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January 3, 2020

Via USPS Express Mail

Linda McGhee
Deputy Planning Manager
Planning Department, City of Nashua
229 Main Street
Nashua, New Hampshire 03061-2019

Re: Application of NH #1 Rural Cellular, Inc. doing business as U.S. Cellular
SAVCAM, LLC, Owner
L Silver Drive (Sheet A, Lot 993)
Decision Date: November 12, 2019
Request for Rehearing Filed on December 11, 2019

Dear Ms. McGhee:

This office is counsel to NH #1 Rural Cellular, Inc. doing business as U.S. Cellular "U.S. Cellular").

I am writing with respect to the above-captioned application. A "Motion for Rehearing" was filed on December 11, 2019 by P.R.A. Properties, LP, of Lowell, Massachusetts. It is our understanding that the Request will be considered at the Zoning Board of Adjustment's next meeting on January 14, 2020. Enclosed herewith please find U.S. Cellular's Response to the Motion for Rehearing. We respectfully request that the Response be forwarded to the Board for its consideration.

A copy of the Response has this day been served upon Michael J. Iacopino, Esquire, counsel for the Movant P.R.A. Properties, LP, via email.

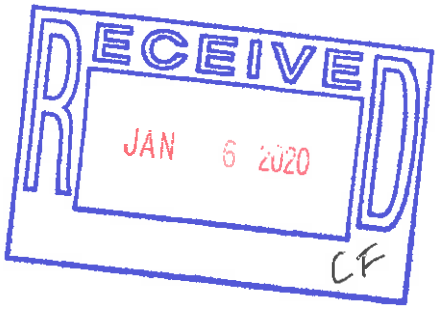
Please do not hesitate to let me know if you have any questions or concerns regarding this matter.

Very truly yours,

Steven E. Grill

cc: Michael J. Iacopino, Esquire, w/encl.

SEG/Enclosure



ZONING BOARD OF ADJUSTMENT
CITY OF NASHUA, NEW HAMPSHIRE

In re: NH #1 Rural Cellular, Inc. d/b/a US Cellular, Applicant
L Silver Drive
Nashua, New Hampshire

APPLICANT'S RESPONSE TO MOTION FOR REHEARING
FILED BY P.R.A. PROPERTIES, L.P., ON DECEMBER 11, 2019

NH #1 Rural Cellular, Inc., d/b/a US Cellular (hereinafter "US Cellular" or the "Applicant") respectfully responds to the "Motion for Rehearing" filed by P.R.A. Properties, L.P., on December 11, 2019, as follows:

1. Following a public hearing held on November 12, 2019, the Nashua Zoning Board of Adjustment (the "ZBA") voted unanimously to authorize US Cellular to place a temporary 130-foot tall cell tower and associated equipment in a parking lot located at L Silver Drive, for a period not to exceed eighteen (18) months. *See* Written Decision dated November 18, 2019 (finding that the proposed temporary tower met the criteria for variances from the "location" limitations found in Subsection 190-38.C (1) and (2) of the Nashua Land Use Code, and for a special exception).

2. P.R.A. Properties, L.P. d/b/a Princeton Properties ("Princeton") was the only party which appeared in opposition to the proposed temporary tower. Princeton has now filed a "Motion for a Rehearing" (the "Motion"), in which it alleges that the approval of the temporary tower was "unlawful and unreasonable" and urges the Zoning Board of Adjustment to grant a rehearing.

3. Princeton's arguments in support of its request for a rehearing are, at best, hyper-technical and legalistic, and they all suffer from the same fatal flaw: they ignore both federal and state law, under which the ZBA was required to grant the relief requested by US Cellular because, in the absence of such relief, US Cellular would have a significant gap in its wireless network in the vicinity of the subject site. As the ZBA was well aware, absent the relief sought by US Cellular, this coverage gap would occur because at some point during the next few weeks, an existing tower located at 311 Daniel Webster Highway (the "COSTCO tower") will be dismantled. Although a diligent search for a location for a new permanent tower to replace the COSTCO tower is underway, the search and subsequent permitting, regulatory research and filings, and construction will take a minimum of several months, and possibly as long as eighteen (18) months. The ZBA thus acted both lawfully and reasonably when it approved US Cellular's request for a temporary tower. Accordingly, the request for a rehearing should be denied.

APPLICABLE LAW

4. Section 704 of the Telecommunications Act of 1996, codified at 42 U.S.C. 337(c)(7) (the "TCA") imposes procedural and substantive limits on the power of municipalities to regulate the placement and construction of wireless telecommunications facilities, including antenna towers and associated equipment. As the New Hampshire Supreme Court explained more than ten years ago:

> the TCA [acts] as an "umbrella" under which a ZBA must evaluate an application to construct a telecommunications tower, as the TCA will preempt local law under certain circumstances. *See* 47 U.S.C.A. § 332(c)(7). As the First Circuit Court of Appeals has noted, although the TCA does not explicitly authorize a zoning board to consider whether a decision amounts to an effective prohibition of the provision of wireless service, "[s]ince board actions will be invalidated by a federal court if they violate the effective prohibition provision, many boards wisely do consider the point." *[citation omitted]*

Daniels v. Town of Londonderry, 157 N.H. 519 (2008). The *Daniels* analysis is consistent with the analysis used by federal courts in TCA cases. *See, e.g., Indus. Communs. & Elecs, Inc. v. Town of Alton*, 2012 U.S. Dist. LEXIS 135158 (D.N.H. 2012) (where evidence established that zoning regulations made it impossible to provide adequate coverage without a variance, ZBA's decision to deny a variance had the effect of prohibiting the provision of wireless services in violation of federal law). Whether or not there is an "effective prohibition" which makes it necessary for a local board to land use zoning relief is a determination which local boards should make on a case-by-case basis, since many different factors might be relevant. *See Omnipoint v. City of Cranston,* 586 F.3d 38 (1st Cir. 2009).

5. In short, in tower permitting cases, local zoning criteria may be completely preempted, *see Brehmer v. Planning Bd. of Wellfleet*, 238 F.3d 117, 121-22 (1st Cir. 2001), and local boards thus act lawfully and reasonably when they apply zoning criteria flexibly, with the needs of federally-licensed wireless providers in mind. This is what the ZBA did in this case, and there is no need for a rehearing or for further proceedings of any kind.

PRINCETON'S ARGUMENTS ARE WITHOUT MERIT

6. Princeton makes numerous arguments in support of its claim that the ZBA acted unlawfully and unreasonably. None of these arguments have merit.

Waivers versus Variances

7. The first argument is that US Cellular should have requested waivers instead of variances because the Nashua Land Use Code (the "Code") grants the ZBA authority express authority to waive the requirements of Subsection C (location) of Section 190-38 of the Code. *See* Motion, ¶ 4.1, citing Section

190-38.B, which provides that the ZBA "may waive the requirements of Subsections C (location) and E (height) to the extent necessary to resolve any gap in service where required by the [TCA]."

8. Princeton's theory seems to be that the existence of the waiver power somehow eliminates the power to grant variances. Princeton does not contend that the ZBA lacked the power to grant relief from the location restrictions found in Subsection C, but only that US Cellular should have labelled this relief with a different word, substituting the word "waivers" for the word "variances." Even if this were so, it hardly justifies reopening the case, because US Cellular indisputably met the requirements for the relief requested; that is, it established to the satisfaction of the ZBA that, without relief from the two location requirements at issue, it will have a significant gap in coverage until a permanent replacement for the COSTCO tower can be found. *See* Written Decision at 2. *See also* Minutes of November 12, 2019 hearing at 13-22.

9. Princeton relies on an eighty-year old case, *Stone v. Cray*, 89 N.H. 483 (1938), but it is difficult to understand how this case helps them here. In *Stone*, the New Hampshire Supreme Court was faced with a challenge to a zoning ordinance enacted by the Town of Lancaster, which landowners alleged failed to contain adequate provisions for granting special exceptions. The Supreme Court held that the ordinance adequately provided for special exceptions. To be sure, the Court discussed the differences between variances and special exceptions, but nothing in the case suggests that a ZBA's authority to grant variances cannot be exercised where, as in Nashua, an ordinance also includes the authority to grant discretionary waivers.

10. Princeton also seems to be arguing that because the request for variances should have been a request for waivers, the notification of the November 12 ZBA hearing which was provided to neighboring municipalities pursuant to RSA 12-K:7(I) was "incomplete." *See* Motion, ¶ 4.1.b. RSA 12-K:7(I), however, only requires notification of an "application to construct a new tower," and does not prescribe any specific form of notice. Plainly, the various municipalities who received the notification in this case were aware that US Cellular had applied for permission to construct a tower on Silver Drive. Such notification satisfied the statute. Significantly, none of the municipalities who were notified voiced any opposition to the proposed temporary tower.

11. Princeton's final point in support of its "waivers versus variances" argument is that the standard for a waiver was not met because US Cellular did not present a "reasonable alternative analysis," and thus did not establish that the effective prohibition clause of the TCA required the relief which US Cellular sought. *See* Motion at ¶ 4.1.c. As already noted, however, the effective prohibition clause requires a case-by-case analysis. There is no absolute requirement under federal law that alternatives be explored in every case. Here, the key fact was the unexpected loss of the lease for the COSTCO tower, resulting in an emergency for US Cellular. The ZBA acted well within its authority when it found that a temporary tower

was required in order to prevent an imminent significant gap in US Cellular's wireless coverage. To be sure, in many cases a reasonably thorough review of alternative locations may be required, but here the time necessary to comply with such a requirement would have created the very evil which the TCA is designed: a loss in wireless coverage. Thus, the ZBA's finding of a need for a temporary facility at the proposed location was both lawful and reasonable.

Hardship

12. Princeton's second argument is that US Cellular failed to establish the existence of a "hardship" and thus was not entitled to a variance. *See* Motion at ¶ 4.2. Although Princeton devotes more than an entire page of single-spaced type to this argument, its entire discussion rests on the mistaken premise that the "hardship" criterion in this case is the same as it is in cases which do not involve wireless telecommunications facilities. *Id.* In fact, however, since this is a case involving wireless facilities, the ZBA correctly focused upon the need to avoid a significant gap in coverage; under these circumstances it is not bound to apply the hardship criteria in the same manner as it would in other types of cases. *See* discussion at paragraphs 4 and 5, above, regarding the TCA and the *Daniels, Manchester* and *Alton* cases. *See also Nextel Com. of Mid-Atlantic v. Town of Wayland,* 231 F. Supp. 2d 396, 406-7 (D. Mass. 2002) (holding that "the need for closing a significant gap in coverage, in order to avoid an effective prohibition of wireless service, constitutes another unique circumstance when a zoning variance is required" even if no "hardship" would be found if the rules applicable to other types of cases were to be followed).

Co-location

13. Princeton's third argument is that US Cellular needed two additional variances from the co-location requirements found in Subsection 190-38(C)(5) of the Code, but it failed to seek them. *See* Motion, ¶¶ 3, 4. Interestingly, although the ZBA has the power to waive these co-location requirements, see Code §190-38(B), Princeton argues that variances should have been requested, which of course is inconsistent with its argument that variances from the other provisions of the same Subsection were not properly requested. In either event, Princeton is mistaken; this application involved a temporary facility, and the ZBA correctly determined that the co-location requirements simply did not apply. This was simply a matter of interpreting the provisions of the Code, which of course is entirely within the ZBA's authority. Moreover, even if variances (or waivers) had been necessary, they would have been granted for the same reason that the other relief requested by US Cellular was granted: without this temporary tower, US Cellular would have a significant gap in its wireless coverage. The ZBA acted both lawfully and reasonably when it determined that the co-location requirements in the Land Use Code simply did not apply in this case because of the temporary nature of the facility and the other unique circumstances involved.

Princeton's Remaining Arguments

14. Princeton's final arguments are a hodgepodge of meritless factual and legal theories that are easily disposed of. *See* Motion, ¶¶ 5-11.

15. In Paragraphs 5 and 6 of the Motion, Princeton contends that the ZBA erred when it found that the temporary tower meets the special exception criteria set forth in § 190-134(F)(1)(e) of the Code. The minutes of the ZBA's November 12 hearing, however, clearly reflect that the ZBA considered these criteria. For example, the ZBA noted that the use itself – even if were to be permanent – is permitted under the Code at the subject location. It also found that any temporary visual impacts were outweighed by the need for the facility. The ZBA acted lawfully and reasonably when it found that the special exception criteria had been met, and Princeton is simply attempting to rehash arguments that were fully considered at the initial hearing. This is not a proper purpose for a rehearing.

16. In paragraph 8 of its Motion, Princeton argues that US Cellular failed to establish that the value of surrounding properties will not be diminished by the temporary tower, but the ZBA already found to the contrary. Once again, Princeton is simply attempting to rehash arguments that were fully considered at the initial hearing, and this is not a proper purpose for a rehearing.

17. In paragraph 9, Princeton argues that US Cellular failed to establish that allowing the temporary tower would not be contrary to the public interest. It cannot seriously be disputed, however, that a loss of cell phone service causes significant and obvious harm to the public, including adverse impacts on police, fire and other first responders; adverse impacts on businesses; and, substantial inconvenience to people who live, work and travel through the affected area. The ZBA already considered this issue and ruled on it based on the evidence at the hearing. Princeton is once again simply attempting to rehash arguments that were fully considered at the initial hearing. This is not a proper purpose for a rehearing.

18. In paragraph 10, Princeton argues that the ZBA improperly found that the variances are consistent with the spirit of the ordinance, but fails to mention that cell towers are a use permitted by special exception in this part of the City. Once again, Princeton is simply attempting to rehash arguments that were fully considered at the initial hearing, and this is not a proper purpose for a rehearing.

19. Finally, in paragraph 10 Princeton makes bald claims that the tower presents a fire hazard and that there is a danger it will fall over and cause harm. There was no evidence to support these inflammatory accusations at the initial hearing, and Princeton does not claim that it has newly-discovered evidence on these points which might somehow justify a new hearing.

CONCLUSION

20. Princeton has not provided any valid factual or legal basis to justify its Motion for a Rehearing. Its belief that a temporary tower might harm its own economic interests is simply not enough to overcome the evidence of an imminent and very significant gap in wireless coverage which remains undisputed. This evidence required the ZBA to view US Cellular's application in a favorable light and to apply all relevant criteria flexibly. No purpose would be served by a rehearing, and Princeton's request for the same should be denied.

Dated: January 3, 2020

Respectfully submitted,

NH #1 RURAL CELLULAR, INC.

By its Attorney:

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CERTIFICATE OF SERVICE

On the 3rd day of January 2020, I served a copy of the foregoing Response upon Michael J. Iacopino, Esquire, counsel for the Movant P.R.A. Properties, LP, via email.

Dated: January 3, 2020

Steven E. Grill, Esquire