its reasoning on its interpretation of: (1) the Town's existing bylaws and (2) *Bellows Farms*, a case from the Massachusetts Supreme Judicial Court applying Massachusetts law. According to Nextel, the dimensional requirement impedes their reasonable use of the property. Nextel disagrees with the Board's interpretation of Massachusetts law, arguing that a tower complying with the current dimensional requirements of the by-laws would leave a substantial gap in coverage, and therefore Nextel could not use it for their desired purpose - eliminating a significant gap in coverage.

As stated above, I must exercise only narrow judicial review of the Board's decision. [\*25] I emphasize that my "review is not focused on whether the [Zoning] Board made the best or the correct decision." *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 99 (1st Cir. 2002). Instead, I "must simply determine whether the plaintiff[] has demonstrated that the Board's decision...is [or is not] supported by substantial evidence." *Id.* Keeping in mind these principles, I find that Nextel's admission that Nextel could still use the location to provide some coverage is substantial evidence supporting the Board's first reason. I also note that whether a tower built in

compliance with the dimensional requirements would result in a significant gap in coverage is more properly an issue for Count II, not Count I.

For these reasons:

Giving the Board of Appeals' informed judgment the deference which it is due, [this court] does not find fault with the Board of Appeals' interpretation of its own By-Law as well as its interpretation of the applicable state law. *Omnipoint Communications MB Operations v. Town of Lincoln*, 107 F. Supp. 2d 108, 116 (D. Mass. 2000).

C. The second step in the Board's reasoning was not based on substantial [\*26]evidence.

A variance may still be required even if the ANR freeze does not require it. Although the first step in the Board's reasoning is based on substantial evidence, the second step is not. After finding that the ANR endorsement did not require the Board to grant the variance, the Board then went on to hold that "there are not unique circumstances relating to soil condition, shape or topography of the location that would cause substantial hardship to the applicant if we do not grant the variance." According to the Board, in order to grant a variance under M.G.L. c. 40A | 10, the board must find that owing to circumstances related to those things listed above, a literal enforcement of the zoning provisions would involve substantial hardship, financial or otherwise, to the petitioner. Because the Board did not find any such unique circumstances, it denied the variance application.

Although the Board's statement may be a correct statement of the general law in Massachusetts regarding variances, it is not controlling in the special case of wireless communications facilities. The Board's variance decision, because it is a local zoning decision regulating the placement and construction[\*27] of a wireless communications facility, is subject to the federal Telecommunications Act. Under the Telecommunications Act, the Board cannot deny the variance if in so doing it would have the effect of prohibiting wireless services. 47 U.S.C. | 332 (c) (7) (B) (i) (II). In other words, the need for closing a | significant gap in coverage, in order to avoid an effective prohibition of wireless services, constitutes another unique circumstance when a zoning variance is required.

In its decision, the Board held, "the hardship alleged by the applicant is related to its business plan of providing a certain amount of wireless coverage to the Town, rather than to the unique shape or topography of the Locus." The Board states that Nextel can comply with the current dimensional requirements and still be able to provide "some wireless coverage." Nowhere in its decision, however, does the Board address whether Nextel would be able to provide sufficient coverage to close the significant gap in coverage. Although Nextel's ability to use the land, for some coverage, may be sufficient to survive judicial review regarding the ANR freeze, it is insufficient to support the Board's second[\*28] step in its reasoning. Although the ANR freeze may not require the variance, the Telecommunications Act may and the Board did not address that issue.

As I stated above, although my review is not limited by the evidence in the Board's written record, my review is limited to the reasons given in that record. *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 22 (1st Cir. 2002) ("we will not uphold a board's denial of a permit on grounds that it did not present in its written decision"). The only reason

the Board gave, in step two of its analysis, is that the unique circumstances that necessitate a variance include only circumstances relating to soil condition, shape, or topography, of the Locus and that such circumstances do not exist. The Board cannot now prevail in the argument that substantial evidence is in the record about locations that would close the gap in coverage, and therefore a variance is not necessary. That reasoning, regardless of whether it would have been supported by substantial evidence, is not in the Board's written opinion, and therefore cannot be considered by the court in reviewing the decision. *Id.* at 21[\*29] ("A board may not provide the applicant with one reason for a denial and then, in court, seek to uphold its decision on different grounds.").

The Board's decision, particularly the second step in its analysis, fails to give due consideration to the requirements of the federal Telecommunications Act. The Board's reasoning involved incorrect legal conclusions, which led to the incorrect factual conclusion that no unique circumstances existed that would require a zoning variance. The decision, therefore, is not supported by substantial evidence and is in violation of 47 U.S.C. | 332 (c) (7) (B) (iii).

C. Count II - The Town's regulatory scheme, as applied by the ZBA, has the effect of prohibiting Nextel from providing wireless services.

#### 1. Introduction

In Count II, Nextel claims that the Town's regulatory scheme, as applied by the ZBA, violates 332(c) (7) (B) (i) (II) because it effectively prohibits Nextel from providing wireless services. In response, the Town points to two alternative sites on which Nextel could construct its tower and asserts that doing so would provide similar coverage and would, therefore, eliminate the substantial gap in coverage.[\*30] The Town argues that, by providing such alternatives, the Town has demonstrated that Nextel is not effectively prohibited from providing wireless services.

#### 2. Standard of review and burden of proof

Although under Count I the court engaged in a limited review of the Board's decision, nevertheless, determining whether the Town has effectively prohibited the provision of wireless services "involves federal limitations on state authority, presenting issues that the district court would resolve *de novo* and for which outside evidence may be essential." *Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 16 fn. 7 (1st Cir. 1999). Because of this standard of review, "such claims under the TCA are treated no differently on summary judgment than any other claims litigated in the District Court." *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 116 (D. Mass. 2000)

On Count II, Nextel carries the burden of proof and must demonstrate that a significant gap in coverage exists and must "show from language or circumstances not just that this application has been rejected but that further reasonable [\*31]efforts are so likely to be fruitless that it is a waste of time even try." *Amherst*, 173 F.3d at 14 (*italics in original*).

#### 3. A significant gap in coverage exists.

It is beyond genuine dispute that a significant gap in coverage exists in Wayland. As stated in Nextel's statement of undisputed facts (Number 5), and

admitted by the Town, "Nextel has had a need since at least 1994 for coverage in the central part of Wayland, an area which includes important commuter thoroughfares such as Routes 20 and 27. Nextel needs to install antenna facilities in this area in order to provide adequate service."

4. Any further reasonable efforts are so likely to be fruitless that it is a waste of Nextel's time even to try them.

The core of the Town's arguments regarding Count II is the fact that two alternative sites exist on which Nextel could build its tower. Nextel argues that these alternatives are not feasible because both sites raise serious environmental concerns and would require additional approvals, hearings, permits, and easements. Also, Nextel claims that one of the sites would not provide sufficient coverage to fill the substantial gap that now exists.

[\*32]

In filing these motions, both parties filed numerous, highly technical affidavits of experts concerning the amount of coverage each alternative site would provide, whether the tests performed to arrive at such conclusions are technically accurate, and what effect, if any, environmental issues may have on each of the sites. This court need not address such technical issues of feasibility, however, because circumstances existing in this case demonstrate that any further efforts of Nextel are likely to be as fruitless as its efforts up to this point. The alternative sites, even if technically feasible in the abstract, do not overcome the undisputed evidence in the record of the Town's hostility to the provision of wireless services. As one court faced with similar issues stated;

Even assuming, however, that the Board was able to present viable alternatives...Plaintiff has still demonstrated 'such fixed hostility by the Board that one can conclude that further applications would be useless.'

Omnipoint Holdings, Inc. v. Town of Westford, 206 F. Supp. 2d 166, 172 (D. Mass. 2002).

First, it is undisputed that, in 1994, the Town denied Nextel authorization [\*33]to construct a monopole antenna tower. After this first denial, Nextel obtained permission from BECO to attach antennas to BECO 111 and filed an application with the Wayland Planning Board for review of the proposed facility. Before Nextel could receive approval, the Town enacted a twelve-month moratorium. This twelve-month moratorium was disapproved by the Attorney General and the Town then enacted a six-month moratorium. The Town further delayed Nextel's attempt to build the tower when it repealed and modified its zoning by-law provisions three times. Although the Town admits such delays, it argues that Nextel agreed to them. The fact that Nextel agreed to the delays is immaterial. The Town has repeatedly delayed Nextel, and Nextel's willingness not to argue over every delay does not overcome the evidence of hostility that those delays present. Also, when Nextel filed the application for variance (in response to the Town's concerns that the ANR did not allow all components of the still-pending original application) the Town further delayed Nextel by holding five public hearings stretching over eight months.

The Town has admitted that, regarding the alternative sites, "of course [\*34]some permits would be required." Defendants' Response Memorandum, pg. 5. Defendants' Response Memorandum states "The Town does not dispute that some permits would be required to locate a facility at BECO 102 or the Old

Landfill [the two alternatives]; however, but [sic] the need for such permits does not make either site 'unfeasible' under the TCA." Id. Although the Town is correct that the requirements of additional permits do not ordinarily make alternative sites unfeasible, the Town cannot show that those permits will be forthcoming. Instead, the undisputed evidence shows repeated delays and denials that, when viewed in the aggregate, demonstrate the Town's hostility towards Nextel. Nextel, therefore, has met its burden of showing "from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Amherst, 173 F.3d at 14.

Nextel also argues that the Town's failure to issue a Request for Proposal ("RFP") until after this litigation began is further evidence of the Town's hostility. The RFP would allow a successful bidder to enter[\*35] into negotiations with the Town for the right to have access to the two alternative sites. In other words, Nextel claims that the Town did not even make the alternatives available until after Nextel began this litigation. The Town responds to this evidence with two arguments: (1) although the formal RFP was not published until August, 2002, six months after this litigation began, the process for developing the RFP was underway before this litigation and (2) the timing of the RFO is irrelevant because Nextel did not even respond to the RFP. Both of these arguments fail to defeat this evidence of hostility, particularly when viewed in the context of the previously discussed evidence. First, even if the process began before the lawsuit was filed, Nextel could not have responded to the RFP until it was formally published. It is reasonable that Nextel would not want to abandon the BECO 111 location it had been pursuing for approximately four years, and respond to the RFP published six months after Nextel filed this lawsuit.

Nextel has met its heavy burden of showing the Town's hostility, and therefore that any further efforts would be so likely to be fruitless, that it is futile even to[\*36] try. The Town has presented no convincing arguments to the contrary.

D. The appropriate remedy for the Town's violation of the Telecommunications Act is an injunction.

Because I find that the Town violated sections 332(c)(7)(B)(iii) and 332(c)(7)(B)(i)(II) of the Telecommunications Act, I must determine the appropriate remedy. A panel of the First Circuit has held; in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order...instructing the board to authorize construction.

National Tower, LLC v. Plainville Zoning Board of Appeals, 297 F.3d 14, 21-22 (1st Cir. 2002) (affirming the district court's issuance of such an injunction against the Plainville Zoning Board). This is true because "Congress did not intend multiple rounds of decisions and litigation" and "a board will not ordinarily receive a second chance." Id. at 21 and 22. I do not find any special circumstances in this case, nor have the parties presented any arguments regarding such circumstances, that would make remand a more appropriate remedy than injunction. Id. at 24 ("While we can conceive[\*37] of circumstances in which a remand may be in order -- for example, an instance of good faith confusion by a board that has acted quite promptly -- this case is not a candidate for remand to the board.").

For all these reasons, I conclude that it will be appropriate to make an order requiring the Wayland Zoning Board of Appeals to authorize Nextel's construction of its antennas, as described in Nextel's original application, on BECO 111, unless some intervening development requires an order of somewhat different terms.

E. This court does not have jurisdiction over Count III.

In Count III, plaintiff claims that the Town's regulatory scheme, as applied by the ZBA, is in excess of the authority lawfully granted to the Town or its ZBA under the laws of the Commonwealth of Massachusetts. This court's jurisdiction in this case, however, does not extend to deciding whether the Town's actions violated Massachusetts state law.

Nextel appears to contend that this court, having federal-question jurisdiction through the Telecommunications Act, must exercise jurisdiction over the state-law claim because the state-law claim arises out of the same nucleus of operative facts under the[\*38] statutory provision for supplemental jurisdiction that appears in 28 U.S.C. | 1367.

Just as Congress can confer jurisdiction upon the federal courts by statute, however, Congress may also limit that jurisdiction. 28 U.S.C. | 1367 (a) ("except...as expressly provided otherwise by Federal statute,..."). Section 332(c)(7)(A) of the Telecommunications Act, which immediately precedes the four requirements of 332(c)(7)(B), listed in Section V. A. above, declares:

Except as provided in this paragraph, nothing in this chapter 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.

47 U.S.C. | 332(c)(7)(A). Construed as favorably to federal jurisdiction as its text can be reasonably interpreted, the Act manifested only a limited scope of federal jurisdiction to review state and local zoning decisions. By limiting the federal courts' jurisdiction, Congress manifestly limited federal intrusion into local zoning authority. That manifested limitation cannot[\*39] be avoided by a purported exercise of supplemental jurisdiction. For that reason, this court is not authorized to exercise subject-matter jurisdiction to consider whether the Town has violated Massachusetts state law.

ORDER

For the foregoing reasons, it is ORDERED;

(1) Plaintiff's Motion for Summary Judgment (Docket No. 20, filed August 15, 2002) is GRANTED on Counts I and II and DENIED on Count III.

(2) Defendants' Cross Motion for Summary Judgment (Docket No. 28, filed September 18, 2002) is DENIED on Counts I and II and GRANTED on Count III.

(3) The parties may file, on or before December 4, 2002, proposals for the text of the order to be issued by the court. Responses may be filed on or before December 18, 2002.

(4) The next Case Management Conference is set for .m., January , 2003 at which time the court will consider the filed submissions and oral argument with the expectation of then ordering an appropriate final judgment forthwith.

Robert E. Keeton  
United States District Judge