UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

INDUSTRIAL COMMUNICATIONS AND ELECTRONICS, INC.,	)	
PLAINTIFF	)	
v.	)	**CIVIL NOS. 98-397-P-H AND 99-96-P-H**
TOWN OF FALMOUTH, ET AL.,	)	
DEFENDANTS	)	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

These two lawsuits arise out of the Falmouth Zoning Board's denials of conditional use permits and variances to Industrial Communications and Electronics, Inc. ("ICE") for a transmission tower. ICE claims that Falmouth has violated the Telecommunications Act of 1996 (the "Act"), 47 U.S.C.A. § 332(c)(7)(B) (1999), by failing to base its decisions upon substantial evidence contained in a written record; prohibiting or effectively prohibiting personal wireless service facilities in Falmouth; and unreasonably discriminating among providers of functionally equivalent services. The Falmouth defendants' motions for summary judgment on all Counts of the two Complaints are **GRANTED** and ICE's motion for summary judgment on the substantial evidence claim is **DENIED**.

I. UNDISPUTED FACTUAL BACKGROUND

A. ICE's Plan to Provide Specialized Mobile Radio Services to Portland

Since 1990, Falmouth has had a special section of its zoning ordinance devoted to transmission towers.[1] Under Falmouth's ordinance, transmission towers are permitted as a conditional use in the Farm and Forest District as long as the tower base sits at least 400' above sea level. Town of Falmouth's Zoning and Site Plan Review Ordinance ("ordinance") §§ 3.2, 5.33(a) (1990).

On September 15, 1997, ICE purchased from Richard Berry approximately 2.35 acres of land (the "site") located off Hardy Road in the Farm and Forest District. At the time, there were two equipment shelters and four communications towers—two guyed towers of approximately 110 feet (the "110' towers"), one tower of fifty feet (the "50' tower"), and one tower of 170 feet (the "170' tower")—on the site. There are four other towers on adjacent lots. All of the towers in the area were constructed before the tower portion of the ordinance was adopted in 1990. From the date of the purchase, ICE broadcast a community repeater service[2] and maintained collocated[3] antennas for a paging service on the 170' Tower. ICE chose the site for various reasons, including its pre-existing use as a communications tower facility, its coverage patterns, and its availability.

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[1] See Appendix A for the entire section.

[2] "Community repeater" is "a commercial radio system that uses a single pair of frequencies for multiple users." Watson Dep. at 36.

[3] "Collocation" or "co-location" occurs when companies agree to place their antennas on the same tower.

In October and December 1997, the Federal Communication Commission ("FCC") licensed ICE to provide specialized mobile radio services ("SMRS")[4] at a number of channels on the 900 MHz frequency band in the Boston Major Trading Area ("MTA"), which includes the State of Maine. According to FCC regulations, ICE must operate a sufficient number of base stations to provide coverage to at least one-third of the population of the Boston MTA within three years, and at least two-thirds of the Boston MTA population in five years, or else it will forfeit a significant portion of its license. See 47 C.F.R. § 90.665(c) & (d) (2000).

Before purchasing the site, ICE did not prepare a written analysis concerning the size, height, and strength of the existing towers or the demographics of the greater Portland market, or the existing competition. It did not perform a structural analysis of the towers, although it did perform a visual inspection. When ICE purchased the Hardy Road site, it also purchased Berry's equipment and FCC license to provide SMRS in the 800 MHz frequency band which, at that time, was being broadcast from a tower Berry owned at 351 Blackstrap Road. ICE planned to move the 800 MHz operation to its Hardy Road site. Fenton Dep. at 14.[5] At or about the time ICE purchased the Hardy Road site, ICE's President, David Fenton, Jr., knew that ICE would need a new tower because the existing towers

[4] Unlike personal communications services or cellular services, a SMRS system serves one geographic area from one tower and does not pass off customers from one tower to another as customers travel.

[5] Although the record is unclear on whether ICE followed through with its plan, it seems that the 800 MHz system remained at the Blackstrap tower until after the January 1998 ice storm.

would not support the number of antennas needed to add the 900 MHz system to an 800 MHz system. Fenton Dep. at 23-24, 27-28.

In January 1998, a severe ice storm struck the area and damaged the 170' tower, toppling approximately one-third of the tower. After the storm, ICE mounted its paging service antennas and community repeater antennas on one of the undamaged towers. In February or March 1998, ICE attached four antennas to the damaged tower for 900 MHz SMRS. While these antennas emit a maintenance signal strong enough to "protect" ICE's FCC 900 MHz licenses, they are not strong enough for commercial use. During the spring of 1998, ICE sold to Nextel, as part of a nationwide deal, its right to use the 800 MHz frequency, the 800 MHz frequency equipment at the Blackstrap tower location, and its customer list for 800 MHz SMRS. After the ice storm and at Nextel's request, ICE attached two antennas to the damaged tower in order to preserve Nextel's 800 MHz licenses. While these antennas did not operate commercially, they could be made commercially operable.

B. The First Application

On May 15, 1998, ICE applied to the Falmouth Zoning Board for permission to remove all four towers and replace them with one 200' tower that would use some of the supports (guy wire anchors and base) of one of the existing towers. ICE requested a conditional use permit, relying upon a safety provision (§ 5.33(g)) of the zoning ordinance. ICE later amended its application to request a variance

for undue hardship if the Board decided to deny the conditional use permit.[6] The Board denied both requests and issued written findings of fact and reasons for its decision. In essence, the Board decided that the safety provision did not permit the new tower because (1) the safety provision permits necessary "structural alterations," whereas the proposed structure was not an "alteration" but a new tower; (2) there was no evidence that the existing towers were not in compliance with safety regulations; and (3) the new tower would violate the setback requirement (§ 5.33(b))[7] unless a variance were granted. The Board concluded that a variance should not be granted because ICE failed to prove three of the necessary elements of a variance—that it could not make a reasonable return on its property, that its need for a variance was due to the unique nature of the property, and that ICE did not create its own hardship.

C. The Second Application

ICE submitted a second application for a conditional use permit on January 4, 1999. This time ICE proposed to tear down the four towers and rebuild the 170' tower, claiming a permissible expansion of a grandfathered non-conforming use under section 6.2(c)[8] and alternatively requesting a variance. However, ICE planned to build the 170' tower not where it currently existed, but

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[6] A conditional use permit may be granted after an applicant demonstrates that the proposed use will meet the specific requirements for such a use under the ordinance, will be compatible with the general character of the neighborhood, will not have a significant detrimental effect on adjoining property, will not result in significant hazards to traffic, will not result in significant fire danger or flood damage and will not overburden existing public services and facilities. See Ordinance § 8.3 (1990).

[7] See Appendix A.

[8] See Appendix A.

"approximately" on the site of one of the 110' towers. The Board rejected ICE's proposal, concluding that (1) the proposed 170' tower was a new tower, not an alteration; (2) ICE still did not demonstrate that the existing towers were not safety compliant; (3) the 170' tower was not a permitted expansion of a grandfathered use; and (4) ICE failed the same variance requirements as in its earlier application.

II. DISCUSSION

The Telecommunications Act of 1996 (the "Act"), 47 U.S.C.A. §§ 151 et seq. (1996), was designed to "encourage the rapid deployment of new telecommunications technology." Reno v. American Civil Liberties Union, 521 U.S 844, 857 (1997). The specific provision involved in this case, 47 U.S.C.A. § 332(c)(7), "is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." Town of Amherst v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 13 (1999).

A. Count III: Were the Zoning Board Decisions Based Upon Substantial Evidence?

The Act requires that any decision denying "a request to place, construct or modify personal wireless service facilities shall be in writing[9] and supported by substantial evidence contained in a written record." 47 U.S.C.A. § 332(c)(7)(B)(iii) (1999). The parties do not dispute what was in the written record before the Board. They do dispute the significance of various parts of the record and the

[9] In Count III of the Complaint (Civil No. 99-96-P-H), ICE alleges that the Board failed to issue a written decision as required under the Act. However, that Complaint was filed only two days after the Board's decision. ICE later received the Board's written findings and conclusions and no longer asserts that the Board failed the "written" decision requirement.

permissibility of the Board's interpretation of the relevant ordinance provisions. This seems to be a purely state law issue that belongs in state courts. Nevertheless, Congress has directed that federal courts become involved. 47 U.S.C.A. § 332(c)(7)(B)(v) (1999).

According to the First Circuit, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Penobscot Air Servs., Ltd. v. Federal Aviation Admin., 164 F.3d 713, 718 (1st Cir. 1999), cited in Amherst, 173 F.3d at 16. While the reviewing court must take into account contradictory evidence in the record, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Penobscot, 164 F.3d at 718. The "substantial evidence" test "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that could satisfy a reasonable factfinder." Id.

(1) Was Either Proposal a "Structural Alteration" Entitled to a Conditional Use Permit Under Section 5.33(g)?

Falmouth's zoning ordinance provides that "*structural alterations* that may be necessary to increase the loading capacity or to bring a tower into compliance shall require conditional use approval of the Board." § 5.33(g) (emphasis added).[10] The Board ruled that ICE's proposals were not "structural alterations" permitted

[10] I do not resolve whether the Board incorrectly decided that ICE's proposals did not increase loading capacity or improve safety because I find that there is substantial evidence to support the Board's conclusions that ICE's proposals were not "structural alterations" under the ordinance.

under section 5.33(g), but rather proposals to replace an existing tower with a new tower. See Decision (I) at 3 ¶ 16; 5. (Pl.'s Ex. M); Decision (II) at 6 (Pl.'s Ex. AA).

The parties' primary disagreement in evaluating the two proposals concerns the meaning of "structural alterations" in section 5.33(g).[11] The Board says that ICE each time proposed a new tower, whereas ICE maintains that its proposals were only structural alterations.[12] The Act mandates that a reviewing court conduct a 'substantial evidence' review of the zoning board's decision, but it is silent on how much deference that court should give to the zoning board's interpretation of a zoning ordinance.[13] In Maine, the construction of a zoning ordinance is a question

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[11] ICE also argued that a grandfathering provision of the original ordinance exempted all its towers. The provision in question, however, section 5 of the 1990 Transmission Tower Amendments, specifies that section 5.33 applies "to all transmission towers for which a building permit has not been issued as of the date of the enactment; except that Section 5.33(g) shall apply to all transmission towers in the Town of Falmouth existing on or after the date of enactment." Agenda, Falmouth Town Council Regular Meeting Apr. 23, 1990 at 128 (Pl.'s Ex. A). Since these towers are subject to section 5.33(g) and since I conclude that substantial evidence supports the Board's decision that ICE's proposals are not "structural alterations" permitted by section 5.33(g), section 5 does not assist ICE on this issue.

The Board also argues that section 5 is merely a rule of construction rather than a substantive provision of the ordinance. See Defs.' Opp'n to Pl.'s Summ. J. Mot. at 7. The history of the ordinance indicates that the Board is correct. Prior to 1990, Falmouth had a moratorium on new tower construction pending the establishment of a new ordinance to address citizens' concerns. See Agenda, Falmouth Town Council Regular Meeting Nov. 21, 1989 at 291 (Defs.' Opp'n Mem. at Attach. A). During the public hearing on the ordinance amendment, the Town Attorney explained that section 5 was designed to clarify that the provisions of the new ordinance applied to those towers waiting for a building permit during the moratorium. See Minutes of Public Hearing on Apr. 9, 1990 at 101 (Defs.' Opp'n Mem. at Attach. A). Without this provision, Maine's grandfathering statute, 1 M.R.S.A. § 302, would have applied, and any tower permit applications pending would not have been required to comply with the new ordinance amendment. See 1 M.R.S.A. § 302 (1999).

[12] ICE seems to recognize now that the original proposal in the first application was in fact a new tower. Pl.'s Reply at 2.

[13] Traditionally, municipal zoning decisions have been afforded substantial (continued...)

of law for the court. See Your Home, Inc. v. City of Portland, 483 A.2d 735, 738 (Me. 1984).

The ordinance defines an "alteration" as a "change, addition, or modification, requiring construction, including any change in the location of structural members of buildings such as bearing walls, columns, beams, or girders, but not including cosmetic or decorative changes." Ordinance § 2.8. The terms "change," "addition" and "modification" are not further defined. Under Maine law, undefined terms must be given their common and generally accepted meaning unless the context requires otherwise. See, e.g., Camplin v. Town of York, 471 A.2d 1035, 1038 (Me. 1984). The ordinary meanings of "addition" and "modification" imply an alteration to, not an outright replacement of, an existing structure. The word "change," on the other hand, can be broader and can mean outright replacement, as in "change of clothes." But here we are talking about change as a subset of "structural alteration." In ordinary usage a "structural alteration" does not mean outright replacement of the structure. In fact, the reference to "change" in the definition section of the ordinance I have quoted refers to "change in the location of

[13] (...continued)
deference by the federal courts due to federalism concerns. See Primeco Personal Communications v. Village of Fox Lake, 26 F. Supp.2d 1052, 1062-63 (N.D. Ill. 1998) (collecting cases). These concerns are compounded when a federal court must interpret substantive provisions of state law. Indeed, the First Circuit has commented, on a different provision of the Act, that it "would be 'surpassing strange' to preserve state authority in this fashion and then to put federal courts in the position of overruling a state agency on a pure issue of state law." Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of Puerto Rico, 189 F.3d 1, 15 (1st Cir. 1999).

structural members of buildings such as bearing walls, columns, beams, or girders. . . ."[14]

With this background concerning the ordinance, I turn to ICE's specific proposals. In its first proposal to the Board, ICE proposed to tear down all four existing towers and replace them with a single 200-foot tower constructed of newly-manufactured structural components. However, this tower would use one of the original foundations, its existing anchors and "perhaps" some of its guy wires. Pl.'s Mot. for Summ. J. at 9. According to ICE, that makes it a "structural alteration" rather than a new tower.

In its second application, ICE proposed to build a 170' replacement for the damaged 170' tower. Although ICE had been granted a permit to repair the damaged 170' structure,[15] ICE proposed instead to build a replacement tower in a different location. ICE's application stated that the tower would be moved to the center of the site for better anchorage. See Letter from David Littell, Esq. to

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[14] Moreover, to read section 5.33(g)'s conditional use permitting of "structural alterations" for safety purposes to allow a wholesale replacement is contrary to the philosophy of grandfathered nonconforming uses as expressed by the Maine Law Court. According to the Law Court, the "spirit of the zoning ordinances and regulations is to restrict rather than to increase any nonconforming uses, and to secure their gradual elimination . . . [t]he policy of zoning is to abolish nonconforming uses as speedily as justice will permit." Gagne v. Inhabitants of the City of Lewiston, 281 A.2d 579, 581 (Me. 1971) (quoting Inhabitants of the Town of Windham v. Sprague, 219 A.2d 548, 552-53 (Me. 1966)). See, e.g., Ordinance § 6.3 ("Once converted to a conforming structure, use, or lot, no structure, use, or lot shall revert to a nonconforming status"); Ordinance § 6.5 (nonconforming structure destroyed by fire or other causes to the extent of 65% or replacement cost may not be rebuilt or repaired except in conformance with ordinance or with a variance).

[15] On January 7, 1999, ICE requested a building permit to repair the 170' tower. This request was granted by Code Enforcement Officer Griesbach. ICE has not yet repaired the 170' tower.

Falmouth Zoning Board of Appeals of Jan. 4, 1999 at 1 (Pl.'s Ex. O); Transcript of Jan. 26, 1999 Board Meeting at 4 (testimony of David Littell, counsel for ICE) (Pl.'s Ex. LL); Letter from David Littell, Esq. to Michael Pearce, Esq. of Mar. 2, 1999 at 4 (Pl.'s Ex. V); Sketch Plan, Proposed Tower Location I.C.&E. Towers (Feb. 24, 1999) (Pl.'s Ex. V, tab 19); Mar. 23, 1999 Tr. at 35 (Pl.'s Ex. MM) (testimony of Don Cody, Director of Operations for ICE). The proposed 170' tower was also substantially wider than the original (60" vs. 18"). See Defs.' Statement of Facts ¶¶ 11, 35; Pl.'s Opposing Facts ¶¶ 11, 35. ICE's Director of Operations Don Cody testified that industry practice dictated that to repair a tower structurally, a builder must replace the tower rather than alter it piecemeal. See January 26, 1999 Tr. at 25-26, 30 (Pl.'s Ex. LL).

It requires no extended discussion to conclude that, under common and generally accepted meanings, substantial evidence supports the Board's decision that the proposed 200' and 170' replacements were new towers, not "structural alterations."[16]

(2) Expansion of a Nonconforming Structure (Ordinance § 6.2(c))

Section 6.2(c) of the Falmouth ordinance permits extension or expansion of a nonconforming structure "provided that the extension or enlargement is not located between the lot lines and the required setback lines, and does not compound nor create a lot coverage or height violation." ICE argues that the Board

[16] In support of its summary judgment motion, ICE has not argued that its proposals were a structural alteration of one of the other towers (it proposed to use the guy wires and perhaps the foundation of a different tower) required to bring the non-damaged tower into compliance with the applicable safety standards. See Pl.'s Summ. J. Mem. at 11-12. I have therefore considered ICE's arguments solely regarding the replacement of the damaged tower.

should have granted its second application under this section, and that the Board's decision denying it permission to proceed under this provision was inconsistent with its decision in the first application, demonstrating that the Board lacked substantial evidence for its decisions.

The Board found that the proposed 170' tower was not an expansion as contemplated under section 6.2(c) for two reasons: first, it would be in an entirely new location and, second, it would involve tearing down the existing tower, not expanding it. See Decision (II) at 7-8 (Pl.'s Ex. AA). Section 6.2, it reasoned, was intended to grandfather nonconforming structures and to provide for limited enhancement of them. But once the tower was torn down, the grandfathered status would be lost. Id. at 8. The Board cited Ordinance § 6.3, which provides "[o]nce converted to a conforming structure, use or lot, no structure, use or lot shall revert to a nonconforming status."

I have already ruled that substantial evidence supports the Board's finding that the second application proposed a new replacement tower to be placed in a different location. Therefore, the Board was justified in refusing to apply section 6.2(c). ICE complains that the Board was inconsistent because in its decision on the first application—which did not raise a section 6.2(c) issue—it said that the 200' tower would be "an expansion of the non-conforming use" that would require ICE to meet variance standards. Using that language to explain why a variance is needed does not prevent the Board from concluding that the proposed tower is not

the sort of extension or enlargement contemplated by section 6.2(c). Substantial evidence supports the Board's decision.[17]

(3) Did ICE Qualify for a Variance (Ordinance § 8.4) on Either Proposal?

In both applications, ICE sought a variance if its application for a conditional use permit were denied. To obtain a variance, an applicant must prove "undue hardship." Ordinance § 8.4 (1990). "Undue hardship" requires an applicant to satisfy a four-part test under section 8.4: the applicant must prove that (1) the land cannot yield a reasonable return without a variance; (2) the need for a variance is due to the unique nature of the property and not to general conditions of the neighborhood; (3) the granting of the variance will not alter the essential character of the locality; *and* (4) the hardship is not the result of an action taken by the applicant or prior owner. Id.[18] ICE fails to meet both (1) and (4).[19]

(a) Reasonable Return

Under Maine law, "reasonable return" is not maximum return: to prove that land will not yield a reasonable return, an applicant must prove that strict compliance with the ordinance "would result in the practical loss of substantial beneficial use of the land." Goldstein v. City of South Portland, 728 A.2d 164, 165 (Me. 1999).

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[17] I note that under section 6.2(c) site plan review by the Planning Board is also required. The record does not disclose whether such a review was obtained.

[18] Falmouth's variance requirements are practically identical to those under Maine's Zoning Adjustment statute. See 30-A M.R.S.A. § 4353(4) (West Supp. 1999).

[19] Because I conclude that substantial evidence supported the Board's decision that ICE did not satisfy either the reasonable return or hardship provisions of the variance requirements, I do not address the third factor the Board relied upon, namely the failure to meet the unique circumstances requirement.

The Board found that ICE did not submit sufficient evidence to show that it could not get a reasonable return from the site if the tower were repaired rather than replaced. The Board concluded that ICE had operated equipment from the site since 1997 and that there was no evidence that, if the tower were repaired, ICE could not operate just as profitably as it had before the storm. See Decision (I) at 8 (Pl.'s Ex M); Decision (II) at 10 (Pl.'s Ex. AA). The Board also found that ICE had submitted no evidence that the site's value would be so much lower than its purchase price as to constitute "the practical loss of substantial beneficial use of the land." Decision (II) at 10 (Pl.'s Ex. AA).

Testimony during the public hearings provides substantial evidence for the Board's decisions. Cody testified that the 170' tower was functional before the storm. June 23, 1998 Tr. at 8 (Pl.'s Ex. JJ). Cody also stated that ICE was able to rent space on its towers to other providers. Id. at 5. During the hearing regarding ICE's first application for a 200' tower, ICE did not provide testimony or evidence that a 170' tower could not meet its licensing needs. See Sept. 22, 1998 Tr. at 7, 22 (Pl.'s Ex. KK); June 23, 1998 Tr. at 10 (Pl.'s Ex. JJ) (acknowledging that the 170' proposed tower does "a little less").

When ICE first purchased the Hardy Road site, it had been operating an 800 MHz system and obtaining good coverage at other sites and had planned to use an 800 MHz system on the Hardy Road tower. Jan. 26, 1999 Tr. at 3-4, 29 (Pl.'s Ex. LL). The 800 MHz system is much more tolerant of combining channels than a 900 MHz system, thus "using a minimum amount of antennas for a maximum amount of loading." Mar. 23, 1998 Tr. at 34 (Pl.'s Ex. MM). ICE, however, knew at the time

it purchased the Hardy Road site that this tower would probably not meet its needs in the future and would need to be upgraded. Jan. 26, 1999 Tr. at 29. ICE nevertheless then made a business decision to switch to a 900 MHz system, see Mar. 23, 1999 Tr. at 34, and subsequently sold the 800 MHz system to Nextel, see Jan. 26, 1999 Tr. at 29. The Board could find that the evidence ICE did submit on the subject of return was focused on its ability to run the 900 MHz system, not the more general question of a reasonable return on the land. See, e.g., Jan. 26, 1999 Tr. at 2 ("the system we're trying to build requires a loading of antennas and cabling that exceeds what this tower is capable of or will safely handle"), 25 ("We attempted to . . . get a tower slightly smaller than what we're proposing tonight in order to meet our needs").

While Cody testified that the physical location of the 170' tower prevented ICE from rebuilding on its foundation, Sept. 22, 1998 Tr. at 11 (Pl.'s Ex. KK), ICE did not provide specifications that discussed other possible business plans given that limitation. Neither did ICE submit any analysis of whether the existing towers could be "beefed up" to support the new system. Mar. 23, 1999 Tr. at 21. Justin Strout, a neighboring tower owner, testified that ICE never approached him about the possibility of co-location. Id. at 33. ICE also did not submit any concrete evidence regarding the price it could obtain for selling the property in its current or repaired condition.[20]

[20] Cody testified that he could not sell the site because of the conditions of the towers and the fact that the site was not suitable for other uses, Sept. 22, 1998 Tr. at 18, 23-24 (Pl.'s Ex. KK), but ICE did not submit a real estate appraisal regarding the site's market value. Once the repair permit was granted, ICE had the option of repairing and re-
(continued...)

ICE wants to define "reasonable return" from its perspective, relying upon its business choice to move to the 900 MHz system and upon the premise that the ordinance should encourage technological advances. But in assessing "reasonable return," I do not conduct a *de novo* review. Instead, I determine whether there is substantial evidence supporting the Board's decision. Further, I look to Maine law for guidance, and the Law Court has already rejected an argument similar to the one advanced by ICE. See, e.g., Brooks v. Cumberland Farms, Inc., 703 A.2d 844, 848-49 (Me. 1997) (holding that even though an applicant's business was operating at a loss and its building would require a significant capital infusion to make it habitable, it had not met the "reasonable return" prong). Although not every reason the Board offered in rejecting the "lack of reasonable return" requirement is supported by substantial evidence, there is substantial evidence that ICE failed to show that it could not continue to offer other service (for example, 800 MHz service) if it repaired its tower. Therefore, substantial evidence exists to support the Board's decision that ICE did not meet its burden of proof on the "lack of reasonable return" requirement.

(b) Self-Created Hardship

The Board found that even though the ice storm may not have been predictable, ICE had created its own hardship by purchasing the property while the ordinance was in effect, thereby having "presumptive knowledge" of the ordinance.

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[20] (...continued)
establishing the pre-existing services. The Board was entitled to disbelieve Cody's testimony, so long as substantial evidence exists in the record to support that disbelief. See Group EMF, Inc. v. Coweta County, 50 F. Supp.2d 1338, 1348 (N.D. Ga. 1999).

See Decision (I) at 9-10 (Pl.'s Ex. M). The Board also recognized that knowledge of the zoning restrictions at the time the property is acquired "is only one factor to be considered in the self-created hardship analysis" under Maine variance law. Rocheleau v. Town of Greene, 708 A.2d 660, 662 & n. 1 (Me. 1998). Here, however, ICE made a business decision to acquire the existing towers and then made a further choice to alter the communications service it wanted to provide while decreasing the number of towers on the site. The core of ICE's presentation to the Board was that the existing towers, even at their height before the ice storm, structurally could not handle ICE's *new* SMRS communications need. See, e.g., Sept. 22, 1998 Tr. at 3. During the second application hearing process, Cody admitted that when ICE purchased the property it suspected that the existing towers would not meet its needs in the future. See Jan. 26, 1999 Tr. at 29-30. Nevertheless, it went ahead. Thus, substantial evidence supports the Board's conclusion that the hardship was self-created.

Substantial evidence supports the Board's decision to deny ICE's applications for both a conditional use permit and a variance. Summary judgment is **GRANTED** for the defendants on Count III of both Complaints.

B. Count II: Has Falmouth Effectively Prohibited Personal Wireless Services?

ICE claims that Falmouth has prevented the modernization of existing communication facilities and therefore prohibited or had the effect of prohibiting personal wireless service. Compl. ¶¶ 77-79; Am. Comp. ¶¶ 70-72. Under the Act, the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services ["PWS"]." 47 U.S.C.A. § 332(c)(7)(B)(i)(II) (1999). Since the Falmouth defendants have moved for summary judgment on this count, I review the evidence in a light most favorable to ICE.

A service provider does not have to point to a general ban against communications towers in order to succeed under this portion of the Act. Town of Amherst v. Omnipoint Communications, Inc., 173 F.3d 9, 14 (1st Cir. 1999). But a provider must meet a "heavy" burden: it must show "from language or circumstance not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Id.

ICE claims that the Board's application of the ordinance effectively prohibits personal wireless service. First, it argues, unless section 6.2(c) is interpreted to permit "expansions" that violate the fall zone setback requirement, tower owners will not be able to reconstruct obsolete towers to comply with new safety technology. See Pl.'s Opp'n Mem. at 19 n.16; Comp. ¶ 77.[21] The defendants concede that 14 of the 15 towers in Falmouth currently do not meet the fall zone setback requirement. See Defs.' Mot. for Summ. J. at 7. Thus, ICE argues, if the owner of one of these towers wants to replace a tower, he or she "would necessarily be limited to (i) replacing the tower with one of the identical design or

[21] ICE argued before the Board that "required setback lines" referenced in section 6.2(c) meant the minimum setbacks for the zoning district. The Board disagreed and ruled that the "required setback lines" included the fall zone setback requirement that applies to transmission towers. The Board also held that section 6.2(c) did not apply to "tear down and rebuild" situations. Decision (II) at 7-8 (Pl.'s Ex. AA).

dimension, or (ii) building a shorter tower that meets the ordinance's fall zone requirement." Pl.'s Opp'n Mem. at 19 n. 16.

But ICE does not offer evidence that all the existing towers are constructed in such a way that they can be upgraded only by violating the fall zone setback (for example, that they could be upgraded only by tearing down and replacing). Moreover, ICE has not demonstrated that the options it recognized—replacement with a tower of identical dimensions or building a shorter tower that does meet the fall zone requirement—are not feasible. See Amherst, 173 F.3d at 14-15; 360° Communications Co. v. Board of Supervisors of Albemarle County, Nos. 99-1816, 99-1897, ___ F.3d ___, 2000 WL 346182, * 5-8 (4th Cir. Mar. 15, 2000) (rejecting district court's holding that provider established a prohibition by showing it cannot provide a high level of service at a cost within or close to the industry-wide norm).

Most important, to prove an effective prohibition forbidden by the Act, ICE must provide proof of what amounts to a ban "in effect." Amherst, 173 F.3d at 14. In Falmouth, it appears that towers still may be constructed on parcels large enough to meet the fall zone requirement. On its face, the Falmouth ordinance permits towers up to 200' so long as their bases are 400' or more above sea level and they meet the fall zone setback requirements. The undisputed evidence shows that there are parcels within Falmouth that satisfy both criteria. See Defs.'

Statement of Material Facts ¶¶ 49-50; Pl.'s Opposing Statement of Material Facts ¶¶ 49-50; Defs.' Ex. 26A; Defs.' Ex. 26B.[22]

ICE responds that the suggestion that it (and any other tower builder under the preceding argument) could purchase land large enough to satisfy the fall zone requirement is a hollow one. It argues that despite its efforts, there was no available land other than the site it acquired. See Pl.'s Opp'n Mem. at 15-16. But the defendants present evidence that there is other land within Falmouth that meets the Forest and Farm District and 400' elevation requirement; that during its initial site purchase, ICE contacted only four people in exploring purchases within these areas;[23] and that ICE chose instead to pursue its policy of purchasing property with pre-existing towers. See Defs.' Statement of Material Facts ¶¶ 10, 16, 49-50; Pl.'s Opposing Statement of Material Facts ¶¶ 10, 16, 49-50. Thus, ICE has

[22] Because ICE has failed to support its qualification of the defendants' Statement of Undisputed Material Facts ¶ 49 by a record citation, I deem paragraph 49 admitted pursuant to Local Rule 56(c). Although ICE objects to the affidavit of James Barker because Barker was not previously identified as a proposed expert witness and because it did not receive the results of Barker's investigations, ICE has not made a proper discovery motion to address its concerns.

[23] ICE president Fenton testified that he spoke with realtors and a landowner but could not remember their identities. Defs.' Statement of Material Facts ¶ 16; Pl.'s Opposing Statement of Material Facts ¶ 16; Fenton Dep. 44-53. When Fenton discussed purchasing the property from the one landowner he contacted, he admitted he never made a monetary offer to the landowner. Fenton Dep. at 47-48. ICE claims that Cody also approached a landowner concerning a potential sale of land to ICE but the land was unsuitable. See Pl.'s Opposing Statement of Material Facts ¶ 16; Cody Dep. at 45. I note that in its Opposition Memorandum, ICE recites different portions of deposition testimony and raises different factual contentions than either side asserted in their respective Statements of Material Facts. See, e.g., Pl.'s Opp'n Mem. at 15-16. However, under Local Rule 56, the facts contained in the parties' statement of material facts, properly supported by record citations, are what controls. If a party disputes facts, it must raise those disputes in accordance with Local Rule 56.

not generated a genuine issue of material fact on the unavailability of qualifying sites.

Finally, ICE argues that any other qualifying land was near residential areas, and that the Board would never have granted a conditional use permit application for such sites. See Pl.'s Opp'n Mem. at 17. But ICE does not offer evidence that the Board has uniformly viewed conditional applications of this type negatively. Instead, the summary judgment record shows the contrary. In 1991, Robert Harris requested conditional use approval to construct a 200' radio transmission tower and a variance for that new tower to violate the fall zone setback. See Harris Statement of Grounds of Variance Appeal at 1-2 (Pl.'s Ex. V, tab 17D). Although the property bordered local residences, the Board approved both the conditional use permit and a variance for his initial application as well as an application in 1993 for a modification of the pre-existing approval. See Harris Statement of Grounds for Variance Appeal at 1-2 (Pl.'s Ex. V, tab 17D); Falmouth Board of Zoning Appeals Notice of Decision (Nov. 27, 1991) (Pl.'s Ex. V, tab 17A); Falmouth Board of Zoning Appeals Notice of Decision (Jan. 29, 1993) (Pl,'s Ex. V, tab 17E).

Conclusory assertions are not enough to survive summary judgment. See, e.g., Nicolo v. Philip Morris, Inc., 201 F.3d 29, 33 (1st Cir. 2000). Because ICE has not offered sufficient evidence to establish a genuine issue of material fact on its assertion that further applications to the Board with different proposals would be

meaningless,[24] summary judgment is **GRANTED** for the defendants on Count II of both Complaints.[25]

C. Count I: Has Falmouth Unreasonably Discriminated Against ICE?

The Telecommunications Act provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C.A. § 332(c)(7)(B)(i)(I) (1999).

ICE argues that Falmouth discriminated against it because (1) the defendants previously approved other locally-based tower owners/operators' setback violations in less compelling circumstances; (2) Falmouth routinely permits antenna placements and replacements without the need for prior approval by the Town; and (3) municipal towers are exempt from the fall zone requirement. Pl.'s Opp'n Mem. at 5-13.[26]

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[24] Under Amherst, a provider may succeed by showing that its proposal is the only feasible plan. 173 F.3d at 14. ICE offers no evidence that the two proposals it submitted were the only feasible plans for establishing telecommunication service to the greater Portland area.

[25] ICE frames most of its arguments under the Third Circuit's standard rather than the Amherst decision. See Pl.'s Opp'n Mem. at 13-19. The Third Circuit requires proof that (1) "the facility will fill an existing significant gap in the ability of remote users to access the national telephone network" and (2) "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives." APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469, 480 (3d Cir. 1999). Because ICE has failed to offer sufficient facts to survive summary judgment under the First Circuit's Amherst analysis, I do not address ICE's arguments that there are factual disputes under the Third Circuit standard.

[26] The defendants argue that because ICE failed to satisfy the criteria of the ordinance, it was not unreasonable discrimination to deny permits. Just because the (continued...)

(1) Previous Applications

ICE recites four instances in which the Board has granted either a conditional use permit or a variance for two towers that violate the height setback since 1990.[27]

However, there is no allegation that at the time the applications were granted, the applicants operated "functionally equivalent services." See Pl.'s Opp'n Mem. at 6-9. Donald Cody states conclusorily by affidavit that either currently or at the time of ICE's applications there were personal wireless service providers broadcasting from these two towers that provided "functionally equivalent service" under the Act. Because ICE failed to raise this in its opposing statement of facts in compliance with Local Rule 56(c), the Cody Affidavit is not properly before me. Even if it were, that conclusory assertion is not enough to establish that the Board's decisions denying ICE's new towers amounted to unreasonable discrimination against ICE as compared to other providers. The "discrimination" prong prohibits a municipality from purposefully denying a PWS provider similar access to that which other functionally equivalent providers have. The Act does not mandate that a provider may construct a tower that does not satisfy the municipality's

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[26] (...continued)
Board's decisions were supported by substantial evidence, however, does not necessarily mean that the decisions satisfied the other requirements established in the Act. See Amherst, 173 F.3d at 14.

[27] In an attachment to its opposition memorandum, ICE submits additional exhibits. However, these exhibits are not referenced in its Opposing Statement of Fact, nor did ICE submit an additional statement of facts regarding the discrimination claim. Because ICE has failed to comply with Local Rule 56, I do not consider these additional submissions. In deciding this case, it has been difficult to ascertain the contents of the record for summary judgment purposes because the parties frequently have not complied fully with Local Rule 56.

zoning requirements merely because other providers have found a way to provide service to a given area. There is no suggestion that ICE could not get the same access to these other towers that its competitors obtained. Indeed, one of them—Nextel —purchased its competing 800 MHz rights and customer list from ICE. There is also no suggestion in the record that Falmouth was intentionally favoring other providers over ICE.[28]

(2) Routine Antenna Placement and Replacement

ICE also claims that Falmouth's policy of routinely permitting antenna placements and replacements without the need for building permits unreasonably discriminates against it. However, ICE has submitted no evidence to suggest that Falmouth would treat it differently from others if all it proposed was to add an antenna to a pre-existing tower. See Letter from Paul Griesbach to David Littell, Esq. of Feb. 8, 1999 (Pl.'s Ex. V at tab 15) ("It is not the practice of the Town of Falmouth to issue building permits for antennas added to transmission towers."). The essence of the Act's anti-discrimination provision is to prevent unreasonable differentiation among providers, not to prevent a locality from applying a neutral policy, applicable to all applicants falling within its scope.

(3) Municipal Tower

ICE argues that municipal towers' exemption from the fall zone requirement unreasonably discriminates against it. It is true that the ordinance language exempts municipally owned and operated towers from the transmission tower

[28] If Congress had intended a "discriminatory effect" test rather than a discriminatory purpose test, it knew how to draft such a provision. See, e.g., 47 U.S.C.A. § 332(c)(7)(B)(i)(II) (1999) ("shall not prohibit *or have the effect of prohibiting* the provision of personal wireless service") (emphasis added).

requirement. See Ordinance § 2.146 (1990). In its opposition memorandum, ICE asserts that while ICE's application was pending, the Town Council was contemplating building a municipally-owned tower, which it would lease to other wireless service providers. Pl.'s Opp'n Mem. at 10. But ICE points to no admissible evidence showing that Falmouth has ever acted on any proposal to provide PWS from such a municipal tower.

* * * * *

I conclude that ICE has failed to generate a genuine issue of material fact in its discrimination claim.[29] This is not a case in which the Board denied an application on the basis that Falmouth's cellular phone or wireless needs were already being met. See Sprint Spectrum, L.P. v. Town of Easton, 982 F. Supp. 47, 51 (D. Mass. 1997). The ordinance as interpreted will affect all tower owners who want to repair by building a new tower that violates the fall zone setback requirements.[30] The Board's decisions were reasonable and there is no evidence

[29] Instead, the evidence submitted by both parties under the "substantial evidence" count indicates that the Board did *not* have an intent to favor one provider over another. Board members repeatedly voiced feeling limited by the language of the ordinance despite their desires to approve ICE's applications. See, e.g., June 23, 1998 Tr. at 11 (statement of Smith); Sept. 22, 1998 Tr. at 13-14 (Pearce); Jan. 26, 1999 Tr. at 16 (McConnell), 26 (Audet), 46 (Audet and McConnell), 47 (Pearce); March 23, 1999 Tr. at 41 (Silverman), 43 (Pearce). There was testimony by other tower owners who indicated that they would apply for variances if ICE received one. See Sept. 22, 1998 Tr. at 19-20 (Pl.'s Ex. KK). But that testimony does not, by itself, indicate the defendants' intent to discriminate unreasonably against functionally equivalent service providers.

[30] The Act prohibits localities from affirmatively granting preferential treatment to one provider over another. APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp.2d 1014, 1023 (W.D. Wis. 1999); see also AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 427 (4th Cir. 1998) (finding no intent by the city council to favor a competing provider).

that the Board intended to discriminate unreasonably against ICE. Thus, summary judgment is **GRANTED** for the defendants on Count I.

D. Count IV: Section 1983

Because I conclude that there is no violation of the Telecommunications Act of 1996, ICE can obtain no relief under 42 U.S.C.A. § 1983.

II. CONCLUSION

Summary judgment is **GRANTED** to the defendants on all Counts of both Complaints and summary judgment is **DENIED** to the plaintiff on Count III of both Complaints.

SO ORDERED.

DATED THIS 9TH DAY OF MAY, 2000.

_____

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

ZONING AND SITE PLAN REVIEW ORDINANCE
TOWN OF FALMOUTH, MAINE

SECTION 5. SPECIFIC REQUIREMENTS

5.33 Transmission Towers [Adopted, 4/23/90]

To regulate the location and erection of transmission towers in all districts in order to: a) minimize adverse visual effects of towers through careful design, siting, and vegetative screening; and b) avoid potential damage to adjacent properties from tower failure and falling ice through engineering and careful siting of tower structures.

a. All transmission towers in the Farm and Forest District, with the exception of amateur (ham) radio towers and municipal transmission towers, shall be located so that the tower base is at or above elevation four hundred (400') feet based on United States Geological Survey datum referred to mean sea level. No transmission tower shall exceed two hundred (200') feet in height as measured from the tower base to the highest point of the tower and any attached receiving or transmitting device.

b. The tower base shall be set back from all property lines by a distance of one hundred (100%) percent of the total tower height, including any attached transmitting or receiving devices. Accessory structures and guy wire anchors shall meet the minimum setback of the zoning district.

c. To ensure that towers have the least practicable adverse visual effect on the environment, towers that are 200 feet or less in height and are not subject to special painting or lighting standards of any federal agency shall have a galvanized finish or be painted in a skytone above the top of surrounding trees and shall be painted in an earthtone below treetop level.

d. Unless existing vegetation provides a buffer strip the width or the required setback as calculated in subsection b, the Board shall require that all property lines along roadways or visible to existing abutting or nearby buildings (within 1/4 mile radius) be landscaped as follows:

    1. With six to eight (6-8') foot evergreen shrubs planted in an alternate pattern, five (5') on center and within fifteen (15') feet of the site boundary.

2. With at least one row of deciduous trees, not less than 2 ½" to 3" caliper measured three (3') feet above grade, and spaced not more than twenty (20') feet apart and within twenty-five (25') feet of the site boundary.

3. With at least one row of evergreen trees at least four to five (4-5') feet in height when planted, and spaced not more than fifteen (15') feet apart within forty (40') feet of the site boundary.

4. In lieu of the foregoing, the Board may determine that the existing vegetation must be supplemented to meet an equivalent means of achieving the desired goal of minimizing the visual impact. To assist in making that determination, the Board may require the applicant to provide a visual impact analysis by a qualified professional.

e. Accessory facilities in the Farm and Forest District may not include offices, long-term vehicle storage, other outdoor storage, or broadcast studios, except for emergency purposes, or other uses that are not needed to send or receive transmission signals.

f. Transmission towers erected after the effective date of this ordinance amendment shall meet all applicable requirements of federal and state regulations and shall be designed and installed in accordance with the standards of the Electronic Industries Association (EIA) *Structural Standards for Steel Antenna Towers and Antenna Supporting Structures*.

g. Within twelve (12) months of the effective date of this ordinance amendment, all existing transmission towers shall be inspected and analyzed by a qualified professional engineer. The engineer shall submit a letter of opinion under his seal to the Code Enforcement Officer (CEO) stating the condition of the tower, the maximum safe loading capacity, and steps that must be taken to correct any safety deficiencies. Safety inspections of all existing and newly erected towers shall be conducted annually thereafter by the tower owner/operator, and an inspection checklist developed by the CEO shall be submitted for his review and approval. Any structural alterations that may be necessary to increase the loading capacity or to bring a tower into compliance shall require conditional use approval of the Board of Zoning Appeals.

SECTION 6. NONCONFORMING STRUCTURES, USES AND LOTS

6.2 Except as provided in this subsection, a nonconforming structure or use shall not be extended or enlarged in any manner except as may be permitted as a variance. The following requirements shall apply to expansion or enlargement of structures which are nonconforming solely due to lot size, lot width, lot frontage, lot coverage, height or setback requirements.

. . . .

c. A structure other than a single family detached dwelling which is nonconforming due to lot size, lot width, lot frontage, lot coverage, height or setback requirements, may be expanded or enlarged subject to Planning Board Site Plan Review, provided that the extension or enlargement is not located between the lot lines and the required setback lines, and does not compound nor create a lot coverage or height violation.

U.S. District Court
District of Maine (Portland)
Civil Docket for Case #: 98-CV-397

INDUSTRIAL COMMUNICATIONS AND ELECTRONICS, INC. plaintiff	PAUL MCDONALD, ESQ. 4 LIGHTHOUSE POINT RD CAPE ELIZABETH, ME 04107 (207) 767-1625
v.	
FALMOUTH, TOWN OF defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. AMY K. TCHAO, ESQ. DRUMMOND, WOODSUM, PLIMPTON & MACMAHON 245 COMMERCIAL ST. PORTLAND, ME 04101 (207) 772-1941
FALMOUTH ZONING BOARD OF APPEALS defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. AMY K. TCHAO, ESQ. (See above)
PAUL GRIESBACH, In his capacity as the Town of Falmouth Code Enforcement Officer defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
WILFRED AUDET, JR., In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
HUGH SMITH, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
KATHLEEN SILVERMAN, In her capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)

MICHAEL PEARCE, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
DAVID McCONNELL, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)