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May 21, 2015

Michele Lumbert, Clerk
Kennebec County Superior Court
Capital Judicial Center
One Court Street, Suite 101
Augusta, ME 04330

RE: Jonathan Lawless, et al. v. Town of Vienna
Docket No. AP-15-12

Dear Michele:

Enclosed for filing please find Brief of Defendant, Town of Vienna, in the above referenced matter. A copy of this Brief has been forwarded this date to Lynne Williams, Esquire, attorney for plaintiffs.

Sincerely,

Stephen E.F. Langsdorf

SEFL:ryp
Enclosure
cc: Lynne Williams, Esq.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Doc. No. AP-15-12

JONATHAN LAWLESS, et al.	)	
	)	
Appellants	)	
	)	
v.	)	**APPELLEE'S BRIEF**
	)	
TOWN OF VIENNA	)	
	)	
Appellee,	)	
	)	
GLOBAL TOWER ASSETS, LLC and NORTHEAST WIRELESS NETWORKS, LLC	)	
	)	
Intervenors.	)	

COMES NOW, Appellee, Town of Vienna ("Vienna") by and through its attorneys, Preti Flaherty, and submits this Brief on Appeal pursuant to M.R.Civ.P. 80(B).

STATEMENT OF FACTS

This case involves an application for a cell tower to be located in Vienna, Maine, and constructed by the Intervenors, Global Tower Assets and Northeast Wireless Networks, LLC (the "Intervenors"). Intervenors submitted an application to the Town on September 25, 2013 for the construction of a 190-foot tall cell phone tower pursuant to the Town of Vienna Wireless Telecommunications Siting Ordinance (the "Wireless Ordinance"). (R. 31). The application was pursued before the Planning Board, culminating in a public hearing on April 23, 2014. (R. 34). The Planning Board denied Intervenors' application on one basis – that it could not meet the setback standards under Section 7.2(E) of the Wireless Ordinance. (R. 31-34). The proposed tower was to be located 100 feet from the property line, approximately 90 feet closer than the

required setback equal to 105% of its height pursuant to Section 7.2(E)(1) of the Wireless Ordinance. The Planning Board considered and rejected what it determined to be a discretionary exemption, under Section 7.2(E)(1)(a), to allow a partial waiver of the setback requirement based on the design of the tower. *Id.* The Planning Board found in favor of Intervenors on all other points required under the Ordinance. *Id.*

On May 20, 2014, Intervenors filed a timely appeal to the Board of Appeals. (R. 35-37, 237). After the appeal to the Board of Appeals was received, it was discovered that although the Town had had a functioning Board of Appeals for a number of years, it had been improperly established. Rather than an Ordinance establishing the Board of Appeals and providing for the appointment of its members, the Selectmen had established the Board themselves by order and appointed its members over the years. After consultation with attorneys for the Intervenors, the Town went through the process of establishing the Board of Appeals through the proper channels, *i.e.* adoption at a duly noticed Town meeting. The Town and the Intervenors agreed it would be appropriate to hold the appeal in abeyance until completion of the re-establishment of the Board of Appeals. Neither Appellants nor anyone else objected to that process.

Accordingly, on August 19, 2014, a Special Town Meeting for the Town of Vienna was held and a new Board of Appeals Ordinance (the "Appeals Ordinance") establishing the Vienna Board of Appeals (the "Board of Appeals") was passed. (R. 23-25, 237, 243). Following establishment of the Board of Appeals, it was necessary for the Selectmen to recruit and appoint five members. On October 21, 2014 the Selectmen had recruited the necessary members and they were sworn in. Thomas Carey, an attorney, was selected as Chairman.

On November 24, 2014, a meeting of the Board of Appeals was held and the process was discussed regarding how to handle the appeal. (R. 238). It was agreed on the record that unless

someone participating in the process asserted that any other issues should be heard at the hearing, that the public hearing would be limited to determining whether or not the Intervenors met the setback exemption under the Wireless Ordinance. A site inspection and public hearing were scheduled for January 13, 2015. There was also a discussion about the Board of Appeals hiring a neutral expert to review the application at Intervenors' cost. Black Diamond Consultants, LLC was hired to do that review.

On January 13, 2015 a full public hearing was held at which witnesses for the applicant testified, as well as the independent expert retained by the Board of Appeals. (R. 238). The testimony was limited to the one issue before the Board of Appeals, although it was made clear that other issues could be reviewed. *Id.* Opportunity was available for anyone present to participate by providing information and/or asking questions. *Id.* The Appellants were present at the hearing and answered one or two basic questions about the proceeding, but did not provide any evidence to the Board. (R. 73-75). At the completion of the hearing, the Board of Appeals voted unanimously to reverse the decision of the Planning Board regarding the exemption and granted the permit. (R. 234-35, 239).

Robert Weingartner, the Vienna resident referenced in Appellants' Brief, filed a Request for Reconsideration, but did not participate in any way or attend the public proceedings regarding the granting of the permit. (R. 68-69). His first involvement in the matter was to submit a Request for Reconsideration on January 21, 2015. *Id.*

On February 9, 2015 the Board of Appeals issued a written decision confirming its oral decision on the record of January 13, 2015. (R. 237-41). This Appeal ensued.

LEGAL ARGUMENT

I. The Board of Appeals had Jurisdiction over the Intervenors' Appeal.

The Wireless Ordinance provides that all appeals must be filed with the Board of Appeals within thirty (30) days. *See* Wireless Ordinance, Section 10, at R. 10. There is no time stated as to how quickly the appeal must be resolved.

At the time that the Appeal was filed in May, 2014, it is uncontested that the Town did not have a properly constituted Board of Appeals. Once that was determined by the undersigned Town Attorney, the information was communicated to counsel for the Intervenors. The two options available at that time were for the Intervenors to file an appeal to the Superior Court (despite the Wireless Ordinance specifically directing such appeals to the Board of Appeals) or to give the Town time to properly adopt the Appeals Ordinance and reconstitute the Board of Appeals. The Town and the Intervenors agreed that it made sense for the Town to go through the process of a Town Meeting and the establishment of a new Appeals Ordinance rather than having the matter go immediately to Superior Court. A public proceeding involving the Selectmen and ultimately a Town Meeting occurred. No one, including the Appellants in this case, objected to the process until the recent filing of Appellants' Brief in Superior Court.

As Appellants have conceded, it is not proper for a case to go directly from a Planning Board to Superior Court unless there is an ordinance so stating. Section 10 of the Wireless Ordinance is specific that appeals go to the Board of Appeals. Appellants have cited a completely separate ordinance involving subdivisions in their Brief, which authorizes appeals from that ordinance directly to Superior Court. That subdivision ordinance, however, does not apply to the instant case. At no time did the Town indicate that it did not believe it had

jurisdiction of the matter any longer. Rather, the parties quite sensibly agreed to allow the Town to form a new Board of Appeals to hear the pending appeal.

Applicant has not cited any case law that holds that under these circumstances the Town lost jurisdiction, especially when no one, including the Appellants, objected to the process. The Town and Intervenors quite properly relied on the lack of objection from the Appellants and proceeded through a Town Meeting and the swearing in of new members of the Board of Appeals. The Town retained jurisdiction of the matter at all times and handled the case pursuant to its duly enacted Appeals Ordinance. There is no basis for reversing the findings of the Board of Appeals based on this jurisdictional argument.

II. The Board of Appeals Properly Interpreted the Wireless Ordinance.

At the hearing, the Intervenors put on a detailed presentation of evidence which showed that the tower was designed to collapse on itself without crossing the property line and presented no other safety concerns. This was confirmed by the testimony of the independent expert. No contradicting evidence was presented by anyone.

The Wireless Ordinance provides in pertinent part as follows:

E) Setbacks.

(1) A new or expanded wireless telecommunications facility must comply with the setback requirements for the zoning district in which it is located, or be setback one hundred five percent (105%) of its height from all property lines, whichever is greater. The setback may be satisfied by including the areas outside the property boundaries if secured by an easement. The following exemptions apply:

a) The setback may be reduced by the Planning Board on 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, guywires or tower structure will not adversely affect public safety.

See Wireless Ordinance, Section 7.2(E).

The Appellants have argued that because the word "may" is used in this section (two separate times), where it states "the setback may be reduced by the Planning Board upon a showing by the applicant that . . .", that the Wireless Ordinance allowed an entirely discretionary standardless determination to be made by the Board. The Board of Appeals' conclusion, however, was that based upon the language of the Wireless Ordinance itself and the constitutional provision against discretionary and standardless ordinances (see cases cited below), that the exemption was not discretionary, but rather was mandatory if the standards were satisfied. The Board of Appeals determined that the standards were satisfied.

Even though the Wireless Ordinance uses the word "may" twice in the setback exemption section, it is clear from how it is drafted that "may" means "shall" in this context. The appropriate meaning to be given words such as "may" or "shall" depends not on the form of the words, but the intent of the drafters. *See Hartley v. State*, 249 A.2d 38, 44 (Me. 1969) (construing the word "may" in a statute to mean "shall" so as to carry out the legislative intent of the statute); *Summers v. Dooley*, 481 P.2d 318, 320 (Id. 1971) (concluding that the term "may" was mandatory in the context of a statute, and finding that whether a statute is mandatory or discretionary "does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other").

Any other interpretation would result in an unconstitutional reading of the Wireless Ordinance. The Intervenors in this case presented uncontroverted evidence, which was accepted by the Board, that they met § 7.2(E)(1)(a) of the Wireless Ordinance. The Board did not have the choice to reject the exemption because to do so would mean the Board would have had unfettered discretion, which would be unconstitutional. The Board did what it was legally required to do, *i.e.* interpret the Wireless Ordinance in a way that made it constitutional. *State v. Brown*, 2014 ME 79, ¶ 24, 95 A.3d 82 ("When reviewing the constitutionality of an ordinance, we presume that the ordinance is constitutional and will reasonably construe the ordinance so as to avoid an interpretation that would render it unconstitutional."); *Anderson v. Town of Durham*, 2006 ME 39, ¶ 19, 895 A.2d 944 (noting that when reviewing a statute or ordinance, the Law Court begins "with the basic principle of statutory construction that this Court is bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements"); *State v. Davenport*, 326 A.2d 1, 5-6 (Me. 1974) (noting that "courts must construe legislative enactments so as to avoid a danger of unconstitutionality").

A municipality may not delegate to itself unfettered discretion to issue or not issue permits. *See Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968) ("The view that the legislative authority cannot delegate to itself or to another municipal board unfettered discretion to issue or not issue permits appears to be accepted by the text writers who have been concerned with the subject."). Further, "[w]hen a reasonable interpretation of a statute would satisfy constitutional requirements," the Law Court applies that interpretation. *Driscoll v. Mains*, 2005 ME 52, ¶ 6, 870 A.2d 124, 126. Where the Wireless Ordinance states that it "may be satisfied" and "may be reduced," the context shows that what that means is that as long as the standards are met, the Board of Appeals must grant the exemption.

In any event, even assuming that Appellants' are correct in their interpretation as to the standard for the grant of a waiver under the Wireless Ordinance, Appellants have not produced any evidence demonstrating that the Board of Appeals committed an abuse of discretion in granting the exemption to Intervenors. As a result, even if Appellants' interpretation of the Wireless Ordinance were correct (which the Town denies), any error by the Board of Appeals in interpreting the standard for granting an exemption is harmless.

Accordingly, Appellants' Appeal on the basis of the applicable standard for granting an exemption under the Wireless Ordinance must be denied.

III. The Board of Appeals was not Required to Reconsider the Case.

Section XI, Reconsideration, of the Appeals Ordinance, provides that the Board of Appeals "may" reconsider any decision. In this case the word "may" is truly discretionary. If the Board of Appeals chooses to reconsider any decision it must decide to do so, must notify all interested parties and make any change to its original decision within forty-five (45) days of the vote on the original decision. In this case the Board of Appeals did not choose to reconsider its previous opinion. It noted in its final order that the party seeking reconsideration did not have standing since he did not participate in the process. *See* R. 241. Nothing in the Appeals Ordinance required the Board of Appeals to undergo any reconsideration procedure.

To have standing to appeal a decision of an appeals board under Rule 80B, a party must make a twofold showing: (1) the person must have been a "party" before the board; and (2) the person must demonstrate a particularized injury. *See Harrington v. Inhabitants of Town of Kennebunk*, 459 A.2d 557, 559 (Me. 1983). As to the first prong, a person is a "party" if he or she "participated" in the administrative proceedings. *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 12, 2 A.3d 284. Although the Law Court has construed the term "party"

broadly so as to mean any participant in the proceedings, a person must nonetheless have participated or appeared in the proceedings, whether informally or formally, to qualify as a "party." *See id.* (noting that an appellant need not have formally appeared as a party "as long as it participated throughout the process"); *Wells v. Portland Yacht Club*, 2001 ME 20, ¶ 4, 771 A.2d 371. For example, in *Friends of Lincoln Lake*, the Court found that an association lacked standing to appeal a planning board decision where it could not show that any member of the association had participated in the underlying administrative proceedings. *Friends of Lincoln Lake*, 2010 ME 78, ¶ 13. Although other persons participated in the proceedings, none of them came forward to state that they had participated as a member of, or on behalf of, the association. *Id.* On these facts, the Court found insufficient evidence of participation by the association to support standing. *Id.* Likewise in the instant case, since Mr. Weingarten did not participate or show a particularized injury, he did not have standing to seek reconsideration.

CONCLUSION

For all of the foregoing reasons, Appellants' Appeal must be denied.

DATED at Augusta, Maine this 21st day of May, 2015.

Respectfully submitted,

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