

11/4/2021

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

Superior Court Department
No.

RICHARD R. HEUSER, NANCY E. DUDLEY,
DIANE GALLAGER, EMIL A. GERTSCH,
PETER GERTSCH, WILLIAM L. LAHEY,
BRETT PRINCE, TODD W. TWOMBLY, and
DAVID C. WARNER IV,

Plaintiffs,

v.

TOWNORTH DEVELOPMENT, LLC; JOHN
E. COUGHLIN; and MARGARET NELSON,
KEITH CARTER, and MICHEAL DAVIS, as
they comprise the ESSEX ZONING BOARD
OF APPEALS,

Defendants.

COMPLAINT

1. This is a zoning appeal from a decision of Defendant Essex Zoning Board of Appeals (“Board” or “ZBA”), granting variances to Defendant TowerNorth Development, LLC (“Applicant” or “TowerNorth”) to construct a 150-foot cell tower (“Tower” or “Project”) on land owned by Defendant John E. Coughlin (“Coughlin” or “Owner”) located at 65 and 73 Eastern Avenue, Essex, Massachusetts (“Site”). A copy of the ZBA’s Decision on Application for Variances (“Decision”) filed in the Essex Town Clerk’s office on October 15, 2021, is attached hereto as Exhibit A.

2. The Decision should be annulled because it improperly granted variances from the Essex Zoning Bylaw by allowing a cell tower in an unauthorized location with insufficient setbacks

that would have an adverse effect on Plaintiffs' abutting properties, despite Applicant's failure to prove a significant gap in coverage or conduct a systemic study of alternative sites.

The Parties

3. Plaintiff Nancy E. Dudley, who owns and resides at 83R Eastern Avenue, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

4. Plaintiff Diane Gallagher, who owns and resides at 77R Eastern Avenue, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

5. Plaintiff Emil A. Gertsch, who owns and resides at 11 Haskell Court, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

6. Plaintiff Peter Gertsch, who owns and resides at 11R Haskell Court, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

7. Plaintiff Richard R. Heuser, who owns and resides at 2 Essex Reach Road, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

8. Plaintiff William L. Lahey, who owns and resides at 64 Eastern Avenue, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

9. Plaintiff Brett Prince, who owns and resides at 7 Essex Reach Road, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

10. Plaintiff Todd W. Twombly, who owns and resides at 76 Eastern Avenue, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

11. Plaintiff David C. Warner IV, who owns and resides at 12 Cogswell Court, Essex, Massachusetts, is a direct abutter to the Site and is aggrieved by the Decision.

12. All Plaintiffs are "parties in interest" as that term is defined in G.L. c. 40A, s. 11:

"abutters, owners of land directly opposite on any public or private street or way, and abutters to

abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list.”

13. Defendant Essex Zoning Board of Appeals is a municipal body designated as the authority to grant variances from the Essex Zoning Bylaw (“ZBL”). Its principal place of business is located at 30 Martin Street, Essex, MA 01929. Each of the individual members of the ZBA is sued in her or his official capacity.

14. Defendant TowerNorth Development, LLC is a foreign limited liability company organized in Delaware in 2017, with a principal place of business located at c/o Centerline Communications, LLC, 750 West Center Street, Suite 301, West Bridgewater, Massachusetts. The Managers of TowerNorth are Josh Costa and Joshua Delman, also located at the same address. According to its application for registration to conduct business in Massachusetts, the general character of TowerNorth’s business in the Commonwealth is “Real estate.” Defendant TowerNorth was the sole Applicant to whom the Decision was issued.

15. Defendant John E. Coughlin, 239 Western Avenue, Essex, Massachusetts, is the Owner of the Site. Defendant Coughlin is the Landlord under a lease agreement dated July 9, 2018 with TowerNorth as Tenant, notice of which is recorded as a Memorandum of Lease in Book 37498, Page 577 at the Essex South Registry of Deeds (“Lease”).

The Site

16. The Site is located at 73 and 65 Eastern Avenue in Essex, Massachusetts, identified as Essex Assessors Map 127, Lots 22 and 23.

17. The lot area is approximately 22.3 acres for 73 Eastern Avenue, and 3.04 acres for 65 Eastern Avenue, for a total Site area of 25.34 acres.

18. The Site is owned by Defendant Coughlin, who operates a self-storage business and would lease space to TowerNorth to construct and operate the Tower.
19. According to the Decision and Lease, the Tower and associated equipment would cover 2,647 square feet of the Site, within a 60' x 60' fenced compound.
20. TowerNorth's lease covers less than one percent of the Site.
21. The Tower compound would be located on the southerly portion of the Site behind the self-storage buildings, accessed by a twenty foot wide easement.

The Project

22. The Project approved by the ZBA allows TowerNorth to construct a new 150-foot tall free-standing, monopole cell phone tower without adhering to four requirements mandated by the Essex ZBL.
23. As approved, the Tower would include an antenna for Verizon plus space for three additional wireless carriers to co-locate their equipment on the Tower.
24. The Project also requires a special permit from the Essex Planning Board, and approval from the Essex Conservation Commission for work proposed adjacent to wetland resource areas.

The Zoning Relief

25. The Essex Zoning Bylaw has a provision that regulates "Telecommunications, Cellular and Television Facilities, Including Free Standing Tower Type Structures" ("Tower Bylaw", ZBL 6-3.4.5).
26. The Tower Bylaw requires:
 - a. No Tower shall be located closer than two (2) miles from any other Tower. (ZBL 6-3.4.5.c)

- b. Towers shall be set back from the front, rear and side property lines a distance equal to at least one hundred twenty-five (125) percent of the height of the Tower.
(ZBL 6-3.4.5.e)
 - c. All Towers shall be located a minimum of five hundred (500) feet from the nearest residential structure. This paragraph shall not apply to radio, telecommunications, cellular, PCS and television facilities, located inside an existing structure. (ZBL 6-3.4.5.g)
 - d. Accessory buildings shall be set back from the front, rear and side property lines a minimum of fifty (50) feet. Accessory buildings shall be of a common design and color. A maximum of ten (10) accessory buildings, each limited to four hundred (400) square feet in area and a maximum of ten (10) feet in height may be permitted per Tower. Multiple buildings shall be connected by a common wall.
(ZBL 6-3.4.5.h)
27. The Project violates the Tower Bylaw requirements as follows:
- a. There is a tower less than two miles from the Site at 16 Tree Hill Lane in Essex.
 - b. There is a property boundary line 121 feet from the Tower, which is less than the required 125% of the height of the Tower.
 - c. There is a residence 379 feet from the Tower, which is less than the required 500-foot setback from the Tower.
 - d. Multiple accessory buildings are not connected by a common wall, as required by ZBL s. 6-3.4.5.h.
28. The Decision grants variances from the Tower Bylaw requirements as follows:

- a. Variance from Section 6-3.4.5.c allowing the new Tower to be located closer than two miles from another preexisting tower.
- b. Variance from Section 6-3.4.5.e allowing the Tower to encroach on the setback to an abutting property line by 66.5 feet.
- c. Variance from Section 6-3.4.5.g allowing the Tower to encroach on the setback to an abutting residence by 121 feet.
- d. Variance from Section 6-3.4.5.h allowing multiple buildings not connected by a common wall.

The Decision

29. On October 15, 2021, the ZBA issued a unanimous decision (3-0) granting the variances from the Tower Bylaw for Applicant to construct the Project on the Site.

30. The Bylaw requires the Board to make findings that comply with the statute that authorizes variances, G.L. c. 40A, s. 10: “In granting a variance the board shall make findings that the reasons set forth in the application therefore comply with the statute permitting variance.” (Decision ¶ 4, quoting ZBL s. 6-9.3.2)

31. Under the Zoning Act, G.L. c. 40A, s. 10, the Board may grant a variance only if the “soil conditions, shape, or topography of such land . . . would involve substantial hardship. . . to the petitioner. . . and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such ordinance or bylaw.” (Decision ¶ 3, quoting G.L. c. 40A, s. 10)

32. Among its findings, the ZBA determined:

- a. “Unique circumstances exist as the topography of the area . . . does not allow for compliance with the Zoning Bylaw” (Decision ¶ 14)

- b. “Setbacks for the Tower from other towers and residences create a hardship as those setback requirements are impossible to meet for the necessary location of the Tower” (Id.)
 - c. “There is a significant gap in service due to a lack of capacity” (Id. ¶ 10)
 - d. “There is no reasonable viable alternative site for the target area” (Id. ¶ 13)
- 33. The ZBA made no findings in its Decision regarding:
 - a. Whether “relief may be granted without substantial detriment to the public good”
 - b. Whether “relief may be granted . . . without nullifying or substantially derogating from the intent and purpose of [the] bylaw.” G.L. c. 40A, s. 10
- 34. The stated purpose of the Essex Zoning Bylaw is “promoting the health, safety and welfare of the inhabitants of the town.” (ZBL. S. 6-1.3)
- 35. The Essex Zoning Bylaw required the Board to give notice to other boards and officials of its variance decision: “The board of appeals shall give the planning board, the board of selectmen and the building inspector written notice of its action with respect to all application for variance.” (ZBL s. 6-9.10)
- 36. The Decision was directed to the Essex Town Clerk, and did not include notice to the “planning board, board of selectmen and the building inspector” as required by the bylaw.

Count I – Zoning Appeal
(G.L. c. 40A, §§ 10, 17)

- 37. Paragraphs 1- 36 are re-alleged.
- 38. The ZBA’s Decision was arbitrary, capricious, unreasonable and an abuse of discretion because it granted variances without making the necessary findings required by statute and its

own bylaw, including where there would be detriment to the public good and whether such variances would nullify or derogate from the intent and purpose of the bylaw.

39. The ZBA's Decision was arbitrary, capricious, unreasonable and an abuse of discretion because the findings it made were erroneous and not supported by evidence. The uniqueness of the topography was used to justify the location of the Tower on the Site. Instead, the Board should have compared the topography of the Site to "generally the zoning district in which it is located", G.L. c. 40A, s. 10, to determine whether the Site's unique topography warranted a variance. Similarly, the "substantial hardship" required for a variance can hardly justify setback encroachments on a Site that is over 25 acres.

40. The ZBA's Decision was arbitrary, capricious, unreasonable and an abuse of discretion because it was issued to TowerNorth, which has a leasehold interest on less than one percent of the Site, and not to the Owner of the entire 25.34-acre Site. Because the variances apply to the entire Site, Mr. Coughlin was a necessary party as the Owner.

41. The ZBA's Decision was arbitrary, capricious, unreasonable and an abuse of discretion because it purported to authorize zoning relief under the Telecommunication Act, 47 U.S.C. 332(c)(7)(B)(i)(II) ("TCA") even though the Applicant does not qualify as a provider of personal wireless services under that statute. TowerNorth, as the sole applicant for the variances, is not a wireless services provider and is not entitled to any zoning relief under the TCA.

42. Even if the TCA were applicable, the ZBA's Decision was arbitrary, capricious, unreasonable and an abuse of discretion because there is no significant gap in coverage to compel variances under federal law that do not comply with state law.

43. Even if the TCA were applicable, the ZBA's Decision was arbitrary, capricious, unreasonable and an abuse of discretion because there are alternative sites that would not compel variances under federal law that do not comply with state law.

44. Because the ZBA's Decision was rendered without the findings required by the Zoning Act and Essex Bylaw, and because its findings were made in error without substantial evidence to support them, the Decision must be annulled.

Prayer For Relief

WHEREFORE, the Plaintiffs request that this Court:

1. Annul the Decision;
2. Determine that neither Defendant TowerNorth nor Defendant Coughlin have any legal right to variances for the proposed Tower on the Site;
3. Determine that Defendant ZBA erred in issuing the variances for the Site;
4. Award the Plaintiffs their costs and fees in this action; and
5. Grant the Plaintiffs such other relief as it deems just and proper.

PLAINTIFFS,

By their attorneys,

/s/ Dennis A. Murphy

Daniel C. Hill (BBO #644885)
Dennis A. Murphy (BBO #645168)
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Boston, MA 02108
(617) 494-8300
dhill@danhilllaw.com
dgusmurphy@gmail.com

Dated: November 4, 2021

Exhibit A

OCT 15 2021 .



ESSEX BOARD OF APPEALS

TOWN HALL * 30 MARTIN STREET * ESSEX, MASSACHUSETTS 01929-1219
 TELEPHONE (978) 768-6531 (978) 768-2505 FAX

TOWN OF ESSEX ZONING BOARD OF APPEALS DECISION ON APPLICATION FOR VARIANCES

To: Essex Town Clerk
 Essex Town Hall
 30 Martin Street
 Essex, MA 01929

Re: APPLICANT: TowerNorth Development, LLC
 c/o Centerline Communications, LLC
 750 W. Center Street, Suite 301
 West Bridgewater, MA 02379
 APPLICATION: Variances for a Free Standing Monopole Tower
 PROPERTY: 73 Eastern Avenue and 65 Eastern Avenue

BACKGROUND AND PROCEDURAL HISTORY

This matter concerns the real property located at 73 Eastern Avenue and 65 Eastern Avenue, Essex, Massachusetts (Assessors Map 127, Lots 22 & 23) and the Applicant's proposal to construct thereon a 150' Free Standing Monopole Tower with a Verizon antennae and designed to accommodate three (3) additional wireless providers and associated equipment on approximately 2,647 s.f. surrounded by chain link fencing.

The Applicant filed its application with the Zoning Board of Appeals (the "Board") on March 1, 2021 (the "Application") seeking four dimensional variances. The Board advertised, posted and noticed a public hearing regarding the Application. The Board opened the public hearing on April 21, 2021. The Board held duly noticed continued public hearings and heard testimony and comment and received evidence on the Application on April 21, 2021, June 16, 2021, August 4, 2021, and September 1, 2021.

On August 28, 2020 the Applicant conducted a balloon test to demonstrate the proposed Tower's height and location. The Balloon Test results were incorporated into the Application.

Board members conducted site visits in May, 2021.

The Board closed the public hearing on September 1, 2021 and on October 4, 2021 the Board deliberated and voted on the Application and related findings. All time requirements pursuant to the Telecommunication Act ("TCA"), G.L. c. 40A and the

Town of Essex Zoning Bylaws (“Zoning Bylaws”) were properly extended by the Applicant and Board with a copy of each extension filed with the Essex Town Clerk.

The following Board members were present at the public hearings during which substantive testimony and other evidence was presented, and then deliberated toward a decision in this matter: Margaret Nelson, Chair; Keith Carter and Michael Davis.

INFORMATION PRESENTED TO THE BOARD

1. Wireless communications towers may be allowed by special permit from the Planning Board. The Applicant has filed an application for a special permit from the Essex Planning Board. The Planning Board process is underway.

2. The Variances requested:

Section 6-3.4.5.c: No Tower shall be located closer than two (2) miles from any other Tower. The existing telecommunications tower located at 16 Treehill Lane in the Town of Essex is located approximately 1.7 miles from the Tower to be located at 73 Eastern Avenue.

Section 6-3.4.5.e: Towers shall be setback from the front, rear and side property lines a distance equal to at least one hundred twenty-five (125) percent of the height of the Tower. The height of the proposed Tower is 150-feet and the nearest property line is 121-feet. The requested relief is to reduce the 187.5-foot setback (150' x 1.25) by 66.5-feet to allow the Tower at a distance of 121-feet from the nearest property line.

Section 6-3.4.5.g: All Towers shall be located a minimum of five hundred (500) feet from the nearest residential structure. The nearest residential structure is located at a distance of 379-feet from the location of the Tower. The request is to reduce the 500-foot setback distance by 121-feet to allow the Tower at a distance of 379-feet to the nearest residence.

Section 6.3.4.5.h: Accessory building shall be set back from the front, rear and side property lines a minimum of fifty (50) feet. Accessory building shall be of a common design and color. A maximum of ten (10) accessory buildings, each limited to four hundred (400) square feet in area and a maximum of ten (10) feet in height may be permitted per Tower. Multiple buildings shall be connected by a common wall. TowerNorth respectfully requests a variance from the requirements of this provision that multiple buildings shall be connected by a common wall.

3. Pursuant to G.L. c. 40A §10, the ZBA may grant:

a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

4. Pursuant to Section 6-9.3.2 of the Zoning Bylaws:

To authorize upon appeal in specific cases a variance from the provisions of this chapter. Such variance may be granted only in accordance with the provisions of Chapter 40A, Section 15, Massachusetts General Laws, after application, notice and hearing as required by state statute. In granting a variance the board shall make findings that the reasons set forth in the application therefore comply with the statute permitting variance.

5. Pursuant to 47 U.S.C. 332(c)(7)(B)(i)(II), “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” if the Board finds both that a significant coverage gap exists and the application presents the only feasible plan to address that significant coverage gap.

6. The Applicant presented the following:

- Application to the Board including a brief supporting the Application,
- Property deeds and authorizations,
- Photo simulations dated October 13, 2020,
- Project plans last revised February 26, 2021,
- Radio Frequency Report by C-Squared dated November 6, 2020 and updated July 28, 2021,
- Alternative Site Analysis, undated and updated July 28, 2021,
- FCC Licenses to Operate,
- Environmental Sound Assessment dated January 22, 2021,
- Calculated Radio Frequency Exposure Report dated November 10, 2020,
- FAA Determination dated March 24, 2020, and
- Real Estate Valuation Report dated December 28, 2020.

7. The Applicant presented reasons to grant the variances pursuant to G.L. c. 40A §10 but also asserted that the Board must grant the variances pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. 332(c)(7)(B)(i)(II).
8. The Board also relied upon a peer review consultant, Isotrope LLC and associated report dated June 8, 2021
9. During the public hearing process Interested Parties and the public submitted evidence against the Application in writing and by a power point presentation. Interested Parties and the public raised concerns about noise, negative impacts on health and property values, visual impacts and the need for the Tower.

FINDINGS SUPPORTING DECISION

10. The Board finds that it has been supplied with evidence that that will allow the Board to infer that there is a significant gap in service due to a lack of capacity. The RF Report has documented that due to distances between the existing sites, the intervening topography, and volume of user traffic in the area, the existing facilities do not provide sufficient coverage and capacity to portions of town and that the proposed site is necessary to fill in these targeted gaps in service. Additionally, any inference was confirmed at the August 4, 2021 hearing where Verizon engineer, Syed Ali, RF Engineer - Network, confirmed that there is a significant gap in service due to a lack of capacity.
11. Additionally, the Town's peer review consultant has noted that the proposed facility is intended to address is capacity as shown by the size of the red coverage area on C-Squared's Radio Frequency Report dated November 6, 2020.
12. The Board also finds (as mentioned during the hearings), that the quality of service and data connection speeds delivered to the users are not necessarily uniform throughout a coverage area. Connectivity issues and level of service issues do exist. Users located in stronger coverage areas will generally experience better service than those users located near the edges of coverage. This improved coverage will increase network capacity.
13. The site for the Tower is appropriate for improved coverage and increased network capacity due to location and topography. Further, the alternatives site analysis provides that there is no reasonable viable alternative site for the target area.
14. The Board finds that unique circumstances exist as the topography of the area and the necessary location of the Tower does not allow for compliance with the Zoning Bylaw. Further, setbacks for the Tower from other towers and residences create a hardship as those setback requirements are impossible to meet for the necessary location of the Tower.
15. The Board finds that the denial of the requested variances will materially limit the wireless provider's ability to improve coverage and capacity.

DECISION

On October 4, 2021, following deliberation and consideration of the testimony and evidence presented during the public hearing process, the Board voted unanimously to grant the following variances:

- Motion by Keith Carter and Seconded by Michael Davis to grant a variance from Section 6-3.4.5.c allowing the proposed Tower be located approximately 1.7 miles from the existing telecommunications tower located at 16 Treehill Lane as shown on the plans submitted with the Application. Voted: unanimous.
- Motion by Keith Carter and Seconded by Michael Davis to grant a variance from 6-3.4.5.e to allow a reduced setback of 121 feet from the nearest property line. Voted: unanimous.
- Motion by Keith Carter and Seconded by Michael Davis to grant a variance from Section 6-3.4.5.g to allow a reduction in the setback of 379-feet to the nearest residence. Voted: unanimous.
- Motion by Keith Carter and Seconded by Michael Davis to grant a variance from Section 6.3.4.5.h to allow multiple cabinets/buildings be built without being connected by a common wall. Voted: unanimous.

CONDITIONS

Additionally, the Board voted unanimously (Motion by Keith Carter and Seconded by Michael Davis) to impose a condition that all construction shall be in conformance with the application and plans submitted by the Applicant.

The following Board member certifies the above decision is a true record of the actions and votes of the Board.

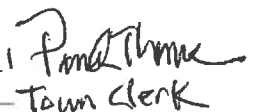
TOWN OF ESSEX ZONING BOARD OF APPEALS

ESSEX TOWN CLERK

OCT 15 2021


Margaret Nelson, Chair

DATED: October 15, 2021

FILED: Rcvd October 15, 2021 
Town Clerk

Any person aggrieved by this decision may appeal to a court of competent jurisdiction pursuant to M.G.L. Chapter 40A, Section 17 and must be filed with the office of the Town Clerk within 20 days from the filing of this decision.