

*Belchertown Planning Board
Minutes of Executive Session
December 14, 2015*



Planning Board members: Daniel Beaudette, Michael Hofler, Donna Lusignan, Christopher Lorenzo, Sierra Pelletier (alternate)

Staff: Douglas Albertson, Town Planner, Gary Brougham, Town Administrator
Katie Laughman, Counsel, Kopelman and Paige by telephone

Christopher Lorenzo, Chair of the Planning Board, called the meeting to order at 6:30 pm.

The purpose of the meeting was to hold an executive session with town counsel about pending litigation on the planning board's failure to grant a special permit requested by BellAtlantic of Massachusetts, LLC, dba Verizon Wireless ("Verizon").

Laurenzo cited Mass. General Law Chapter 30A §21(a)3 governing executive sessions and declared that discussing this matter in open meeting would have a detrimental effect on the town's position.

Motion M. Hofler to enter executive session, Second D. Lusignan. Roll call vote: Beaudette: yes; Lusignan: yes; Hofler: yes; Laurenzo: yes.

Attorney Laughman explained the complaint. Verizon filed their appeal in September in federal court. Kopelman and Paige (K&P) has answered on behalf of the planning board. The court sets the schedule for briefing and discovery. This case differs from most appeals in that it is a complaint within federal law, the Telecommunications Act of 1996 (TCA). That is, under a special permit the town can act on local zoning laws. If the town decides a telecommunications facility does not meet the zoning bylaw, the TCA is triggered to determine if the denial is an effective prohibition of telecommunication service. The federal court will ask first, does the applicant have a gap in service, and then second, does the applicant have a viable alternative location to fill the gap? In reviewing the town's position, the court will determine if the town's position is substantiated by evidence in the record.

K&P's most significant concern is that the decision does not go beyond the first – in that it addresses zoning, but not the TCA. Courts have overwhelmingly favored applicants in these decisions. The only time the applicant is not favored is when the applicant clearly did not consider alternative sites. Municipalities usually try to settle as case law overwhelmingly favors applicants. This is usually a declaration of judgement to negotiate a settlement. Generally these do not get remanded to the planning board to find additional facts as they are based on the evidence presented up to the point of the decision.

Radio frequency propagation maps are proprietary to the applicant so it is not possible to have the town's expert review them.

The options of the board are:

- The board could do nothing, and then the project proceeds with no negotiation.
- There could be a declaration of judgement to allow for some settlement negotiations. Laughman said that the applicant's attorney represents that Verizon is open to some negotiations.
- Because this is under the TCA, the judge could remand the case without judgement.
- The board could defend the decision. If this is chosen, discovery could begin in March.

Laughman emphasized that Verizon stands to prevail, so they are unlikely to agree to another site. The pre-emption portion of the TCA addresses variances and the planning board could make a determination for any needed zoning variance under the TCA.

A board member asked if the denial of telecommunication service applied overall, or if it applied only to Verizon regardless of the strength of other companies' signals. Laughman answered that it does not matter what competitors do; the court will look only at Verizon's coverage gap. As we did not commission our own radio frequency testing we are unlikely to prevail under the TCA.

Hofler asked what K&P's opinion is if we choose to not defend. Laughman responded that Verizon might offer concessions in a settlement, such as further screening, post-construction radio frequency measurements with a commitment to not exceed the legal amount and to report annually to the town, which might address some of the neighborhood concerns, and any of the terms the planning board might have wanted normally. If we defend and lose, we get nothing. The planning board could make a list of things they would normally want in a special permit.

Beaudette is interested in in what constitutes the written record – is it more than the decision? Laughman said everything that was part of the hearing, i.e. video, submittals, minutes and the decision. Beaudette asserts that Verizon had already determined what they want when they arrived and did not adequately respond to the planning board's question of what alternative sites they considered. Laughman stated that the planning board would have to rigorously defend that there are alternatives and would have to provide our own radio frequency analysis. Lusignan said Verizon stated that they had considered two alternatives and determined them as undesirable, partly because of not meeting our zoning bylaw's two-mile separation standard.

Beaudette wonders if we risk paying Verizon's legal fees. Laughman has never encountered that situation. The town is not subject to damages in denying an application. Beaudette wondered what the cost of an active defense could be. Laughman was reluctant to speculate, but it could be six months of K&P work, hiring experts for testimony, and more. She thinks the court would not allow this to go to trial. Brougham speculates it might cost at least \$70,000 based on experience. Laughman added that it would be expensive with very unlikely chance of success.

Laughman said that Verizon is amenable to any reasonable screening the board would want and to the annual radio frequency testing, which is something the board could not require, if we chose a settlement.

There are four scenarios:

1. Default judgement – the board takes no action and gets no concession, but is least expensive;
2. Agreement for judgement (negotiated settlement), which costs a little of counsel's time, but Verizon provides the concessions stated above;
3. Remand to the planning board to open the process to the public, which is more expensive because of taking more time, costs for new hearing notice, and additional legal time but with the same outcome as 2;
4. Active defense, which is most expensive and would probably result in a loss with no concessions.

Verizon would have to agree to 2 and 3.

Laurenzo asked if the neighbors could appeal a reversal of the planning board's denial. Laughman said they could request to intervene within an appeal period, but could not take over the defense. Laurenzo asked what the timing is for the board to decide their course. It would be good to fill in Natle, the board member who is absent, and to let the board members consider everything before they decide. Laughman said that January 15 is when she has to act. March 30 is the end of the discovery period. In the beginning of February, we need to be in a settlement position or we start spending money preparing for a defense. Next week's planning board meeting will be fine for the board to vote on an action. The board decided to hold an executive session at next week's regular planning board meeting. Laughman left at 7:34pm.

Hofler does not like a default judgement as it would not get anything more out of Verizon. Beaudette likes the default judgement because he does not want to negotiate with Verizon, especially in a way that is not open, nor give them anything, and so default would be the least cost solution. Pelletier thinks that a negotiated settlement would be better as we could answer to the neighbors that we are trying to get what we can for them.

Motion M. Hofler to adjourn the executive session, Second D. Beaudette. **Roll call vote:** Beaudette: yes; Lusignan: yes; Hofler: yes; Laurenzo: yes.

Motion D. Beaudette to adjourn the meeting, **Second D.** Lusignan, **Vote 4-0**

Chris Laurenzo Christopher Laurenzo *CLJ 3/8/16*

Donna Lusignan Donna Lusignan *DJM 3/8/16*

D. Beaudette Daniel Beaudette *DBB 3-8-2016*

Michael Hofler Michael Hofler *mH 3-8-16*