STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.: AP-15-12

JONATHAN LAWLESS, ED LAWLESS, KATHY LAWLESS and JESSE LAWLESS Appellants	)	
v.	)	APPELLANTS' BRIEF
TOWN OF VIENNA Appellees	)	
GLOBAL TOWER ASSETS, LLC and NORTHEAST WIRELESS NETWORKS, LLC Intervenors	)	

NOW COME Appellants, JONATHAN LAWLESS, KATHY AND ED LAWLESS AND JESSE LAWLESS (hereinafter 'Appellants'), by and through their undersigned attorney, Lynne Williams, and present this brief on appeal pursuant to M.R.Civ.P. 80(B).

STATEMENT OF FACTS

Appellants Jonathan, Ed, Kathy and Jesse Lawless participated in the process culminating with the Appeals Board of the Town of Vienna (Town) granting a permit to Global Tower Assets, LLC and Northeast Wireless Networks, LLC (Global) for the construction of a cell phone tower on a lot abutting the land owned by Petitioner Jonathan Lawless, and on which he resides, within 400 feet of the land owned by Jesse Lawless, and within 800 feet of the land owned by Ed and Kathy Lawless. The Appeals Board decision was made at the Board's January 13, 2015 meeting.

On September 25, 2013, Global submitted an application to the Vienna Planning Board (Planning Board) for construction of a cell phone tower in the Town. On April 23, 2014, after a public hearing and the taking of evidence, the Planning Board denied Global's application, rejecting the applicant's request for a waiver of the setbacks specified in the Vienna Wireless Telecommunications

Facilities Siting Ordinance (Wireless Ordinance). Sub. Rec: Planning Board Written Decision.[1] On May 20, 2014, the attorney for Global submitted a timely written appeal of the Planning Board decision to the Town.

On June 10, 2014, the Vienna Selectmen met with the Town attorney in Executive Session to discuss the fact that the Town did not have a duly constituted Appeals Board, nor an Appeals Board Ordinance. Following the Executive Session, it was stated on the record that "[i]t has been established that the Town of Vienna does not have a legally authorized Board of Appeals – ours was established as an appointed committee around 1985 – by law it must be established by town charter or specific ordinance. Vienna has neither." Sub. Rec: Minutes at 1. At the July 22, 2014 Selectboard meeting, however, the Selectmen announced that they would hold a special town meeting in order to pass an Appeals Board Ordinance, and would then appoint an Appeals Board to handle Global's appeal. Sub. Rec: Minutes at 1. The special town meeting was held on August 19, 2014 and the Appeals Board Ordinance was passed. Sub. Rec: Minutes at 2.

By October 21, 2014, the Selectmen had recruited five individuals to serve on the Appeals Board and they were sworn in on that date. The Selectmen chose Thomas Carey as Chairman. There is no evidence on these individuals were chosen for appointment.

On January 13, 2015, the Appeals Board held a public hearing on Global's appeal and, conducting a *de novo* review, overturned the Planning Board's denial of the permit and granted the setback waiver and permit to Global. Sub. Rec: Appeals Board Written Decision.

On January 21, 2015, Robert Weingarten, a Vienna resident, filed a Request for Reconsideration of the January 13, 2015 decision, with Thomas Carey, Chair of the Appeals Board. Mr. Weingarten also submitted written testimony to the Board within 7 days of the decision, per the Appeals Board

1 An Index to a Stipulated Appeals Board Record and an Index to the Stipulated Planning Board Record on this matter have been submitted, along with the submission of various additional documents relevant to the matter. The record of the submitted documents will be noted as Sub. Rec.

Ordinance which permits such submissions. Sub. Rec: Request for Reconsideration.

The Appeals Board issued its final written decision on February 9, 2015, almost four weeks after the oral decision was made at the January 13, 2015 meeting of the Appeals Board, despite the fact that the recently approved Appeals Board Ordinance states that a written decision shall be issued within seven days of the Board's decision. In the written decision, the Appeals Board Chair, Thomas Carey, denied Mr. Weingarten's Request for Reconsideration on the basis of standing, without having discussed and voted on the issue at an Appeals Board meeting. This was done despite the fact that the Ordinance states that "[a] vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision." Sub. Rec: Appeals Board Written Decision.

LEGAL ARGUMENT

I. THE APPEALS BOARD HAD NO JURISDICTION OVER THE GLOBAL APPEAL.

If a town institutes land use controls within the town, it is required to establish an appeals board through charter language or ordinance passage. 30-A M.R.S.A. § 4353; see *Thornton v. Lothridge,* 447 A.2d 473, 474-75 (Me.1982). It is uncontested that the Town did not have a legally constituted appeals board at the time that Global filed its appeal of the Planning Board's decision.

Therein lies the key issue for this court. The Law Court has held that such an appeal cannot go directly to the Superior Court under M.R.Civ.P. Rule 80(B) unless the ordinance specifically orders it[2]. *See* 30-A M.R.S.A. § 4353(1) (1996); *Perkins v. Town of Ogunquit,* 1998 ME 42, ¶ 5 n. 5, 709 A.2d 106, 107 n. 5; *Freeman v. Town of Southport,* 568 A.2d 826, 828 and n. 3 (Me.1990); *see also George D. Ballard, Builder, Inc. v. City of Westbrook,* 502 A.2d 476, 479 n. 3 (Me.1985) (The Westbrook Ordinance provided: "An appeal from any order, relief, or denial of the planning board may be taken by any party to superior court in accordance with the Maine Rules of Civil Procedure, Rule 80B.").

2 There are two other exceptions, neither relevant in this matter.

Yet, when the May 20, 2014 Global appeal was filed, there was no legally constituted Appeals Board to handle the appeal. Sub. Rec: Minutes at 1. The fact that the Town passed an Appeals Board Ordinance on August 19, 2014 does not give that Board the authority to hear the appeal, even though the appeal was arguably a pending proceeding. 1 M.R.S.A. §302 clearly states that "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing." This statute specifically states that a pending proceeding must be handled under the ordinance that was in effect at the time of the proceeding was determined to be pending.

It is, however, clear that a Town can pass an ordinance that applies retroactively. (If an application is *pending* when an ordinance is amended, Maine law requires a planning board to complete its review under the original ordinance, *unless the new ordinance contains a retroactivity clause*. (Emphasis added) *City of Portland v*. *Fisherman's Wharf Associates III*, 541 A.2d 160 (Me. 1988); *Kittery Retail Ventures,* 2004 ME 65, 856 A.2d 1183 (Me. 2004)). However, while it was applied retroactively, the Appeals Board Ordinance passed by the Town does not contain a retroactivity clause. Therefore, without the inclusion of a retroactivity clause in the Appeals Board Ordinance, the Global appeal matter should have been handled as it would have been handled had no Appeals Board Ordinance been passed in August 2014.

Therein lies the dilemma. Since the Wireless Ordinance authorizes an appeal to a body that was not legally constituted at the time of appeal, and the Appeals Board ordinance subsequently passed did not contain a retroactivity clause, the court should look to the body of Vienna Land Use Ordinances to identify any other authorization for appellate jurisdiction. A review of the Subdivision Regulations, clearly part of the body of Vienna Land Use law, is instructive. The Town Subdivision Regulations, which include the standards for review of a subdivision application, and which were passed in March

1995, states that "[a]n appeal may be taken, within thirty **(30)** days from the Planning Board's decision on the Final Plat, by any party to Superior Court in accordance with Rule 80(B) of the Rules of Civil Procedure." Sub. Rec: Subdivision Regulations at 9. These "regulations," which include language that a Subdivision Ordinance would include, have never been repealed or amended and are still in force.

Consequently, we are faced with a situation where the appeal of a Planning Board decision on one type of application goes to a non-existent Appeals Board, while the appeal of a Planning Board decision on another type of application goes to the Superior Court under Rule 80(B). It is not a stretch to argue that in the absence of an Appeals Board, and since at least one Town land use ordinance authorizes an appeal of a Planning Board decision directly to the Superior Court, Global should have brought their appeal directly to the Superior Court.

II. THE APPEALS BOARD MISINTERPRETED THE LANGUAGE OF THE WIRELESS ORDINANCE.

If this court decides that the Appeals Board did have jurisdiction over the Global appeal, Appellants present the following argument that the Appeals Board used the wrong standard in its consideration of whether to grant a waiver to the setback requirements in the Wireless Ordinance. Despite the fact that the Wireless Ordinance states that "[t]he setback *may* be reduced by the Planning Board upon a showing by the applicant that: i. The facility is designed to collapse in a manner that will not harm other property," the argument before the Appeals Board inferred that they were *required* to grant a setback waiver, given the safety information submitted by Global. The May 20, 2014 appeal application itself states that "[t]he Applicant sought a waiver of the greater setback of the [Ordinance] and presented comprehensive and complete testimony and documentation to address the criteria set forth in Section 7(2)(E)(1)(a)(1) [of the Ordinance.]" Global then argues that the Planning Board decision was arbitrary and capricious, inferring that, given the information that was presented to them, the Appeals Board was required to grant the waiver. Sub. Rec: Global Appeal Letter at 2.

That is simply not the case. The use of the word *may* in the section on waivers, as compared to the balance of the Ordinance that uses the word *must* on almost every page, suggests that the legislative intent of the drafters of the Ordinance wanted the grant of a waiver to be discretionary. As we see in *In re the Plaza Resort at Palmas, Inc. v. Scotiabank De Puerto Rico*, 741 F.3d 269, 276 (1st Cir. 2014), "[t]hat phrase ["may be recorded"] unambiguously indicates that recordation of special real property rights is an option, not an obligation." See also *Rastelli v. Warden, Metro. Correction Center,* 782 F.2d 17, 23 (2d Cir. 1986). ("The use of a permissive verb – 'may review' instead of 'shall review' – suggests a discretionary rather than mandatory review process.").

Likewise, the Appeals Board in this matter, if this court determines that they had jurisdiction to hear the appeal, had complete discretion over whether to grant or deny a waiver of setback standards. They could analyze the technical information that was presented to them, could make assessments of the credibility of such evidence without any sort of bar which, when jumped over, required a grant of a waiver. As *Plaza Resorts* states, the use of the word "may" *unambiguously* indicates an option, not an obligation. This appeared not to be what was argued before the Appeals Board.[3]

SUMMARY

In summary, Appellants respectfully request that this court:

1. Find that the Vienna Appeals Board had no jurisdiction over the Global appeal filed on May 20, 2014 and remand the matter back to the Vienna Appeals Board for dismissal.
2. Alternatively, find that the Vienna Appeals Board made a decision in this matter that was based on an incorrect standard for the grant of a waiver, and remand the matter back to the Vienna

3 There were additional procedural errors on the part of the Appeals Board, made by the Chair. While the court may consider these errors *de minimis* they should be made part of the record. The Appeals Board failed to issue its written decision within seven days as required by the Appeals Board Ordinance and by 30-A M.R.S.A. §2691 (3)(E). The Appeals Board Chair failed to allow the entire Board to consider and vote on Mr. Weingarten's Request for Reconsideration, which was a violation of the Appeals Board Ordinance and of 30-A M.R.S.A. §2691(3)(F). Likewise, the Appeals Board Ordinance is contradictory in that it allows submission of written testimony within 7 days of the public hearing, while treating the oral decision following the public hearing as the final decision, made with no consideration of any written testimony that might be submitted post-hearing.

Appeals Board for reconsideration consistent with this court's order.

3. Grant whatever additional remedies this court may find appropriate.

Respectfully submitted this 14th day of April, 2015.

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CERTIFICATE OF SERVICE

The undersigned, Lynne Williams, hereby certifies that on April 22, 2014, she mailed by prepaid USPSS the attached Brief to the following:

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Dated: April 14, 2015

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