

NO. 01-2737

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THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST JUDICIAL CIRCUIT

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TOWN OF KINGSTON, NEW HAMPSHIRE  
DEFENDANT - APPELLANT

V.

ATC REALTY, LLC; SBA TOWERS, INC.  
PLAINTIFFS - APPELLEES

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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**BRIEF OF APPELLANT**

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**Jurisdictional Statement:**

The United States District Court for the District of New Hampshire exercised original subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1331 because the Plaintiffs-Appellees, SBA Towers, Inc. and ATC Realty, LLC, ("SBA/ATC"), sought recovery under the Telecommunications Act of 1996, 47 U.S.C. §332 (c)(7)(B), ("TCA").

The First Circuit Court of Appeals may exercise jurisdiction pursuant to 28 U.S.C. §1291 because this appeal arises out of a final decision of the New Hampshire District Court in the form of an Order dated 8 November 2001, which entered summary judgment in favor of SBA/ATC and ordered injunctive relief against the Defendant-Appellant, Town of Kingston, ("Town" or "Kingston"). By Notice of Appeal dated 6 December 2001, the Town appealed the District Court's Order to this Court.

**Statement of the Issue Presented for Review:**

I. Whether the District Court erred by improperly transforming the substantial evidence test into a comparison test when it independently reweighed the evidence presented to the Kingston Planning Board in order to choose the "better" applicant under the Town's Zoning Ordinance when the Town received two applications from competing real estate developers to site 180 foot high towers to close the same existing service gap and when there was substantial evidence in the record to

deny real estate developer, SBA/ATC's application?

**Statement of the Case:**

SBA/ATC filed a complaint in the United States District Court<sup>1</sup> for the District of New Hampshire after the Kingston Planning Board denied their application for a conditional use permit to construct a 180-foot high, wireless telecommunications tower, but contemporaneously granted a conditional use permit to the plaintiffs' competitor, American Tower Corporation, ("American Tower") to build a 180-foot high, wireless telecommunications tower at another site within the Town. (Add. at 1).<sup>2</sup>

SBA/ATC's complaint alleged that the Planning Board's decision violated the TCA in two different ways. First, they

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<sup>1</sup>SBA/ATC also filed a companion case in the New Hampshire Superior Court for Rockingham County contesting the grant of a conditional use permit to their competitor, American Tower, (Docket No.: 00-E-0591). The New Hampshire Superior Court dismissed SBA/ATC's writ and the New Hampshire Supreme Court summarily affirmed the trial court's decision. (Case No.: 2001-099).

<sup>2</sup>References to the addendum will be abbreviated "Add. at \_\_\_\_." References to the Appendix will be abbreviated "App. at \_\_\_\_." References to original documents filed with the District Court and not included in the Addendum or the Appendix will be abbreviated as follows: Answer: "Ans."; Plaintiffs' Motion for Summary Judgment: "Pl. Mo."; Defendant's Motion for Summary Judgment: "Def. Mo."; Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment: "Pl. Memo."; Defendant's Memorandum of Law in Support of Motion for Summary Judgment: "Def. Memo.". References to items in the original Certified Record filed with the District Court and not reproduced in the Appendix will be abbreviated as follows: Original Site Plan of SBA and TeleCorp. Realty, LLC: "Pl. Orig. Site Plan"; Revised Site Plan of SBA and TeleCorp. Realty LLC: "Pl. Revd. Site Plan".

alleged that the Town's denial of a permit was not supported by substantial evidence contained in a written record in contravention of 47 U.S.C. §332(c)(7)(B)(iii). (Add. at 1 - 2). Second, they alleged that the denial of their application had the effect of prohibiting the provision of personal wireless services in violation of 47 U.S.C. §332(c)(7)(B)(i)(II). (Add. at 2). Finally, SBA/ATC alleged the Planning Board's decision violated New Hampshire law of zoning. (Add. at 2). On 21 December 2000, the Town answered the plaintiffs' complaint and denied the substance of these allegations. (Ans. at 1-6).

On 9 July 2001, SBA/ATC and the Town filed cross motions for summary judgment. (Pl. Mo.; Def. Mo.). Each party objected to the other's motion, after which the District Court held a hearing on 6 September 2001. The District Court, (Muirhead, Magistrate Judge), granted SBA/ATC's motion for summary judgment by Order dated 8 November 2001. The District Court held that the Town had violated 47 U.S.C. §332(c)(7)(B)(iii), finding that the Planning Board's decision was not supported by substantial evidence contained in a written record. (Add. at 17).

Concomitantly, it denied SBA/ATC's other claims as moot and denied the Town's cross-motion for summary judgment. (Add. at 27). The District Court then ordered the Planning Board to approve the plaintiffs' application and issue all necessary

permits within 45 days. (Add. at 28). The Town appealed that judgment by filing a notice of appeal on 6 December 2001.

**Statement of Facts:**

On 17 October 2000, pursuant to the Town's zoning ordinance, the Kingston Planning Board had to make a choice. On that night, the Board chose to approve American Tower's application for a conditional use permit to install a 180-foot high monopole telecommunications tower to close a gap in coverage. (App. at 192). After this approval, the Planning Board voted to deny SBA/ATC's application for a conditional use permit to construct a 180-foot high monopole telecommunications tower to close the same coverage gap. (App. at 193). The Planning Board made this decision after considering the reports of an independent telecommunications expert, conducting public hearings, holding site walks at each location, and receiving and evaluating the applicants' respective evidence.

i. Kingston's Telecommunications Facility Ordinance.

The Town evaluated all of the above evidence pursuant to Kingston's Telecommunications Facility Ordinance, (Kingston, N.H. Zoning Code, Art. VII, Sec. 7.80 ("Zoning Ordinance"))(Add. at 34-47). In April of 1997, the Town of Kingston adopted this

ordinance pursuant to the broad grant of police power given to municipalities to zone by the New Hampshire legislature as set forth in N.H. Rev. Stat. Ann. §§674:16 and :21.<sup>3</sup> The Zoning Ordinance regulates wireless facilities to fulfill the following pertinent purposes and goals:

- A) Preserve the authority of Kingston to regulate and to provide for reasonable opportunity for the siting of telecommunications facilities, by enhancing the ability of providers of telecommunications services to provide such services to the community quickly, effectively, and efficiently.
- B) Reduce adverse impacts such facilities may create, including, but not limited to; impacts on aesthetics, environmentally sensitive areas, historically significant locations, flight corridors, health and safety by injurious accidents to person and property, and prosperity through protection of property values.
- C) Provide for co-location and minimal impact siting options through an assessment of technology, current locational [sic] options, future available locations, innovative siting techniques, and siting possibilities beyond the political jurisdiction of

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<sup>3</sup>Among the legislative grants of power given to municipalities, a local zoning ordinance may regulate and restrict the height, number of stories, and size of buildings and structure. (N.H. Rev. Stat. Ann. §674:16 I(a)). A municipality may also restrict and regulate the location and use of buildings, structures and land used for business, industrial, residential, or other purposes. (N.H. Rev. Stat. Ann. §674:16 I(d)). To accomplish these and other goals, the legislature also granted to municipalities innovative land use controls. These controls are set out in N.H. Rev. Stat. Ann. §674:21.

the Town.

- D) Permit the construction of new towers only where all other reasonable opportunities have been exhausted, and to encourage the users of towers and antennas to configure them in a way that minimizes the adverse visual impact of the towers and antennas.
- E) Require cooperation and co-location, to the highest extent possible, between competitors in order to reduce cumulative negative impacts upon Kingston.

(Add. at 36-37). To secure these purposes and goals, the Zoning Ordinance only permits a new tower to be constructed within the Town's "rural residential" districts and requires a conditional use permit.<sup>4</sup> (Add. at 39).

The Zoning Ordinance also requires that each applicant apply to the Planning Board for site plan review, and to submit certain information to the Planning Board. (Add. at 43-45). An applicant proposing to erect a new tower must provide "written evidence demonstrating that no existing structure can

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<sup>4</sup>A conditional use permit allows a land use which is in harmony with the permitted uses in a zoning district but, because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required which imposes conditions to mitigate those external effects. In contrast, a variance allows an otherwise prohibited use. See, 3 Anderson's Law of Zoning §20.05 (4<sup>th</sup> ed. 1996). The Fourth Circuit Court of Appeals defined a special use permit as a: "Use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment, 172 F.3d 307, 314 (4<sup>th</sup> Cir. 1999).

accommodate the applicant's proposed antenna" and submit "an agreement with the Town that allows for the maximum allowance of co-location upon the new structure." (Add. at 44-45).

ii. The Route 125 service gap attracted rival real estate developers.

The Town of Kingston is a small New Hampshire town with a population of 7,113 at the time of the events of this case. (App. at 76). Yet, in the year 2000, the Kingston Planning Board received two different applications to construct two new telecommunications towers within the Town. One application was from SBA/ATC, and the other was from American Tower. What lured SBA/ATC and American Tower to Kingston was a gap in coverage in the northern section of the Town. (Add. at 3). The gap existed between a multi-carrier tower known as the Crown tower in the southern part of Kingston and a multi-carrier tower located in the Town of Brentwood to the north. (Add. at 3).

A tower which closed this gap would be a valuable asset because a portion of Route 125, a major commuter road, fell within this unserved area. Indeed, Mr. Hopkins, SBA/ATC's representative to the Kingston Planning Board, predicted that, "the area along NH Route 125 had the potential to be a great market for these towers." (App. at 44).

To tap into this great market, ATC began studying the possibilities of closing the Route 125 gap around June of 1998. (Pl. Memo at 5). At roughly the same time, SBA was independently pursuing sites in Kingston which would exploit the benefits of Route 125 coverage. Soon thereafter, the two former competitors agreed to consolidate their efforts and business activities. (Pl. Memo at 5). Combining their efforts made sense because SBA and ATC operate similar businesses. Neither is a provider of personal wireless services, as those services are defined in the TCA at 47 U.S.C. §332 (c)(7)(C)(i). Instead, they develop locations and lease spaces on towers to providers of wireless communications. (Pl. Memo. at 2).<sup>5</sup>

To close the gap in coverage on Route 125, SBA/ATC decided to build a 180-foot high, free standing, multi-user telecommunications tower along with related ground equipment on property owned by Heidi J. Heffernan, ("Heffernan site"). (Add. at 1; App. at 4, 44). SBA/ATC proposed a three-legged lattice tower<sup>6</sup> that would handle eight carriers.<sup>7</sup> (App. at 44). The

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<sup>5</sup>Similarly, SBA/ATC's competitor, American Tower, is not a provider of personal wireless services but is in the business of erecting and leasing wireless communications towers.

<sup>6</sup>The Planning Board inquired if a monopole design was possible and SBA/ATC responded that they "were not opposed to a monopole," and the tower's design was subsequently changed to a monopole structure. (App. at 45, 150).

<sup>7</sup>As to 8 spaces for providers, the information set forth in SBA/ATC's original site plan drawing contradicts this representation. The original site plan drawing shows spaces for 5 providers. (Pl. Orig. Site Plan). And

tower would be located in a 100' x 100' area surrounded by a chain link fence.

The Heffernan Site is a 17-acre parcel surrounded by woods. (App. at 44). It is located at 19 Marshall Road and is zoned rural residential. (App. at 4). There are nine abutters to the Heffernan site, all of which are residential properties except one. (App. at 9).

Unknown to SBA/ATC, the coverage gap had also caught the attention of their "direct competitor," American Tower, and in late 1999, American Tower was searching for suitable land in Kingston to build a tower to cover Route 125. (Add. at 6) (Pl. Memo at 6). In the end, American Tower decided that a tower sited on Northland Forest Products' land, ("Northland site"), would meet the needs of the Route 125 commuters. (App. at 134).

The Northland site is zoned rural residential and consists of 30.8 acres of land. (App. at 52, 60). The site is located between Depot Road and Route 125 in Kingston, (App. at 52), and is approximately 1.35 miles south of the Heffernan site. (Def. Memo at 2). Northland Forest Products operates a large lumber operation on the site, which is screened from the abutting properties by a large buffer of deciduous and evergreen trees. (App. at 52). Its immediate neighbors include an automotive repair shop and an antique business. (App. at 135).

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indeed, SBA/ATC's revised site plan drawing only has spaces for 6 providers. (Pl. Revd. Site Plan) (See also, the Agreement SBA/ATC provided to the Planning Board wherein SBA/ATC represented that their tower could accommodate 6 providers. (App. at 114)).

American Tower also proposed to cover the Route 125 gap by constructing a 180-foot high, wireless telecommunications tower, plus equipment compound at the northern most corner of the Northland site. (App. at 134). The tower would be located on commercial property within a 100' x 100' fenced in area. (App. at 134). The tower would be a monopole to be "less visually intrusive" and painted slate blue to blend in with the sky. (App. at 134, 136). Five providers of telecommunications services could locate on the tower and one spot could be set aside for the town's use. (App. at 135).

iii. The Planning Board's hearings on SBA/ATC's application.

Following the receipt of SBA/ATC's application for a conditional use permit dated 18 May 2000, the Planning Board held a series of public hearings to gather evidence on SBA/ATC's proposed tower. Public hearings were held on 18 July 2000, 19 September 2000, 3 October 2000, and 17 October 2000. (Add. at 7 - 8). At the public hearing held on 17 October 2000, the Planning Board voted to deny SBA/ATC's application for a conditional use permit. (App. at 193).

At the 17 October 2000 public hearing, the Planning Board first decided that it should only approve one tower when

directly competing applicants propose to build equivalent towers to close the same coverage gap. (App. at 191). It reached this decision because the fewest number of towers to close the same service gap effectuated the Zoning Ordinance's intent. Mr. Ouellette, a Planning Board member, expressed this intent of the Zoning Ordinance cogently and succinctly:

[B]oth applicants should be commended for their proposals. He said that both adequately covered the gap. He read the Purposes and Goals section of the [Zoning Ordinance]. He said that per Town Counsel and the Board's consultant Ivan Pagacik, both towers were not needed. He proposed that only one tower be approved and the other be denied. He said that his preference would be to support SBA/ATC tower on the Heffernan property because their discussion regarding spacing was convincing and this would not be seen from the Historic District. Ms. Bartlett agreed although she supported approving both towers.

(App. at 190). After further comments, Mr. Ouellette made the following motion that:

[T]he Kingston Planning Board only approves [sic] one of the two telecommunication tower applications because as stated in the Town of Kingston Telecommunication Ordinance, Purposes and Goals, cooperation and collocation is required.

(App. at 191). The Planning Board passed the motion 4 votes to 2. (App. at 191).

After the passage of the above motion, the Planning Board voted to grant American Tower's application for a conditional use permit and then to deny SBA/ATC's application for a conditional use permit. (Add. at 11). The reasons for the Planning Board's denial were the following:

- 1) Based upon the purposes section of the Kingston zoning ordinance letters C and E it is the responsibility of the Kingston Planning board to provide for minimal impact siting and to require cooperation and coordination between telecommunications service providers in order to reduce cumulative negative impacts upon Kingston.
- 2) The location of this proposed location [sic] is in close proximity to residential abutters. While there are commercial users backing into the property, the majority of the abutting and nearby properties are residential and of a rural nature. The siting of this tower does not meet the intent of the ordinance to reduce adverse impacts on neighborhood aesthetics.
- 3) The design of the tower does not prevent nor reduce the visual intrusive\ness [sic] along the NH Route 125 corridor. Minimizing the adverse visual impact is required by the Town's ordinances.
- 4) The Planning Board hired a

telecommunication consultant to assist in determining the technical viability of the SBA/ATC site. This consultant provided evidence that two proposed sites offered the same ability to cover existing service gaps. As a result, the SBA/ATC site failed to meet the standard of section D) of the Town's ordinance which indicates that all other reasonable opportunities have been exhausted. In addition Section VII,. 3., paragraph h and j require the Planning Board to consider other factors in making decisions that include availability of existing towers and other structures and the availability of alternative siting locations. The Planning board has done this with respect to this denial.

(App. at 195-196). There is substantial evidence in the record to support each of the above reasons.

**Summary of Argument:**

This Court should reverse the District Court's Order granting summary judgment to SBA/ATC and instead enter judgment on behalf of the Town. This Court should reach this result for two reasons.

First, the District Court misapplied the substantial evidence test set forth in the TCA by transforming that test into a comparison test. The District Court's transformed substantial evidence test required it to act as a super-planning

board and reweigh the evidence to decide whether the SBA/ATC or its direct economic competitor, American Tower, had submitted the better application. This is plain legal error. The substantial evidence test restricts judicial review to whether the findings of the local board and the relative weight to be given to these findings are supported by substantial evidence. Substantial evidence review does not permit the District Court to substitute its own conclusions for those of the local board. The District Court's decision to choose the better applicant is reversible error.

Second, when a substantial evidence review is properly conducted the Planning Board's decision should be upheld and judgment entered on behalf of the Town. The Zoning Ordinance's intent is to restrict the number of towers within the Town's borders to the fewest necessary for service. The Planning Board properly implemented this intent by approving one tower when directly competing applicants propose to build equivalent towers to close the same coverage gap. There is substantial evidence in the record that both SBA/ATC's and American Tower's tower closed the Route 125 gap and that only one tower was needed. Accordingly, the Planning Board's decision to reject SBA/ATC's application was proper under the TCA.

Moreover, there is substantial evidence in the record that

SBA/ATC's proposed tower did not comply with the Zoning Ordinance due to its proximity to and aesthetic impact on residential abutters and its visual intrusiveness on Route 125. Finally, there is substantial evidence in the record that American Tower's site was available and SBA/ATC should have exhausted this possibility before seeking to site its tower on a different parcel within Kingston.

For all of the above reasons, this Court should reverse the District Court and enter judgment for the Town.

**Argument:**

A. Standard of Review.

This Court's review of the District Court's grant of summary judgment is de novo, and all factual inferences will be drawn in a light most favorable to the Town, the appellant in this matter. Brehmer v. Planning Board of the Town of Wellfleet, 238 F.3d 117, 120 (1<sup>st</sup> Cir. 2001).

B. The Kingston Planning Board complied with the TCA, which preserves local zoning authority but requires that a denial be supported by substantial evidence.

Under the TCA, towns have the right to "control the siting

of facilities." Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 17 (1<sup>st</sup> Cir. 1999). To secure this right, the TCA expressly preserves local zoning control "over decisions regarding the placement, construction, and modification of personal wireless service facilities.'" Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 57 (1<sup>st</sup> Cir. 2001) (quoting 47 U.S.C. §332 (c)(7)(A)). Indeed, this right extends to denying the "construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. §332 (c)(7)(B)(iii)." Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 639 (2<sup>nd</sup> Cir. 1999). This right, though, is not absolute. Congress also "intended to protect providers of [personal wireless] services from irrational or substanceless decisions by local authorities who might bend to community opposition to these facilities." Brehmer v. Planning Board of Wellfleet, 238 F.3d at 122.

To secure the above goals, the TCA imposes a limited number of procedural and substantive safeguards. Specifically, the TCA provides in pertinent part:

(7) Preservation of local zoning authority

\* \* \* \*

(B) Limitations,

\* \* \* \*

(iii) Any decision by a state or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(47 U.S.C. §332(c)). The result of these two competing goals, preserving local land use decisions while affording procedural safeguards to applicants, is that both the local board's zoning decision and judicial review of that decision are moderated by the substantial evidence test.

The substantial evidence test protects telecommunications providers from irrational planning board decisions by imposing two key procedural brakes upon unfettered decision-making by local boards. First, the local board must consider and make its decision on relevant evidence. Second, the local board's conclusion must be supported by relevant evidence.

As to the first requirement, relevancy is gauged and set by local zoning law. "The TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable local zoning requirements." USCOC of New Hampshire RSA #2 v. Town of Hopkinton, N.H., 137 F.Supp.2d 9, 15 (D.N.H. 2001) (Citations and quotation marks omitted). Substantial

evidence refers to "the need for substantial evidence under the criteria laid down by the zoning law itself." Town of Amherst v. Omnipoint Communications Enterprises, Inc., 173 F.3d at 14.

"The TCA itself does not provide the legal basis to deny an application to construct a personal wireless facility. That authority must be found in state or local law." Sprint Spectrum, L.P. v. Willoth, 176 F.3d at 644 (2<sup>nd</sup> Cir. 1999).

Under New Hampshire law, zoning ordinances are interpreted to give effect to the enacting body's intent which requires consideration of the entire ordinance. Hurley v. Town of Hollis, 143 N.H. 567, 570; 729 A.2d 998, 1001 (N.H. 1999). Upon reading the Zoning Ordinance as a whole, one of the primary goals, if not the paramount one is to limit the proliferation of towers within its borders to the fewest number needed to provide service. This desire to limit the growth of towers is natural as this Court has noted: "Few people would argue that telecommunication towers are aesthetically pleasing." Southwestern Bell Mobile Systems v. Todd, 244 F.3d at 61. The Planning Board's denial of SBA/ATC's application implemented this fundamental intent given the fact that two developers sought to build 180-foot high towers to access the same lucrative market created by the same gap in coverage.

The Zoning Ordinance's purpose and goals section restricts

and limits unnecessary tower development through a number of considerations. For example, applicants must provide for co-location and minimal impact siting. (Add. at 37, parag. C). New towers are only permitted "where all other reasonable opportunities have been exhausted." (Add. at 37, parag. D). The Town requires cooperation and co-location to the highest extent possible . . . to reduce cumulative negative impacts on Kingston. (Add. at 37, parag. E) (emphasis added). Moreover, the Town requires the removal of abandoned towers and outdated facilities are to be removed or upgraded. (Add. at 37, parag. H and I).

Kingston's desire for the fewest number of towers needed within its borders is also reflected in the factors to be considered in granting a conditional use permit. The Zoning Ordinance requires the Planning Board to consider the "[a]vailability of suitable existing towers and other structures as discussed in Section VII, C, 3," (Add. at 43, parag. h), and the "[a]vailability of alternative tower structures and alternative siting locations." (Add. at 43, parag. j). The goal of minimal towers is reflected also in Kingston's requirement that an applicant must submit an agreement with the Town that allows the maximum allowance of co-location upon a new tower and must represent that no existing structure can

accommodate the applicant's antenna. (Add. at 44).

Pursuant to the Zoning Ordinance, the Planning Board had a duty to approve the fewest number of towers required to close the Route 125 gap. Initially three competitors looked to build towers to close this gap. Two of those competitors collaborated, but, conceivably, Kingston could have received three applications to build 180-foot high towers, all for the same purpose. There is no federal mandate requiring Kingston to accept all tower proposals to close the 125 service gap.

Indeed, the TCA reserves to towns the right to limit tower development; otherwise towns would have to accept unnecessary towers constructed solely to advance the speculative investments of real estate developers. Kingston avoids this undesirable result through its zoning requirement of a conditional use permit. As stated, a conditional permit allows a use, while mitigating undesirable or incompatible features of that use. Here, towers which are needed are permitted, while the Town is protected from unbridled construction of unnecessary towers by speculators hoping to turn a profit.

The second procedural brake imposed on local boards by the substantial evidence test is that the evidence must support the local board's decision, but the quantum of that supporting evidence is minimal. A local board's decision does not have to

be supported by "a large or considerable amount" of evidence. Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64, 71 (3<sup>rd</sup> Cir. 1999). Under the TCA, a local board's decision will pass muster if it is "supported by less than a preponderance but more than a scintilla of evidence." Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2<sup>nd</sup> Cir. 1999). (See also, Sprint Spectrum, L.P. v. Willoth, 176 F.3d at 638; 360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 83 (4<sup>th</sup> Cir. 2000)). In sum, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Penobscot Air Service, Ltd. v. Federal Aviation Administration, 164 F.3d 713, 718 (1<sup>st</sup> Cir. 1999).

The Planning Board correctly denied SBA/ATC a conditional use permit after taking a hard look at SBA/ATC's application. It conducted four public hearings, held a site walk, and received and evaluated an independent expert's written and oral opinions on SBA/ATC's proposal. After considering all of this evidence, the Planning Board correctly denied SBA/ATC's application for four reasons.

The first of those reasons was that the Zoning Ordinance required minimal impact siting and cooperation and coordination

among tower companies. There was substantial evidence in the record that SBA/ATC's application did not meet this requirement.

SBA/ATC and American Tower each proposed and designed towers to close the service gap that existed in the Route 125 corridor. Upon receiving these applications by real estate developers who sought to exploit the market potential of this service gap, the Planning Board hired an independent consultant, Ivan Pagacik, to determine if one or two towers were needed to close the service gap. Mr. Pagacik concluded that only one tower was necessary and that either tower would close the gap in coverage. (App. at 163).

Mr. Pagacik reached this conclusion after reviewing SBA/ATC's proposal and American Tower's proposal. In his report on SBA/ATC's application dated 14 October 2000, he stated that: "The proposed ATC\SBA [sic] site at 170 feet does fill in this gap and provides for the necessary overlap to facilitate adequate 'handoffs.'" (App. at 168). Similarly, his 14 October 2000, report evaluating American Tower's proposal stated that: "The proposed American Tower site at 140 feet does fill in this gap, however, the overlap to the Brentwood site is minimal." (App. at 172).<sup>8</sup>

In addition to his written reports, Mr. Pagacik spoke with

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<sup>8</sup>Although Mr. Pagacik tested American Tower's tower at 140 feet, the Planning Board approved a 180 foot tower.

Ms. Faulconer, a Planning Board member. At the 3 October 2000, public hearing/work session, Ms. Faulconer related Mr. Pagacik's "conclusion that both proposed towers would cover the same area and corridor." (App. at 163). She also related that it was Mr. Pagacik's opinion that "only one tower would be necessary." (App. at 163).

At this hearing, American Tower's representative, Mr. Wells, a radio frequency engineer, concurred with Mr. Pagacik's opinion. He added, "it was his opinion that the coverage for either proposal would be equivalent and that he could prove this." (App. at 163). Ms. Ware, American Tower's other representative at the meeting, then added, "their [sic] proposal would provide coverage for the center of town, Rte. 107, 107A and a portion of Rte. 125." (App. at 163). She concluded by stating that American Tower "had taken longer to look for the right site" and that the company had conducted "extensive research." (App. at 163). Finally, Mr. Alberts, a Planning Board member, asked if American Tower was willing to co-locate with SBA/ATC. Ms. Ware expressed a willingness to cooperate with SBA/ATC stating that co-location could be done "as they were both in the same business." (App. at 163).

In short, there was substantial evidence in the record that the Planning Board's denial of SBA/ATC's application implemented

the Zoning Ordinance's intent of requiring minimal impact siting and cooperation and coordination among tower companies. The evidence most relevant to achieve that zoning intent, which the Planning Board relied upon, was Mr. Pagacik's opinion, a neutral expert and radio frequency engineer, who advised the Planning Board that only one, 180-foot high tower was needed to close the Route 125 service gap, and that both SBA/ATC's and American Tower's tower accomplished that goal.

In conclusion, Kingston's choice for permitting the fewest number of needed towers is a proper choice under the TCA. As the Willoth Court stated in the context of prohibition of services: "A local government may also reject an application that seeks permission to construct more towers than the minimum required to provide wireless telephone services in a given area." Sprint Spectrum, L.P. v. Willoth, 176 F.3d at 643. Similarly, this Court has held that the TCA permits towns to rationally resolve how towers should be sited within their borders. Town of Amherst, N.H. v. Omnipoint Communications Enterprise Inc., 173 F.3d at 14 - 15. As a result, towns may solve the "numbers" problem differently.

For example, in the Town of Amherst case, Amherst chose to solve this issue by choosing more towers at lower heights to provide needed coverage. Kingston, in contrast, chose the

fewest number of towers needed to provide coverage. Kingston's decision fulfilled the intent of its Zoning Ordinance and was supported by the substantial evidence provided by Mr. Pagacik and the applicants themselves. Indeed, Kingston's rejection of SBA/ATC's application in this matter is no different than if the Planning Board rejected a single developer's plan to close the same Route 125 service gap by erecting two towers or the separate plans of three developers proposing to build three towers to close one gap.

The TCA is not the key to unlocking unbridled tower development within municipalities. Undoubtedly it was in SBA/ATC's economic self-interest to have its own tower to tap into this great market; however, its business decision to reject coordination with American Tower and share the spoils is an inadequate reason to overturn the Planning Board's decision. The Town properly denied SBA/ATC's application for a conditional use permit. Accordingly, this Court should reverse the District Court's judgment and enter judgment for the Town

The Planning Board's second reason for denying SBA/ATC's application for a conditional use permit was the tower's close proximity to and adverse impact on the surrounding residential neighborhood. Under the Zoning Ordinance, the Planning Board is to consider the proximity of the tower to residential

development. (Add. at 43.) The evidence that SBA/ATC's proposal was in close proximity to residential abutters and adversely impacted neighborhood aesthetics takes several forms. It includes oral and written opposition from residential abutters, photographic evidence, and first hand visual evidence gather by the Planning Board on its site walk of the Heffernan property.

At the 18 July 2000 public hearing, the Planning Board heard evidence from a number of abutters. A neighbor across from the Heffernan site on Marshall Road, Steven Blaisdell, stated that SBA/ATC's tower was "not something that he wanted to look at." (App. at 45). He also expressed concern that the tower would lower property values. (App. at 45). In a letter to the Planning Board dated 3 October 2000, Mrs. Blaisdell expanded upon her husband's oral evidence before the Planning Board.

We purchased this property 2 years ago in July . . . . After extensive searching, my husband and I were delighted to find this piece of property with a view of a horse farm. This view of the farm and horses was enough to overlook the busy Rt. 107 traffic. Now, with the proposed tower - our view would be as you see in the photo.<sup>9</sup> I doubt

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<sup>9</sup>The Blaisdells' property is located at 14 Marshall Road, and to appreciate the Blaisdells' concern regarding aesthetics and property value please see the photo simulations at App. at 17-21 and 105-113.

the first thing a potential buyer of our property would see the horses before they noticed the tower. It would certainly not be considered very picturesque! We don't believe for a moment that this would not change our property value . . . Would you want to purchase property with a view of a 180' tower?

(App. at 160).

Abutters, Andrea and Almus Kenter, also expressed concerns similar to the Blaisdells. (App. at 45). In addition to speaking out against SBA/ATC's tower, the Kenters wrote to the Planning Board setting out their objections more concretely.

My husband and I purchased our property (Map 41 Lot 11) in 1991 and were thrilled with our acquisition of a picturesque piece of property and a part of Kingston history . . . . The sight of a steel structure as a backdrop to our New England house and barn is contrary to the reason why we chose to live in this setting. SBA's viewshed analysis unveiled at the public meeting on July 18, 2000 and the subsequent site walk on July 24, 2000, depicted a clear view of the proposed tower from our property. Other abutters to the proposed project would have an even more objectionable view of the structure.

\* \* \* \*

SBA/ATC cites existing vegetation as adequate screening for the proposed tower site. We strongly disagree. The

deciduous hardwoods (primarily maple and hickory) in the vicinity of the site will shed their leaves for 5 or 6 months of the year. The remaining aged conifers (White and Norway Pines) are approximately 50 years old and routinely shed large limbs during ice storms . . . . These conifers have a finite usefulness for possible screening purposes and should not be considered a beneficial attribute to the proposed 180 foot tower siting.

(App. at 86-89).

Another residential abutter, Tina Staublin, also spoke out against SBA/ATC's tower at the 18 July 2000 public hearing. She stated that "she agreed with the lack of esthetic [sic] value and she felt that the project would not be worth doing." (App. at 46).

The Kingston Planning Board also received a letter from Mariah Champagne, a residential abutter to the Heffernan site. She also objected to SBA/ATC's proposed tower.

As an abutter to this proposed project, I find it necessary to put into writing my strong objections to siting of this tower at this location.

\* \* \* \*

The Heffernan property was at one time listed by the state - funded Historic Preservation Assistance Project as a historically significant local property. The HPAP was

discontinued due to lack [sic] of federally matching funds, but when active, provided funding to listed properties to assist in maintenance of said important properties. The siting of a tower on such a property seems ironic and inconsistent with previous listing with HPAP.

\* \* \* \*

Please deny construction of this eyesore and health risk in our small neighborhood.

(App. at 90-92). In sum, nearly 40 percent of the residential abutters to the Heffernan site opposed SBA/ATC's application. In contrast, the record is devoid of any objection to American Tower's proposal.

In addition to the large percentage of abutters who objected to SBA/ATC's application, the Planning Board received and reviewed photographic simulations of what SBA/ATC's tower would look like from various locations. (App. at 17-21; 105-113). The Planning Board also took a site walk of the Heffernan property while a balloon test showed the visibility of the proposed tower from various places. (App. at 115-126). The site walk and photographic evidence proved that SBA/ATC's tower was in close proximity to this residential neighborhood and created negative visual and aesthetic concerns therein. In short, a visible 180-foot high tower was incompatible with this

neighborhood's bucolic and picturesque New England landscape. (App. at 86 - 89, 160).

The Planning Board's third reason for denying SBA/ATC's application for a conditional use permit was the tower's visual intrusiveness upon the Route 125 corridor. The substantial evidence supporting this conclusion was the balloon test and photographic simulations provided by SBA/ATC. (App. at 17-21; 105-113 and 115-126). After reviewing and evaluating this evidence, the Planning Board reasonably concluded that visibility of the tower created a negative visual impact when viewed from Route 125.

The final reason for denying SBA/ATC's application for a conditional use permit was the evidence that SBA/ATC had not complied with the Zoning Ordinance's requirement that an applicant must exhaust all other reasonable siting possibilities. The evidence supporting this conclusion is two-fold. First and most fundamentally, Mr. Pagacik's reports and his maps of wireless communications service from existing and proposed towers fully supported his conclusion that either of the two towers adequately served the coverage gap. (App. at 168-175). Second, Mr. Kozyra, a representative of Telecorp<sup>10</sup>, who spoke in favor of SBA/ATC's application, admitted that even

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<sup>10</sup>Telecorp is a provider of personal wireless communications services.

though Telecorp had not reviewed American Tower's proposal, it "had no interest in locating on their [sic] proposed tower." (App. at 164). Mr. Kozyra drove this point home by stating that, "if both towers were approved that would be fine but if only the Northland proposal was approved the town would probably be looking at litigation with Telecorp involved." After this statement, the minutes reflect that SBA/ATC's attorney, "explained competition between tower companies." (App. at 164).

Mr. Pagacik's report and Mr. Kozyra statements to the Planning Board were substantial evidence upon which the Planning Board could reasonable conclude that SBA/ATC had not exhausted co-location opportunities. Accordingly, the Planning Board properly denied SBA/ATC's application for a conditional use permit.

C. The District Court erred when it transformed the substantial evidence test into a comparison test.

The TCA's substantial evidence test also limits judicial review by requiring a "deferential" examination of a local board's decisions. Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d at 494. This means that the local board is given 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." Penobscot Air Service, Ltd. v. Federal Aviation Administration, 164 F.3d at 718 (emphasis in original).

A reviewing court's task "is to determine whether the findings of local officials concerning the positive and negative factors, and their relative weight is supported by substantial evidence." Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d at 72. In conducting this task, a reviewing court has "no power either to weigh the evidence contained in that record or to substitute its own conclusions for those of the factfinder." Id. at 71. Under substantial evidence review, a court cannot overturn a local board's decision "even if the court could have reached a justifiably different conclusion between two conflicting views had it reviewed the matter de novo." AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment, 172 F.3d 307, 314 (4<sup>th</sup> Cir. 1999).

Although the District Court cited to a number of the rules set forth above, it failed to apply them when it decided that the Town's denial of SBA/ATC's application was not supported by substantial evidence. Instead of determining whether the Planning Board's decision was "guided by" the Zoning Ordinance and "supported by substantial evidence," the District Court, in

error, reweighed the evidence and substituted its opinion for the Town's decision. (See, Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d at 72).

Specifically, the District Court reexamined and reweighed the evidence to determine whether SBA/ATC or American Tower submitted the better application. In short, its substantial evidence review was a de novo comparison test. It compared SBA/ATC's application with American Tower's application to determine which proposed tower, in the District Court's opinion, better fulfilled the Zoning Ordinance. This erroneous view of the law infected the District Court's rejection of each of the Planning Board's reasons for denying SBA/ATC's application.

By way of example, the following statements by the District Court illustrate the pervasiveness of its de novo comparison review:

- Moreover, the fact that SBA/ATC and American Tower failed to cooperate to develop a single tower plan provides no justification for selecting American Tower's proposal over the plaintiffs' proposal.

(Add. at 18).

- Moreover, the record indicates that the plaintiffs' proposal would have best [sic] fulfilled the Ordinance's goal of requiring co-location to the highest extent possible.

(Add. at 18).

- Accordingly, the residential character of the community surrounding the Heffernan site, without more, provides inadequate justification for the Board's decision to select American Tower's proposal over the plaintiffs' proposal.

(Add. at 20).

- Nevertheless, the Board failed to consider the impact of the American Tower proposal on nearby historic properties and to compare that impact, if any, to the SBA/ATC proposal.

Add. at 23).

- Having failed to evaluate the full impact of each proposal on nearby properties, the Board cannot justify its decision to deny the plaintiffs' application on aesthetic grounds.

(Add. at 24).

- Although photographic simulations of the SBA/ATC tower indicate that the tower would be visible from Route 125, photographic simulations of the American Tower structure indicate that it too would be visible from Route 125.

(Add. at 24).

- Accordingly, visual intrusiveness along Route 125 provides no support for the Board's decision to select the American Tower plan over the SBA/ATC plan.

(Add. at 24).

- Second, even assuming both towers could provide the same level of service, the plaintiffs submitted their application a full two months ahead of American Tower. Consequently, the suggestion that American Tower's plan provided a reasonable alternative to the SBA/ATC plan lacks any support in the record.<sup>11</sup>

(Add. at 25).

In conclusion, the District Court's decision is wrong because it sat as a super-planning board. Choosing between the conflicting evidence of which was the better applicant is a function that the TCA reserves to the Town. "At bottom, these issues, as to which conflicting evidence was presented, are of the type that zoning board are typically qualified to resolve." 360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albermarle County, 211 F.3d at 85. In making its own de novo comparison, the District Court strayed from its task under the TCA: To decide if the Planning Board's denial of a conditional use permit was supported by more than a scintilla of

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<sup>11</sup> In regard to the District Court's statement that SBA/ATC filed an earlier application than American Tower, three factual points are either minimized or ignored by the District Court. First, pursuant to the Planning Board's Site Plan Procedures, American Tower sought guidance from the Board on an appropriate tower site within Kingston on 22 February 2000, almost three months prior to SBA/ATC's application dated 18 May 2000. (App. at 4). Second, the critical time frame is not when either SBA/ATC or American Tower applied for site plan review but when the Planning Board voted on the applications in the fall. Otherwise, the Planning Board would be forced to consider tower applications seriatim, in contravention of the Zoning Ordinance. At the time of the final vote, American Tower's proposal was a viable option. Third, the District Court did find that SBA/ATC "voiced no objection to the delays and in fact agreed twice in writing to extend the

evidence which a reasonable mind might accept as adequate to support this decision. Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d at 494. Instead of adhering to the law's requirement for limited and deferential review, the District Court substituted its judgment for the Planning Board's, independently reweighed the evidence, and then picked a new winner. Under a proper substantial evidence review, the Kingston Planning Board's decision is supported by more than a scintilla of evidence. Accordingly, this Court should reverse the District Court's Order and enter judgment for the Town.

**Conclusion:**

This Court should reverse the District Court and enter judgment in favor of the Town because the TCA does not champion tower speculation over local zoning control. The TCA does not require the Town to site more towers than needed to close a service gap. Indeed, Kingston is not relegated by the TCA to becoming a ground upon which tower speculators joust for the opportunity to tap into a "great market." In this factual context, the Planning Board's rejection of SBA/ATC's application for a conditional use permit to erect a telecommunications tower was supported by substantial evidence.

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hearing process." (Add. at 8).

Guided by the intent of the Zoning Ordinance, the Planning Board properly chose to site only one tower when it received rival applications to close the same gap in coverage along the Route 125 corridor. Mr. Pagacik, the Planning Board's independent expert, concluded that both proposed towers covered the same area and that only one tower was necessary to close the Route 125 gap. In addition, there was substantial evidence that SBA/ATC's proposed tower was too close to residential abutters and visually intruded on the residential neighborhood in the Marshall Road area and Route 125. Given the above evidence, the Planning Board properly rejected SBA/ATC's application.

The District Court erred in its review by interpreting the TCA's substantial evidence standard as allowing it to determine whether the Town had selected the better application. The substantial evidence test is not a comparison test. Instead, the TCA empowers the Planning Board and not the Court to make this decision.

When a substantial evidence review is properly conducted, it is clear that the Planning Board correctly discharged its duty under the TCA when it rejected SBA/ATC's application. It denied SBA/ATC's application for a conditional use permit after weighing and considering relevant evidence that this proposed tower did not fulfill the values, purposes, and goals of the

Zoning Ordinance. Accordingly, this Court should reverse the District Court's Order and enter judgment for the Town.

Respectfully submitted,

TOWN OF KINGSTON

By and through its attorneys,

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Dated: March 5, 2002 By:

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