

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEW PAR d/b/a VERIZON WIRELESS

Plaintiff/Appellant,

Case No.

vs.

Hon.

COUNTY OF WEXFORD, a Michigan
municipal corporation, and the WEXFORD
COUNTY ZONING BOARD OF APPEALS

COMPLAINT FOR RELIEF UNDER THE
U.S. TELECOMMUNICATIONS ACT OF
1996 AND CLAIM OF APPEAL UNDER
MICHIGAN LAW.

Defendant/Appellee.

REQUEST FOR EXPEDITED REVIEW
PURSUANT TO 47 U.S.C. §332(c)(7)(B)(v)

STEPHEN R. ESTEY (P53262)
JOHN A. FERROLI (P35869)
MICHAEL R. VOGT (P74168)
Dykema Gossett, PLLC
Attorneys for Plaintiff/Appellant
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
(248) 203-0538

ROBERT A. LaBELLE (P38310)
Myers Shierk & LaBelle, PLLC
Attorneys for Plaintiff/Appellant
40701 Woodward Ave., Suite 235
Bloomfield Hills, MI 48304
(248) 203-2040

COMPLAINT AND CLAIM OF APPEAL

NOW COMES Plaintiff/Appellant, NEW PAR, d/b/a VERIZON WIRELESS, by and through its attorneys, Dykema Gossett, PLLC and Myers Shierk & LaBelle, PLLC and, for its Complaint and Claim of Appeal, states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff/Appellant, New Par d/b/a Verizon Wireless, is a Delaware general partnership, which does business as Verizon Wireless (“Verizon Wireless”) in Michigan.

2. Verizon Wireless maintains a regional office located at 26935 Northwestern Highway, Suite 100, Southfield, Michigan 48034.

3. Defendant/Appellee, County of Wexford (“Defendant” or “Wexford”), is a municipal corporation existing under the laws of the State of Michigan, whose address is 437 E. Division St, Cadillac, Michigan 49601.

4. The Wexford County Zoning Board of Appeals (“ZBA”) is an authorized body of Wexford pursuant to Article 8 of the Wexford County Zoning Ordinance (“Ordinance”).

5. Subject matter jurisdiction over this action is properly vested in this Court pursuant to 28 USC §1331, because this case involves a civil action arising under the laws of the United States.

6. Specifically, jurisdiction of this Court exists in that this action arises under Section 704 of the Telecommunications Act of 1996 (the “Act”), 47 USC §332(c)(7)(B), the laws of the United States and the State of Michigan.

7. The Court has supplemental jurisdiction over any claims based on Michigan law pursuant to 28 USC §1367(a), because such claims are so related to claims arising under the Act

and form a part of the same case or controversy under Article III of the United States Constitution.

8. Venue properly lies in the Western District of Michigan pursuant to 28 USC §1391(b) because the acts giving rise to the claims alleged herein occurred in the Western District for the State of Michigan and involve real property located within the Western District. Further, Defendant is located in the Western District of Michigan.

REQUEST FOR EXPEDITED CONSIDERATION

9. Verizon Wireless is entitled to have its Complaint heard and decided on an expedited basis pursuant to 47 USC§332(c)(7)(B)(v).

FACTUAL BACKGROUND

A. Wireless Service Technology

10. Verizon Wireless is licensed by the Federal Communications Commission ("FCC") as a provider of personal and advanced wireless voice and data services, commercial mobile radio services, as well as other telecommunications services, as those terms are defined under the Act and federal law, in the Michigan market, including without limitation, Wexford County.

11. Verizon Wireless is seeking to facilitate the development of a wireless communications network within Wexford, in keeping with the goals of the Act, and Verizon Wireless' licenses issued to it by the FCC.

12. The licenses which authorize Verizon Wireless to provide wireless service in Wexford County were issued by the FCC pursuant to 47 USC §151. Section 151 establishes a national policy to "make available, so far as possible, to all people of the United States, without discrimination ... a rapid, efficient, Nation-wide and world-wide wire and radio communication

service with adequate facilities at reasonable charges, for the purpose of national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 USC §151.

13. To meet these policy goals, Verizon Wireless seeks to provide personal wireless services to local businesses, public safety entities and the general public. To advance the national policies enumerated under 47 USC §151, Verizon Wireless must create and maintain a network of wireless communication facilities, each of which consists of antennas and related equipment designed to send and receive radio signals.

14. Wireless service is vitally important to public safety and convenience. Wireless devices utilizing digital technology operate by transmitting a radio signal to antennas mounted on a tower, pole, building or other structure. The antenna feeds the signal to electronic equipment housed in the small shelter building, which is called a base station. The base station is connected by microwave, fiber-optic cable or ordinary telephone wire to a base station controller, subsequently routing calls and data throughout the world.

15. Previously, signals were provided by analog carriers using lower frequencies and thus higher signal strength. Modern and newer providers, like Verizon Wireless, operate on the higher Personal Communications Service ("PCS") and Advanced Wireless Services ("AWS") frequencies. Because of the lower signal strength and higher frequencies than analog and because of the vastly increased traffic - both voice and data - required to be processed by each wireless communication facility, the effective communications range between a handheld wireless device and that facility is more limited.

16. In order to provide reliable service to a user, coverage must connect in a grid pattern resembling a honeycomb, thus "cellular" coverage. If Verizon Wireless is unable to

construct a wireless communication facility within a specific geographic area, Verizon Wireless will not be able to provide service to the consumers within that area.

17. Verizon Wireless' radio frequency engineers use complex computer programs and extensive field testing to complete propagation maps indicating where additional wireless communication facilities are needed to support the increased voice and data traffic on its network. These propagation maps take into account the topography of the land, intervening structures, the coverage boundaries of neighboring facilities and other limiting factors. Wireless communication facilities do not work independently. Rather, a reliable and robust network can only be realized by placing these facilities in a carefully planned configuration so that they operate as a unified network. Only when the entire network is operational will a user have service and an uninterrupted signal throughout a given area.

18. When customer demand for wireless voice and data services exceeds capacity of the existing network to deliver those services, a gap is created.

19. Based upon Verizon Wireless' research and analysis, Verizon Wireless' radio frequency engineers determined that additional capacity was needed to provide service in Wexford County, specifically in the area near the intersection of State Route 115 and South 29 Road. Increased voice and data traffic on the Verizon Wireless network in this area created a significant need for increased capacity.

B. The Proposed Site

20. In order to meet this urgent need for increased capacity, Verizon Wireless identified potential locations for a new wireless communications facility. Based upon several factors, including the requirements of the Ordinance, a particular parcel of land, located within Wexford was identified as the most favorable for the construction of the new wireless

communications facility. A legal description of the property is attached hereto as **Exhibit A** ("Property").

21. The Property, which consists of approximately 60 heavily wooded acres, is owned by Ronald Lalama and Carmina Lalama (the "Landowners").

22. The Property is located in the F-R (Forest-Recreational) zoning district pursuant to the Ordinance.

23. Verizon Wireless entered into a lease with the Landowners that includes approximately 10,000 square feet of land on the Property (the "Lease"), together with access and utility easements, on which Verizon Wireless proposes to build the proposed wireless communications facility (the "Proposed Site"). A copy of the Memorandum of Land Lease Agreement, which is dated July 9, 2014 and was recorded in the Wexford County Register of Deeds at liber 669, pp 1668 – 1677, is attached hereto as **Exhibit B**.

24. The Proposed Site is set back more than 1,200 feet from the nearest road and located within a densely wooded area.

25. Verizon Wireless intends to build the following improvements on the Proposed Site: a 250 foot tower, an equipment shelter on the ground to house necessary ancillary communications equipment, an exterior generator for emergency power, and other related equipment (collectively, the "Facility"). The Proposed Site will be enclosed by a 6-foot-high security fence. *See Exhibit C, Verizon Wireless Site Plan, Midwestern Consulting.*

C. The Ordinance

26. Wireless Communication Towers are regulated by Article 3A of the Ordinance, which sets forth the requirements necessary for approval of a new wireless communication tower (the "Approvals").

27. Pursuant to the Ordinance, wireless communications towers or antennas that are not a permitted use under Section 3A.5 or entitled to administrative approval under Section 3A.6 must obtain a special land use permit by approval of the Wexford Planning Commission.

D. The Verizon Wireless Application for Special Land Use Permit and Site Plan Approval

28. On or about March 17, 2014, Verizon Wireless, through its site acquisition specialist Robert J. Przybylo, submitted its application for a special land use permit, pursuant to the requirements of the Ordinance. A copy of the application is attached hereto as **Exhibit D** (“Application”).

29. On May 14, 2014, the Wexford Planning Commission considered Verizon Wireless’ Application (“Planning Commission Meeting”).

30. During the course of the Planning Commission Meeting, various individuals appeared in opposition to the Proposed Site, and made various comments on the record against approval of the Application, including unsubstantiated and improper concerns over aesthetics, and unsupported assertions that the Facility could be built elsewhere.

31. Contrary to these unsupported assertions of the tower opponents, Verizon Wireless produced substantial evidence in the record to demonstrate its need for the Proposed Site and Facility. This evidence included, among other things, uncontroverted reports from a qualified radio frequency engineer establishing Verizon Wireless’ need for increased capacity in the surrounding area and testimony from a site acquisition specialist regarding Verizon Wireless’ efforts to locate a suitable site.

32. Specifically, the record evidence established the following: (a) Verizon Wireless engineers produced propagation maps demonstrating the significant need for increased capacity in the area surrounding the Proposed Site; (b) a new wireless communication facility is necessary

to address that coverage issue; (c) the only other available existing tower in the area was incapable of addressing the capacity issue; (d) utilizing the existing tower site in the area would have required Verizon Wireless to construct a total of three towers, rather than two, in order to address the capacity issues, in violation of the goals of the Ordinance (Section 3A.1(3)); (e) there were no other potential sites within the coverage area that would have been less intrusive while at the same time offering as robust a coverage solution as the Proposed Site (*See Exhibit D and Exhibit I, Propagation Maps*); (f) the tower on the Proposed Site was designed for co-location by other wireless providers, as required by the Ordinance; and (g) the setback and separation requirements in the Ordinance were unnecessary given the design specifications and engineering analysis of the specific type of tower to be built on the Proposed Site. *See generally Exhibits C through I.*

33. No other record or documentary evidence was submitted in opposition to Verizon Wireless' application. Instead, only generalized verbal objections were raised by certain individuals at the meeting, consisting of nothing more than unsupported assertions that the Facility was aesthetically displeasing, and generally questioning the need for the Proposed Site, without any specificity or evidentiary support.

34. After conducting the public hearing, and having received and reviewed all evidence submitted, the Wexford Planning Commission approved the Special Land Use Permit and Site Plan.

35. Upon information and belief, on or about June 11, 2014, the Minutes of the Wexford Planning Commission May 14, 2014 Meeting were approved. *See Draft Meeting Minutes of May 14, 2014 Wexford Planning Commission, attached hereto as Exhibit E.* (The

copy attached hereto is a draft, the final approved version is in the possession of Wexford and will be provided).

E. The Appeal to the Wexford Zoning Board of Appeals

36. After the Wexford Planning Commission approved Verizon Wireless' Application, Patrick and Sandra Donovan and five other couples, presumed to be residents of Wexford, filed an appeal of the Wexford Planning Commission decision to the Wexford Zoning Board of Appeals ("ZBA"). *See Exhibit F, Request to Appeal, filed by Patrick Donovan, et al ("Appeal")*.

37. The Appeal was heard and decided by the ZBA at its regular meeting on July 21, 2014. A copy of the certified transcript of the court reporter who transcribed all of the proceedings before the ZBA is attached hereto as **Exhibit G**.

38. At that meeting, the ZBA reversed the Wexford Planning Commission's Approvals of the Application. *See Exhibit H, Draft Minutes of July 21, 2014 Meeting of the Wexford Zoning Board of Appeals*. (The final approved minutes are in the possession of Wexford and will be provided).

39. Upon information and belief, the July 21, 2014 Minutes of the ZBA were approved at the ZBA August 18, 2014 Meeting.

40. Section 8.4 of the Ordinance requires that the ZBA "return its decision in writing within thirty (30) days after a request or appeal has been heard, unless additional time is agreed upon by all parties concerned." *See Ordinance, Section 8.4(B)*.

41. The ZBA failed to comply with its Ordinance and the procedures thereunder, in that it did not issue a written decision.

42. The comprehensive materials submitted by Verizon Wireless at the Wexford Planning Commission and ZBA hearings demonstrated that it had met all the requirements of the Ordinance for the Approvals and under the Act.

COUNT I

**VIOLATION OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996:
FAILURE TO SUPPORT DENIAL WITH A WRITTEN DECISION BASED ON
SUBSTANTIAL EVIDENCE IN THE RECORD
(47 USC §332(c)(7)(B)(iii))**

43. Verizon Wireless incorporates by reference all prior paragraphs.

44. The Act comprehensively addresses telecommunications policy and the development of facilities to provide telecommunications services throughout the United States.

45. The stated purpose of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." (Preamble to the Act).

46. The Act provides, in pertinent part:

Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.
47 USC§332(c)(7)(B)(v).

47. The Act further provides, in pertinent part:

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 USC§332(c)(7)(B)(iii).

48. Verizon Wireless satisfied all applicable requirements under the Ordinance for issuance of a special land use permit and site plan approval to erect a new wireless communication tower and construct its Facility on the Proposed Site.

49. The denial of the Application, through the decision of the Wexford ZBA, was not in writing, nor based on substantial evidence contained in the written record established before the Wexford Planning Commission or the ZBA. *Telespectrum v PSC of Kentucky*, 227 F3d 414 (6th Cir. 2000); *New Par v City of Saginaw*, 301 F2d 390 (6th Cir. 2002).

50. The ZBA's decision is contrary to the uncontroverted evidence, which supported Verizon Wireless' Application. The generalized, unsupported assertions made in opposition to the Proposed Site before the Wexford Planning Commission and ZBA do not constitute "substantial evidence" upon which a decision to deny placement of the Facility must be based pursuant to the Act.

51. Verizon Wireless is a "person adversely affected" as that term is used in 47 USC §332(c)(7)(B)(v) in that its Application has been denied.

52. The ZBA's denial of Verizon Wireless' Application was a final action by a local government.

53. The refusal to grant the special land use permit was an abuse of discretion, contrary to applicable law and was not supported by competent, material and substantial evidence in the written record.

54. Verizon Wireless has, and will continue to suffer irreparable harm as a direct and proximate result of Wexford's unlawful acts, through its authorized body, the ZBA, in violation of 47 USC §332(c)(7)(B)(iii).

COUNT II

VIOLATION OF FEDERAL TELECOMMUNICATIONS ACT OF 1996:
EFFECTIVE PROHIBITION OF PERSONAL WIRELESS SERVICES
(47 USC §332(c)(7)(B)(i)(II))

55. Verizon Wireless incorporates by reference all prior paragraphs.

56. The Act further provides, in pertinent part:

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.
47 USC§332(c)(7)(B)(i)(II).

57. The denial of the Application has the effect of prohibiting personal wireless service within Verizon Wireless' network.

58. Verizon Wireless demonstrated, through its Application the testimony of credentialed experts in radio frequency engineering and placement of towers, the propagation maps and other compelling evidence at the hearings before the Wexford Planning Commission and ZBA, that the Facility is urgently needed to resolve wireless service capacity issues within Wexford County in the area of State Route 115 and South 29 Road.

59. Verizon Wireless also submitted evidence showing that it investigated alternative sites in and around the Property, but none of the alternative locations would adequately or completely address coverage.

60. No competent evidence was submitted to rebut any of Verizon Wireless' engineering, geotechnical and other evidence.

61. The denial of the special land use permit and site plan was an abuse of discretion, contrary to applicable law and was not supported by competent, material and substantial evidence in the record.

62. Accordingly, Wexford's denial of the Application, through the decision of the Wexford ZBA, violates the Act as it has the effect of prohibiting the provision of personal wireless services, contrary to the requirements of 47 USC § 332(c)(7)(B)(i)(II).

63. As a direct and proximate result of Wexford's unlawful acts in violation of 47 USC § 332(c)(7)(B)(i)(II), acting through its authorized body, the ZBA, Verizon Wireless has and will continue to suffer irreparable harm.

COUNT III

APPEAL OF ZBA DECISION PURSUANT TO THE ACT AND MCL 125.3606

64. Verizon Wireless incorporates by reference all prior paragraphs.

65. Pursuant to the Act and MCL 125.3606, Verizon Wireless appeals the decision of the Wexford ZBA which reversed the approval by the Wexford Planning Commission of Verizon Wireless' Application. 47 USC §332(c)(7)(B)(v); MCL 125.3606.

66. The denial of the Application prohibits Verizon Wireless from carrying out its federally imposed obligation to provide continuous and uninterrupted wireless telecommunications service, thus frustrating the purposes of the Act, i.e. to encourage competition among wireless carriers and provide wireless service throughout the United States.

67. The denial of the Application was not supported by a written decision based on substantial evidence contained in the record.

68. The Wexford ZBA failed to comply with its Ordinance and procedures, including without limitation, failing to return its decision in writing within thirty (30) days after the request for appeal was heard.

69. Indeed, the Wexford ZBA failed to produce any written decision or cite *any* evidence in the record in support of its decision.

70. The unwritten, unsupported decision lays bare the Wexford ZBA's failure to properly consider the undisputed, substantial, competent and sufficient evidence presented by Verizon Wireless in support of its Application, which satisfied the Ordinance and Michigan law.

71. The refusal to grant the special land use permit was an abuse of discretion, contrary to applicable law and was not supported by competent, material and substantial evidence on the record.

72. The denial of the Application was an arbitrary denial of a legitimate land use and an unreasonable exercise of Wexford's police powers in violation of the Act and state and federal law.

COUNT IV

DECLARATORY ACTION/INJUNCTIVE RELIEF

73. Verizon Wireless incorporates by reference all prior paragraphs.

74. There is an actual and justiciable controversy between the parties in existence at the present time.

75. This Court has the power to adjudicate the matter at issue and enter its judgment declaring the rights of the parties pursuant to the Act and state law.

76. The actions of Wexford have caused substantial harm to Verizon Wireless and threaten to interfere with interstate and intrastate commerce and the Plaintiff's business.

77. Verizon Wireless has no adequate remedy at law.

78. Injunctive relief is necessary to prevent ongoing violations of both federal and state law.

79. No harm to the public or public interest will arise if this Court issues injunctive relief.

80. The public interest will be served as the intent of the federal government as set forth in the Act will be advanced and wireless communication services providing recognized safety and security benefits will be promoted throughout the region.

COUNT V

MANDAMUS

81. Verizon Wireless incorporates by reference all prior paragraphs.

82. In acting upon Verizon Wireless' Application, Wexford was subject to the duties, limitations, liabilities and restrictions imposed by law, including, but not limited to, Michigan's Zoning Enabling Act.

83. For the reasons described above, the decisions of Wexford, acting through its authorized body, the ZBA, to deny the special land use permit and site plan Approvals was without basis, in violation of the Act and constituted an unreasonable, arbitrary and capricious exercise of its police power, resulting in the exclusion of a legitimate and authorized land use on the Proposed Site.

84. As Verizon Wireless fulfilled and satisfied all requirements under Wexford's Ordinance, and the decision of the ZBA was unsupported by the record and not based upon substantial evidence, as a matter of law, Verizon Wireless is entitled to the granting of the special land use permit and site plan Approvals as requested in its Application.

RELIEF REQUESTED

WHEREFORE, Plaintiff/Appellant respectfully requests the following relief:

A. That the Court determine, declare and adjudge Wexford's denial of the Application, acting through its authorized body the ZBA, constitutes a violation of the Act;

B. That the Court issue an injunction preventing Wexford from interfering with Verizon Wireless' use of the Proposed Site for wireless communication services and the construction of the Facility;

C. That the Court reverse the decision of the Wexford ZBA, affirm the Approvals issued by the Wexford Planning Commission, and approve the Application;

D. That the Court issue a writ of mandamus compelling and ordering Wexford to approve the Application as submitted and to issue all necessary building or other permits required by Wexford for the construction of the Facility;

E. That the Court expedite its decision in this case pursuant to Section 332(c)(7)(B)(v) of the Act;

F. That the Court order Wexford to pay to Verizon Wireless all of its reasonable attorneys' fees, costs and expenses allowed by law; and

G. That the Court award such other relief to the Plaintiff as may be appropriate under the circumstances.

Respectfully submitted,

By: /s/ Stephen R. Estey

Stephen R. Estey (P53262)
John A. Ferroli (P35869)
Michael R. Vogt (P74168)
Dykema Gossett PLLC
Attorneys for Plaintiff/Appellant
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
(248) 203-0700
sestey@dykema.com
jferroli@dykema.com
mvogt@dykema.com

By: /s/ Robert A. LaBelle

Robert A. LaBelle (P 38310)
Myers Shierk & LaBelle, PLLC
Attorneys for Plaintiff/Appellant
40701 Woodward Ave., Suite 235
Bloomfield Hills, MI 48304
(248) 203-2040
rlabelle@msl-llc.com

Date: August 20, 2014