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Cellco Partnership v. City of Peabody

Appeals Court of Massachusetts - September 24, 2020 - N.E.3d - 98 Mass.App.Ct. 496 - 2020 WL 5667189

Personal wireless services carrier sought review of city's denial of special permit application to construct a wireless services facility to remedy wireless coverage gap in city, alleging violation of Telecommunications Act (TCA).

The Land Court Department granted summary judgment for carrier. City appealed.

The Appeals Court held that:

- Municipal-wide distributed antenna system was not a feasible alternative to proposed facility;
- Statements in summary judgment affidavit concerning cost comparisons for alternative to facility were conclusory and unsupported; and
- No feasible alternative existed.

Municipal utility's proposed municipal-wide distributed antenna system to remedy personal wireless services coverage gap in city was not a feasible alternative to carrier's proposed personal wireless service facility, and thus city's denial of carrier's special permit application to construct facility effectively prohibited provision of personal wireless services in violation of Telecommunications Act (TCA), where carrier requested a price proposal seven times over a two-month period, utility failed to offer any price proposal, and parties could not reach an agreement as to provision of communication services to the new antennae, pole rental fees, and safety concerns.

Statements from municipal utility's affidavit about estimated cost comparisons for a proposed alternative option to remedy carrier's coverage gap for personal wireless services were conclusory and unsupported, and thus, insufficient to defeat motion for summary judgment in carrier's zoning appeal alleging that city's denial of special permit application to construct a wireless services facility violated Telecommunications Act (TCA) as an effective prohibition on service, where proposed option failed to materialize and cost estimates were developed based on wireless services from a different town.

No feasible alternative existed to carrier's proposed personal wireless service facility, and thus city's denial of carrier's special permit application to construct facility effectively prohibited provision of personal wireless services in violation of Telecommunications Act (TCA), where carrier made diligent attempts, over course of four and one-half years, to find another feasible option, carrier considered multiple locations including utility pole, a church steeple, and site itself, carrier explored other options, such as small cell antennae and a municipal-wide distributed antenna system, and carrier considered some options multiple times.