STATE OF MAINE **KENNEBEC, ss**	**SUPERIOR COURT** **DOCKET NO. AP-15-12**
JONATHAN LAWLESS **ED LAWLESS, KATHY LAWLESS** **and JESSE LAWLESS** *Plaintiffs,* v. **TOWN OF VIENNA** *Defendant,* **GLOBAL TOWER ASSETS, LLC** and **NORTHEAST WIRELESS NETWORKS, LLC** *Parties-in-interest.*	**PARTIES-IN-INTEREST GLOBAL TOWER ASSETS AND NORTHEAST WIRELESS NETWORKS RULE 80B BRIEF**

Parties-in-interest Global Tower Assets, LLC ("GTA") and Northeast Wireless Networks, LLC ("NWN") respectfully submit the following Rule 80B Brief.

BACKGROUND & PROCEDURAL HISTORY

This case involves an appellate challenge to the approval of a telecommunications tower by defendant Town of Vienna ("Town" or "Vienna"). Parties-in-interest GTA and NWN were the applicants/permittees that received approval for this tower. (R. 27.)

Parties-in-Interest. NWN is the holder of a Federal Communication Commission ("FCC") license authorizing the provision of personal communication services ("PCS") to the Town of Vienna and surrounding area. (R. 263-64.) GTA works with wireless carriers such as NWN to identify, develop, and construct appropriate sites for the development of personal

wireless service facilities, such as the telecommunications tower approved by the Town. (R. 396-99.)

Plaintiffs. Plaintiff Jonathan Lawless abuts the property where GTA and NWN's telecommunication tower was approved, and Plaintiff Jesse Lawless owns property proximate to the project's location. (Complt. ¶ 1; R. 294.) Plaintiff Ed Lawless is a member of the Vienna Planning Board, who also owns property proximate to the project's location with Kathy Lawless. (Complt. ¶ 1.)

Defendant Town of Vienna. Defendant Town of Vienna includes two discrete instrumentalities: its Planning Board, of which Plaintiff Ed Lawless is a member, and its Board of Appeals, which, as explained *infra*, was lawfully constituted by a Special Town Meeting on August 19, 2014. (R. 23.)

Lack of Wireless Services in Vienna. GTA and NWN, through radio frequency ("RF") engineers, perform detailed analyses to identify areas covered by NWN's FCC license that have inadequate wireless service. In Vienna, such analyses showed large wireless service gaps exist for PCS (NWN's FCC license frequency), which need to be filled in order to: (1) provide wireless service to residents, businesses, and first responders in Vienna; and (2) connect the Vienna area with the surrounding regions to have a seamless, reliable network (similar to a honeycomb pattern). (R. 265-74, 396-99, 449.) Graphical depictions of these wireless service gaps, and how they are filled by the new tower, are demonstrated by RF maps contained in the Record. (R. 265-74.)

Wireless Technology Background. Wireless technology has undergone significant technological advancements, which include the provision of digital technologies such as PCS. (R. 396-97, in which PCS operates in the 1700 to 1900 Mhz and 1900-2170 Mhz frequency

ranges.) PCS, when compared to old cellular analog technology no longer used, operates at shorter wavelengths (i.e., at higher frequencies) and at lower power levels. (R. 396.) This means antennas that broadcast and receive PCS signals in a "honeycomb-style" network must be more closely knit with each other to provide coverage, and to ensure the overall network is reliable. *Id.* This is due to low signal power and intervening vegetation and topography, which blocks and interferes with wireless signals. (*Id.*) As a result, it is critically important that PCS telecommunication facilities be located in specifically sited and prescribed areas to properly function. (*Id.*)

GTA and NWN's Methodology to Identify a Viable Telecommunications Facility Site in Vienna. When identifying potential viable telecommunications sites, GTA and NWN first look for existing structures to locate antennas (such as existing towers, silos, church steeples, or similar structures that are elevated into the air). (R. 397.) In the wireless industry, these are known as "co-locations." (*Id.*) GTA and NWN conduct investigations for available co-locations because they do not require the significant costs associated with construction of a new tower, making them more cost-effective; in Vienna, however, there are no existing structures that present viable co-locations for antenna making it necessary to construct a new tower. (*Id.*)

Identifying a viable site for a new tower involves a number of factors, including adequate signal broadcasting and receiving (i.e., sufficiently elevated above intervening topography and vegetation), the location of residents, businesses, first responders, and travel ways (the actual users of wireless services), the location of sensitive resources (e.g., protected cultural and scenic resources, water bodies, wetlands, and other environmental resources), FAA regulations (which restrict air space – for example, for towers above 200 feet in height, the FAA requires lighting

that is visible at night), and willing landowners to host a new tower. (R. 398-99, 449-51; *see also* 47 C.F.R. § 24.55 and 47 C.F.R. Part 17 "Construction, Marking, and Lighting of Antenna Structures".)

Upon analyzing these factors, GTA and NWN identified a property in Vienna that could host a viable new tower (the Seamans property, Tax Map 6, Lot 16), entered into an agreement with this property owner, and prepared the necessary technical studies to support an application for the Town of Vienna to process and review. (R. 27-29.)

Federal Telecommunications Act of 1996 Adopted to Support Wireless Technologies. Telecommunication facilities are unique when compared to other development projects under local review because they are also governed by federal law. Specifically, Congress enacted the Federal Telecommunications Act of 1996 ("TCA") to promote the development of personal wireless technologies, such as PCS, establishing a national policy to "make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151.

Congress recognized local and state reviews of applications can stand as unreasonable impediments to this national policy, and set forth five express limitations on local and state authority to regulate personal wireless service facilities. *See* 47 U.S.C. § 332(c)(7)(B)(i)-(iv) (stating local and state authorities may not regulate personal wireless service facilities in a manner that (i) prohibits, or has the effect of prohibiting, the provision of wireless services, (ii) discriminates amongst providers of functionally equivalent wireless services (e.g., cellular vs.

PCS), (iii) unreasonably delays action on an application; (iv) denies an application where the denial decision is not supported by substantial evidence in the written record (i.e., a denial based on unreasonable or non-existent evidence), or (v) is based on concerns relating to the environmental effects of radio frequency emissions).

To help facilitate Congress' directive to rapidly deploy the provision of personal wireless service facilities, it mandated courts to review claims arising under the TCA on an expedited basis. *Id.* ("The court shall hear and decide such action on an expedited basis.").

To clarify and help remedy unreasonable delays in application processing, the FCC issued a declaratory ruling that, among other things, sets 150 days as a presumptively reasonable time frame to review and decide an application for a new telecommunications tower. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals As Requiring a Variance*, 24 F.C.C.R. 13994, 14012, ¶ 45 (2009) ("FCC Shot Clock Ruling") (R. 425); *see City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1867 (2013) (confirming the FCC's interpretation is afforded agency deference); *see also T-Mobile South, LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 817 (2015). In this ruling, the FCC recognized under certain circumstances it may be practical to extend this review period, which applicants and reviewing authorities may do by mutual consent. *FCC Shot Clock Ruling* at ¶ 49 (R. 426).

Planning Board Review.[1] In September 2013, GTA and NWN submitted an application to the Planning Board for local approval of their telecommunications tower pursuant to the Town

[1] GTA and NWN have already gone through the process of obtaining federal approvals required by the National Environmental Protection Act and from the FAA, and now only need local approval to construct the new tower. (R. 27.)

of Vienna Wireless Telecommunications Facilities Siting Ordinance ("Wireless Ordinance"). (R. 1-12, 27, 31, 35.) At an initial Planning Board meeting, it became clear Planning Board member Ed Lawless had a conflict of interest by virtue of his son, Jonathan Lawless, owning property that directly abuts the project and due to Ed Lawless' proximity to the project's location. (R. 294.) As a result, Planning Board member Ed Lawless recused himself and did not participate in the public meetings to review the Application. (R. 34, showing Mr. Lawless did not participate in the Planning Board's decision.)

After approximately eight months of review, in a written decision dated May 13, 2014, the Planning Board determined GTA and NWN met all ordinance review standards, except for the safety setback standard set forth in Section 7.2(E) of the Wireless Ordinance. (R. 31-34, setting forth positive findings of approval on the review standards contained in Sections 7.2(A) through (D) and Sections 7.2(F) through (N) of the Wireless Ordinance.) To resolve the safety setback issue, GTA and NWN filed a timely administrative appeal on May 20, 2014, pursuant to Section 10 "Appeals" of the Wireless Ordinance.[2] (R. 10, "Any person aggrieved by a decision of the Planning Board under this ordinance may appeal the decision to the Board of Appeals"; R. 35-55, GTA and NWN's administrative appeal.)

The Town Lawfully Constitutes a Board of Appeals and Expressly Directs a *De Novo* Review of GTA and NWN's Administrative Appeal. After receiving GTA and NWN's administrative appeal, the Town discovered there were no records that a municipal board of appeals had been lawfully established by the Vienna Town Meeting (the Town's legislative authority, its voters). To remedy this oversight, the voters of Vienna adopted a Board of Appeals ordinance to lawfully constitute a board of appeals at a Special Town Meeting held on August

[2] GTA and NWN have opted initially to pursue their state law remedies rather than those provided by the TCA.

19, 2014, approximately three months after GTA and NWN filed their administrative appeal. (R. 23, 35-55.)

In addition to lawfully constituting the Vienna Board of Appeals, the voters made clear in express language that any pending appeals, such as GTA and NWN's administrative appeal, must receive a *de novo* review. (R. 17, "Provided, however, appeals pending at the time of adoption of this [Board of Appeals] Ordinance shall be heard and decided under a *de novo* review standard consistent with the regular administration of appeals under 30-A MRS §2691."; R. 24.) [3]

The Board of Appeals Approves GTA and NWN's Telecommunications Tower. On November 24, 2014, after the Vienna Board of Appeals was lawfully constituted, it held a properly noticed pre-hearing meeting to review the scope of GTA and NWN's administrative appeal, and to schedule a site visit and hearing. (R. 238.) Plaintiffs did not attend this pre-hearing meeting and did not object to the Board of Appeals proceeding with a *de novo* review, nor did any party or person raise any other issues other than the safety setback standard raised in GTA and NWN's administrative appeal. (*Id.*) On January 13, 2015, the Vienna Board of Appeals conducted a properly noticed site visit and *de novo* hearing, where again no party or person (including Plaintiffs) objected to the Board of Appeals conducting a *de novo* review, and the only issue raised by any participant was whether GTA and NWN's application met the Section 7.2(E) setback standard of the Wireless Ordinance. (*Id.*; *see also* R. 70-236, transcript of the January 13, 2015 *de novo* hearing.)

[3] GTA and NWN submitted a Consent Motion to Correct the Rule 80B Record concerning Article 5 of the Town Warrant for the August 19, 2014, Special Town Meeting, as previously the Town Clerk inadvertently noted it had "passed" when in fact it had been "rejected." *See GTA and NWN's Consent Motion to Correct the Record, Exhibit A* (dated May 12, 2015); *see also* R. at 242-43.

At the January 13, 2015 hearing, GTA and NWN presented extensive witness testimony from Bryan Lanier of American Tower Corporation, Blaine Hopkins of GTA, and Michael Deletesky of AMEC with respect to the safety design of the telecommunications tower. (R. 238; *see also* R. 106-212.) This testimony was in addition to the substantial documentary evidence regarding the tower's safety design submitted as part of GTA and NWN's administrative appeal and considered by the Board of Appeals *de novo*. (R. 324-395, 462-463, 476-479, 483-90.) In addition, the Town's independent engineering consultant confirmed the tower was designed in accordance with industry safety standards and the setback standard in Section 7.2(E) of the Wireless Ordinance. (R. 491-92.) Collectively, this evidence established the tower would not harm other property because it would be wholly contained within the property where it is sited, that ice-build up and discharge would not present a public safety hazard, and that the tower structure would not adversely affect public safety – which was not controverted by conflicting evidence in the Record on any of these safety criteria. (R. 239.)

Accordingly, at the hearing's conclusion on January 13, the Board of Appeals rendered its decision by unanimously voting GTA and NWN had satisfied the safety setback standard of the Wireless Ordinance (Section 7.2(E)), and the Board issued its Notice of Decision granting GTA and NWN's administrative appeal and approving their telecommunications tower application. (R. 237-241.)[4]

Plaintiff Jonathan Lawless spoke at the Board of Appeals January 13, 2015 hearing. (R. 172, 176-77.) Plaintiffs Jesse, Ed, and Kathy Lawless did not speak or otherwise attempt to

[4] As noted *supra*, the Planning Board had already issued positive findings stating GTA and NWN met all other standards in the Wireless Ordinance, which were not challenged by any person before the Board of Appeals or by Plaintiffs in this proceeding. (R. 31-34.)

participate in the January 13, 2015 hearing.[5] (R. 70-236.) On February 24, 2015, Plaintiffs commenced this instant Rule 80B appeal. (Compl. p.4.)

STANDARD OF REVIEW

When acting in an appellate capacity pursuant to Rule 80B, the Superior Court reviews the operative decision below for abuses of discretion, errors of law, and findings unsupported by substantial evidence in the record. *See, e.g., Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 4, 757 A.2d 773. The Law Court has set forth a clear test to determine the "operative decision" under judicial review. If a board of appeals conducts a *de novo* review, its decision is the operative decision. Conversely, if the board of appeals conducts a purely appellate review (e.g., deferring to factual findings of a planning board if they are supported by substantial evidence), then the Superior Court reviews the planning board decision as the "operative decision". *Id.* at ¶ 7.

To determine the proper role of a board of appeals, courts examine the statute authorizing the municipality to establish a boards of appeals and a municipality's own ordinances. Under the governing statute, 30-A M.R.S. §2691, boards of appeal perform *de novo* reviews of any decisions under review, unless there is express ordinance language that directs a purely appellate review. 30-A M.R.S. § 2691(3)(D); *see also Stewart v. Town of Sedgwick*, 2000 ME 157, ¶¶ 6-8, 757 A.2d 773.

Here, it is clear the Vienna Board of Appeals conducted a *de novo* review consistent with 30-A M.R.S. § 2691 and the Vienna Town Meeting's express legislative directive to conduct

[5] To have standing, a party must both (1) participate in the administrative hearing below; and (2) have a legally cognizable particularized injury. *See, e.g., Lucarelli v. City of S. Portland*, 1998 ME 239, ¶¶ 3-4, 719 A.2d 534, 535; *see also Nergaard v. Town of Westport Island*, 2009 ME 56, ¶¶ 16-22, 973 A.2d 735, 740. If it is assumed Plaintiffs Jesse, Ed, and Kathy Lawless have a particularized injury, they nevertheless did not participate in the Board of Appeals hearing below and thus lack standing in the instant Rule 80B appeal. To determine whether Plaintiff Jonathan Lawless adequately participated for the purposes of standing, the Court may review the relevant portions of the Board of Appeals hearing transcript. (R. 172, 176-77.)

such a *de novo* review. (R. 17, 24.) The operative decision under appellate review by this Court is therefore the decision of the Vienna Board of Appeals. (R. 237-41.)

ARGUMENT

I. THE BOARD OF APPEALS HAD JURISDICTION OVER GTA AND NWN'S ADMINISTRATIVE APPEAL, CONDUCTED A PROPER *DE NOVO* REVIEW, AND RENDERED THE OPERATIVE DECISION FOR PURPOSES OF JUDICIAL REVIEW.

A. The Wireless Ordinance Expressly Grants Jurisdiction to the Vienna Board of Appeals to Hear Administrative Appeals of Planning Board Decisions.

In their brief, Plaintiffs argue the Vienna Board of Appeals did not have jurisdiction because the Town did not enact a Board of Appeals ordinance until after GTA and NWN filed their administrative appeal. (Pls.' Br. 3-5.) As a consequence, Plaintiffs argue GTA and NWN should have appealed the Planning Board's decision directly to Superior Court and bypass any review by the Vienna Board of Appeals. (*Id.*)

These arguments, however, fail upon a review of the Wireless Ordinance and substantive state law governing jurisdictional and prudential aspects of municipal boards of appeals.

The Wireless Ordinance sets forth a clear grant of jurisdiction to the Vienna Board of Appeals to hear administrative appeals arising out of that ordinance from Planning Board decisions.[6] It specifically states,

> Any person aggrieved by a decision of the Planning Board under this ordinance may appeal the decision to the Board of Appeals. Written notice of an appeal must be filed with the Town of Vienna

[6] Plaintiffs' reliance on the Board of Appeals ordinance as the jurisdictional grant is misplaced, as clearly it is the Wireless Ordinance that establishes the authority of the Board of Appeals to entertain administrative appeals of Planning Board decisions arising out of that ordinance. Equally unavailing is Plaintiffs' reliance on the Town's subdivision regulations, (Pls.' Br. 4-5), since GTA and NWN's telecommunications tower is on a property wholly leased to GTA and NWN and therefore does not involve either a division or subdivision.

> Board of Appeals within thirty (30) days of the decision. The notice of appeal shall clearly state the reasons for the appeal.

Wireless Ordinance, § 10 "Appeals" (R. 10) (emphasis supplied). This jurisdictional grant is express, and is also consistent with the Town of Vienna's home rule authority and statutes governing municipal board of appeals. 30-A M.R.S. § 3001; Me. Const. Art. VII, Pt. 2, § 1; 30-A M.R.S. § 2691(4) (stating "[n]o board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board" – here, the Wireless Ordinance provides such language) (emphasis supplied).[7]

At its core, Plaintiffs' argument is not one of jurisdiction, but instead concerns the judicial doctrine of exhaustion of administrative remedies – a defense to judicial review that can be raised by an aggrieved party. The Law Court's decisions in *Fletcher v. Feeney* and *Cushing v. Smith* demonstrate this point.

In *Fletcher v. Feeney*, which involved circumstances similar to this case, the Law Court remanded a matter back to the municipality with instructions to lawfully constitute a proper board of appeals because the town had failed to do so. *Fletcher v. Feeney*, 400 A.2d 1084, 1090 (Me. 1979). The Law Court rejected approaches taken in other jurisdictions that invalidated ordinances where a municipality failed to establish a board of appeals, and instead concluded the absence of a necessary board of appeals did not invalidate the underlying ordinance but rather gave aggrieved persons standing to institute a mandamus action in court, if necessary. *Id.* at 1088. The Law Court set forth two alternative rationales for this relief: (1) the court's lack of

[7] Plaintiffs' citations to Maine statute and case law that confirm an appeal cannot go directly to Superior Court under Rule 80B unless the ordinance specifically orders otherwise only serve to reinforce the Board's proper determination that it had jurisdiction over this appeal. (Pls.' Br. 3.)

subject matter jurisdiction; and (2) the exhaustion of administrative remedies doctrine, a judicially imposed limitation. *Id.*

In *Cushing v. Smith*, the Law Court modified its holding in *Fletcher v. Feeney* by concluding the correct basis for its remand instructions to remedy the town's failure to lawfully constitute a board of appeals was the exhaustion of administrative remedies doctrine (and not on a jurisdictional basis). *Cushing v. Smith*, 457 A.2d 816, 821 (Me. 1983) ("Therefore, to reconcile our disposition of *Fletcher* with the fact that we took action in that case on appeal, we now conclude that *Fletcher* properly rested on the alternative ground set forth in that opinion that a party must exhaust its administrative remedies before seeking judicial review."); *see also State ex rel. Brennan v. R.D. Realty Corp.*, 349 A.2d 201, 206 (Me. 1975) ("'Exhaustion' emerges as a defense to judicial review of an administrative action not as yet deemed complete.") (quotations in original). Plaintiffs' argument that the Town failed to lawfully constitute a board of appeals is therefore an exhaustion defense.

As a threshold matter, the Court may decline to entertain Plaintiffs' defense because they did not properly preserve it for judicial review. *See, e.g., New England Whitewater Ctr., Inc. v. Dept. of Inland Fisheries and Wildlife*, 550 A.2d 56, 58-62 (Me. 1988); *see* R. 70-236, 238 (demonstrating no participant raised an exhaustion defense before the Vienna Board of Appeals). Moreover, even if Plaintiffs had preserved this issue, the only state law remedy available would be a court order directing the Town of Vienna to lawfully constitute a board of appeals and properly hear GTA and NWN's administrative appeal. The Town, however, has already lawfully established the Vienna Board of Appeals consistent with the Wireless Ordinance, state law, and the exhaustion of administrative remedies doctrine (R. 23, 243), and the Vienna Board of Appeals properly heard and decided GTA and NWN's administrative appeal (R. 237-41). As a

result, Plaintiffs' claims in this respect are moot. *See, e.g.*, *Clark v. Hancock Cnty. Comm'rs*, 2014 ME 33, ¶ 12, 87 A.3d 712, 716; *cf.* M.R. Civ. P. 80B(b) (stating review of governmental action is appropriate when the government fails to act "within six months after the expiration of the time in which action should have reasonably occurred")[8], and *Your Home, Inc. v. City of Portland*, 505 A.2d 488, 489 (Me. 1986) ("An action pursuant to Rule 80B may lie where the extraordinary writ of mandamus was formerly available").

B. The Board of Appeals Statute and Vienna Town Meeting Expressly Direct the Board of Appeals to Conduct a *De Novo* Review, Which Makes that Board's Decision the "Operative Decision" under Judicial Review.

In addition to properly exercising jurisdiction over GTA and NWN's administrative appeal, the Vienna Board of Appeals conducted a proper *de novo* review consistent with state law and the Vienna Town Meeting's express legislative directive.

When GTA and NWN's appeal was filed on May 20, 2014, 30-A M.R.S. § 2691 provided the controlling authority that required the Vienna Board of Appeals to conduct a *de novo* review. *See Wireless Ordinance § 10*, R. 10 (omitting any clear directive to conduct a purely appellate review); *see also Stewart v. Town of Sedgwick*, 2000 ME 157, ¶¶ 6-8, 757 A.2d 773 (directing a *de novo* review in the absence of express ordinance language directing a purely appellate review). Subsequent to filing this administrative appeal, and upon discovering no municipal records existed to support the lawful establishment of a board of appeals, the Vienna Town Meeting adopted a Board of Appeals ordinance with an express legislative directive that any "appeals pending at the time of adoption of this Ordinance shall be heard and decided under

[8] Here, no such failure to act occurred under Maine law, as the Town took the necessary incremental steps to (1) lawfully constitute a board of appeals three months after GTA and NWN filed their administrative appeal (R. 23, 35-55), and (2) hold a hearing and make a decision on GTA and NWN's administrative appeal approximately four months thereafter (R. 237-41).

a *de novo* review standard consistent with the regular administration of appeals under 30-A M.R.S. § 2691." (R. 17.)

Consistent with both the statutory and municipal directive, the Vienna Board of Appeals proceeded to review GTA and NWN's administrative appeal *de novo*, (R. 237-39; *see also* R. 70-236 Transcript of the January 13, 2015 *de novo* hearing),[9] which, pursuant to *Yates v. Southwest Harbor* and *Stewart v. Sedgwick* and their progeny, makes the Vienna Board of Appeals decision the proper "operative" decision under judicial review. *See supra* at 9.

For the reasons detailed below, that decision approving the safety design of GTA and NWN's telecommunications tower pursuant to Section 7.2(E) of the Wireless Ordinance and granting approval of the overall project should be affirmed because it does not contain any abuse of discretion, any errors of law, or any factual findings that are unsupported by substantial evidence in the record.

II. THE BOARD OF APPEALS PROPERLY INTERPRETED AND APPLIED SECTION 7.2(E) OF THE WIRELESS ORDINANCE AND MADE FINDINGS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE.

In their brief, Plaintiffs concede the Board of Appeals may properly approve a reduced setback if certain safety criteria are met pursuant to Section 7.2(E) of the Wireless Ordinance as the Board did in this case, (Pls.' Br. 6, "the Board of Appeals in this matter . . . had complete discretion over whether to grant or deny a waiver of setback standards"), but nonetheless argue the Board of Appeals somehow committed an error of law based on Plaintiffs' assertions that certain arguments were presented stating the Board was required to approve a reduced setback. (Pls.' Br. 5.) This argument, however, is inconsistent with the Record developed before the Board of Appeals, does not comport with well-established rules of ordinance interpretation, and,

[9] As noted *supra* at 7-9, no participant in the Board of Appeals proceeding challenged the Board's *de novo* standard of review to properly preserve this issue for judicial review. *New England Whitewater Ctr., Inc. v. Dept. of Inland Fisheries and Wildlife*, 550 A.2d 56, 58-62 (Me. 1988)

more fundamentally, does not contest that the Board of Appeals actually did anything improper in its decision.

The specific ordinance language at issue states,

> A new or expanded wireless telecommunications facility must comply with the set back requirements for the zoning district in which it is located, or be set back one hundred five percent (105%) of its height from all property lines, whichever is greater. The setback may be reduced by including areas outside the property boundaries if secured by an easement. The following exemptions apply:
>
> a.) The 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;
>
> ii. Ice build-up and discharge will not present a public safety hazard,
>
> iii. Any hazard guy wires or tower structure will not affect public safety.

Wireless Ordinance, § 7.2(E) "Setbacks" (R. 8).[10]

The Record before the Board of Appeals demonstrates GTA and NWN met each and all of the relevant showings necessary to obtain a reduced setback, because their telecommunications tower is designed to be wholly contained within the property where it is located.[11] Specifically, the Record evidence includes extensive documentary evidence provided by experts in the tower designs (R. 324-395, 462-463, 476-479, 483-90), testimonial evidence by GTA and NWN's experts (particularly, engineer Bryan Lanier of American Tower Corporation) (R. 106-212), and the Town's own independent tower design expert, engineer James Hebert of

[10] Section 7.2(E) has three distinct components as set forth in its plain text: (1) a setback of 105% of the tower height from all property lines is generally applied to a new wireless communication tower; (2) that setback "may" be satisfied by including the areas outside the property boundaries if secured by an easement; or (3) an alternate setback or "exemption" applies and the Board "may" reduce the setback upon a showing the safety criteria set forth in (i) through (iii) are satisfied.

[11] Specifically, the record evidence demonstrates that the tower is designed such that, in the unlikely circumstance of a catastrophic event, it will collapse within an 85-foot radius of the tower's base, which is an area wholly contained within the Seaman's property where the tower is located. (R. 239-40, 359-95, 476-77, 479, 490-92.) It does so by incorporating specifically designed truss members in the lattice tower at a height of approximately 110 feet so the upper 80 foot portion of the tower will simply bend over and fold upon the remaining tower base. (*Id.*)

Black Diamond Consultants in Gardiner, provided both testimonial and documentary evidence confirming the adequacy of GTA and NWN's safety tower design in relation to the Wireless Ordinance criteria (R. 208-11; 491-92). No person presented conflicting credible evidence that controverted the evidence offered by GTA and NWN or the Town's independent engineering consultant. (R. 239.)

In interpreting and applying the setback standard above, the Board of Appeals determined the relevance and credibility of the Record evidence supported affirmative findings that (i) GTA and NWN's telecommunications tower is designed to collapse in a manner that will not harm other property, (ii) any ice build-up and discharge from the tower will not present a public safety hazard; and (iii) the tower structure will not adversely affect public safety. (R. 239-40.) Accordingly, the Board of Appeals concluded it had authority to approve a reduced setback based on GTA and NWN's sufficient evidentiary showing, and approved a reduced setback of 85 feet as supported by the Record. (R. 240.)

The Board of Appeals thus made findings supported by substantial evidence and applied the applicable standards precisely as they appear in Section 7.2(E) of the Wireless Ordinance (R. 8). Far from committing error, the Board of Appeals followed a careful and correct review of the evidence, and a careful and correct application of the relevant standards in Section 7.2(E) to that evidence.

Recognizing the soundness in the Board of Appeals' findings and conclusions of law, Plaintiffs do not dispute the Board of Appeals had authority to approve a reduced setback based on safety criteria, but rather assert the Board heard arguments it was required to do so. (Pls.' Br. 5-6.) There are, however, three flaws in this assertion.

First, the Board's own decision does not state this specific legal interpretation was adopted by the Board. (R. 237-41.) Indeed, notwithstanding Plaintiffs' assertion the Board somehow misapplied the word "may" in Section 7.2(E) of the Wireless Ordinance, the Board's deliberations and Decision do not place any particular emphasis on this term. Instead the Board of Appeals reached a decision that the requirements of Section 7.2(E) mandate three safety showings by an applicant seeking to use the exemption or alternative setback, and concluded, in this case, that the Record evidence demonstrated the requisite showings had been made. (*Id.*)

Second, for Plaintiffs' ordinance interpretation argument to succeed, the Court would need to conclude the word "may" in Section 7.2(E) could only mean "cannot" or "may not." Such an interpretation, however, would be contrary to well-established rules of ordinance interpretation.

When interpreting an ordinance, courts look first to the plain language. *See Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 22, 868 A.2d 161 (*citing Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, ¶ 9, 854 A.2d 216, *and Marton v. Town of Ogunquit*, 2000 ME 166, ¶ 6, 759 A.2d 704) (internal citations omitted)). When terms of an ordinance are not defined, they must be given their plain and ordinary meaning – such as those contained in customary dictionary definitions (e.g., Webster's New Collegiate Dictionary). If an ordinance term is ambiguous, the ambiguity must be resolved in favor of the property owner's proposed use because zoning is in derogation of the common law right of every property owner to use his or her property as the owner sees fit. *Rockland Plaza Realty Corp.*, 2001 ME 81, ¶ 12, 772 A.2d 256; *LaPointe v. City of Saco*, 419 A.2d 1013, 1015 (Me. 1980); *see also Forest City, Inc. v. Payson*, 239 A.2d 167, 169 (Me. 1968).

Here, the plain and ordinary meaning of the term "may" in Section 7.2.(E) is the authority to act when certain safety criteria are met. *See Webster's New Collegiate Dictionary* (1977 ed.) (defining "may" as: "**1** *archaic*: have the ability to: CAN **2a** have permission to … : have liberty to, … **5:** "SHALL, MUST—used in law where the sense, purpose or policy requires this interpretation.") (R. 482); *see also Webster's New Collegiate Dictionary* at 767 (11th ed. 2004) (also defining the term "may"). Similarly, Maine statutes provide that "may" indicates "authorization or permission to act." 1 M.R.S. § 71(9-A). Neither of these sources for the customary meaning of the term "may" suggest or require that the term be given a sense of prohibition, but rather connotes "authorization" or "permission" to act.

Moreover, the term "may" is contextual and consistent with the principle of ordinance construction that terms be interpreted in a manner that gives meaning to the overall ordinance scheme. In reviewing Section 7.2(E), the term "may" appears twice. First, when signaling the setback "may" be satisfied if the area outside the property is secured by an easement;[12] and second, when stating an "exemption" applies and the setback "may" be reduced by the Board if evidence shows three safety criteria are met. Again, using the customary meaning of the term "may" to mean "permission or authority to act," these parallel uses of the term "may" evince the Town Meeting's intention to approve telecommunication towers provided they meet certain property or safety criteria. Accordingly, interpreting "may" to mean the Board was prohibited in approving a reduced setback, as Plaintiffs' argument contemplates, is contrary to both the plain language and overall scheme of Section 7.2(E) of the Wireless Ordinance.

Third, even if it is assumed Plaintiffs' contention is correct that the Board heard arguments stating the Board was required to approve a reduced setback based on the Record evidence, that contention does not present any dispute for the Court to resolve. As Plaintiffs'

[12] Indeed, it would be nonsensical to interpret the term may as a signal of prohibition if an easement is secured.

acknowledge, the Board of Appeals had authority to approve a reduced setback, which is exactly what it did.[13]

Accordingly, for each of the above reasons, the Board of Appeals properly interpreted and applied Section 7.2(E) of the Wireless Ordinance, and made findings amply supported by substantial evidence in the Record.

CONCLUSION[14]

As set forth in this brief, there is no basis to overturn the Vienna Board of Appeals' operative decision to approve Parties-in-interest GTA and NWN's telecommunications tower. GTA and NWN therefore respectfully request that the Court deny Plaintiffs Rule 80B appeal in its entirety, and affirm the decision of the Vienna Board of Appeals.

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[13] If the facts and circumstances of this case were hypothetically altered such that the Board of Appeals *denied* a reduced setback notwithstanding substantial record evidence satisfying the Section 7.2(E) safety setback criteria, then GTA and NWN would have claims the Board acted arbitrarily and that Section 7.2(E) is constitutionally void for vagueness. *See Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968) (phrase "subject to the approval of the Board of Zoning Appeal" not appropriately delimited by ordinance standards); *cf. Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987) (terms "intensity of use" and "density of development" deemed to be unconstitutionally vague). Such facts and circumstances, however, do not exist in this case.

[14] In a footnote Plaintiffs' argue the Board of Appeals should have reconsidered its decision. (Pls.' Br. 6.) GTA and NWN note, however, that Mr. Weingarten, the individual requesting reconsideration, was neither a party nor a person who appeared before the Board in either the November or January meetings, and is not a party in this action. *Cf. Laux v. Harrington*, 2012 ME 18, ¶ 24, n. 4. He is also not an abutter or on the Town's list of persons who were required to be sent notice. Plaintiffs themselves did not seek any reconsideration.

Moreover, even if they had, reconsideration is wholly discretionary with the Board and, contrary to Plaintiffs' assertion, the full Board addressed the prior request for reconsideration filed shortly after the Jan 13 public hearing and vote, and acted as a full Board by reviewing and signing the Notice of Decision.

Plaintiffs also announce a facial challenge to the provision of the Board of Appeals Ordinance that grants the Board discretion to entertain post-hearing written submissions within 7 days of the close of the hearing. However, there was no request for the Board to exercise that discretion nor did the circumstances suggest or compel such circumstances.

Dated: May 20, 2015

GLOBAL TOWER ASSETS, LLC and

NORTHEAST WIRELESS NETWORKS, LLC

By their attorneys,

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