

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CIVIL ACTION NO. 2:14-00081-NT

Mariner Tower II, LLC, *
Plaintiff *
v. *
Town of Boothbay, et al., *
Defendants *

CONSENT ORDER

With the consent of Plaintiff Mariner Tower II, LLC and Defendants Town of Boothbay and Boothbay Board of Appeals, the Court makes the following factual findings and enters the following Consent Order:

1. Plaintiff seeks to construct a personal wireless service facility on a parcel of land in the Town of Boothbay owned by Lucy Ann Spaulding, located off Route 96, Ocean Point Road, Boothbay, Maine, Tax Map R9, Lot 12-A, and more particularly described in a deed recorded in the Lincoln County Registry of Deeds in Book 3558, Page 304 (“the Spaulding Property”). The proposed personal wireless service facility includes a one hundred and twenty foot (120’) monopole tower in order to host telecommunication antennas, and at the base of the tower, within a fenced compound, an equipment shelter and related equipment, as well as an easement for utilities and access for the same (“the Facility”). Plaintiff applied to the Boothbay Board of Appeals (“the BoA”) for a variance from Section 3.9.7.2.1 of the Zoning Ordinance of

the Town of Boothbay (“the Ordinance”), which prohibits a “Communication Tower” in the Special Residential District. The Spaulding Property is located in the Special Residential District.

2. The BoA denied Plaintiff’s request for a variance by written decision dated August 19, 2014, and subsequently denied Plaintiff’s a timely filed motion for reconsideration.

3. There exists disagreement between Plaintiff and Defendants about the applicability of certain provisions of the Ordinance to Plaintiff’s personal wireless service facility in light of the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7), et. seq., but the parties wish to resolve this disagreement by means of this Consent Order.

4. A variance is hereby granted pursuant to 30-A M.R.S.A. § 4353, and the Ordinance, as follows:

Property Owner: Lucy Ann Spaulding

Property: Off Ocean Point Road in Boothbay, Maine more particularly described in a deed recorded in the Lincoln County Registry of Deeds in Book 3558, Page 304.

Variance: Plaintiff is hereby granted a variance from Section 3.9.7.2.1 of the Ordinance in order to locate, construct, operate and maintain the Facility, on the Spaulding Property.

Conditions of the Variance:

- (a) Plaintiff shall construct, operate, maintain and, if necessary, remove the Facility in accordance with the variance application filed by Mariner Tower for the Spaulding Property, including but not limited to, the site plans submitted by Mariner Tower in support of the said application for the Spaulding Property, with the site plans dated July 28, 2014. Future co-locators using the Facility will not have to apply for land use approval from the BoA, but each co-locator shall seek and obtain a building permit from the Code Enforcement Officer prior to commencement of construction of any improvements. No change from the site plans, as amended by this Consent Order, is permitted unless and until an amended site plan is first submitted to and approved by the Planning Board.
- (b) Plaintiff shall remove the said monopole upon the earlier of the following events: (a) the monopole is not used by or actively marketed to

- telecommunication providers for a continuous period of twelve (12) months, or (b) the termination of the lease agreement between Plaintiff and the owner of the Spaulding Property.
- (c) Prior to the commencement of any construction, Plaintiff shall provide the Town of Boothbay (the "Town") with a removal bond in the amount of \$20,000 to cover the cost of the removal of the Facility, including all site reclamation costs deemed necessary to return the site to its pre-construction condition such as the removal of any road and reestablishment of vegetation, if such removal is necessary hereunder. Plaintiff shall maintain the removal bond throughout the time period that the Facility is in existence. The removal bond shall be subject to the prior approval of the Town Attorney. The amount of the removal bond shall be increased by 15% on or before January 1, 2020 and every five years thereafter.
 - (d) Plaintiff shall install a Knox box on the compound entrance and shall provide the Town with a set of keys to the Knox box in order to allow emergency access to the Facility by emergency vehicles and personnel.
 - (e) Prior to the commencement of any construction, Plaintiff shall provide the Town with a copy of an executed agreement with a telecommunications provider.
 - (f) Plaintiff agrees to allow shared use of the tower if another applicant agrees to pay reasonable charges for co-location. Plaintiff and its successors and assigns agree to:
 - i. respond in a timely, comprehensive manner to a request for information from a potential co-location applicant, in exchange for a reasonable fee not in excess of the actual cost of preparing a response;
 - ii. negotiate in good faith for shared use of the wireless telecommunications facility by third parties;
 - iii. allow shared use of the wireless telecommunications facility if an applicant agrees in writing to pay reasonable charges for co-location; and
 - iv. require no more than a reasonable charge for shared use of the wireless telecommunications facility, based on community rates and generally accepted accounting principles. This charge may include, but is not limited to, a pro rata share of the cost of site selection, planning project administration, land costs, site design, construction and maintenance, financing, return on equity, depreciation, and all of the costs of adapting the tower or equipment to accommodate a shared user without causing electromagnetic interference. The amortization of the above costs by the facility owner shall be accomplished at a reasonable rate, over the life span of the useful life of the wireless telecommunications facility.
 - (g) The proposed facility will comply with all FCC standards for radio emissions.
 - (h) Upon request, the applicant shall provide the Town with a list of tenants of the facility.

- (i) Plaintiff shall not cut or trim the trees outside the Facility without the property owner and the Town's prior consent.
- (j) Electric generators at the facility shall be operated only as necessary for emergency power and for normal maintenance and repair, and that the sound level produced by said generators and/or any and all machinery or equipment at the Facility shall not exceed 65dB when measured at any property line forming the boundary of Lot 12-A as shown on Assessors' Map R-9 as of the April 1, 2013 assessment date.
- (k) There shall be no lights on the tower, and all lights installed at the facility shall be mounted less than 12 feet above ground level, located and shielded to minimize light pollution, and illuminated only as necessary for work or safety at the facility.
- (l) The tower shall be constructed of galvanized steel, matte gray in color.
- (m) Plaintiff certifies that no more than two "dish-type" antennas having a diameter of 36" or greater shall be attached to the tower without seeking and obtaining the prior approval of the Planning Board.
- (n) Tower installation shall meet all local, state and federal requirements for equipment emissions.
- (o) The tower shall be constructed to the current ANSI/EIA/TIA Standard 222 as may be amended from time to time.
- (p) The only improvements to be constructed by the applicant on the Spaulding Property are the (i) equipment shelter and generator pad or generator pad with equipment cabinet for each co-locator, (ii) tower and (iii) fence, all as shown on Plan Sheet C-103.
- (q) The top of any panel antennas mounted on the tower shall not exceed 120'.

5. An attested copy of this Consent Order shall serve as the so-called "Certificate of Variance" pursuant to 30-A M.R.S.A. § 4353(5). This Consent Order shall be recorded by Plaintiff at the Lincoln County Registry of Deeds within ninety (90) days of the date of this Consent Order; otherwise, the variance is void. This Consent Order shall be indexed under the name of the current property owner.

6. Within thirty (30) days of the date of this Order, Plaintiff shall pay Defendants' outside consultant fees in the amount of \$3,800.23, and Plaintiff shall pay Defendants' other actual costs and expenses in an amount not to exceed \$2,500.00. Such payments shall be made by bank or cashier's check made payable to the Town of Boothbay. All payments shall be

forwarded to the Town c/o Town Manager, Boothbay Town Offices, 1011 Wiscasset Road, P.O. Box 106, Boothbay, ME 04537-0106.

7. As long as this monopole remains in place, Plaintiff, its successors and assigns, shall provide Defendant Town of Boothbay with space on the monopole rent-free for public service communication links at no higher than ten (10) feet below the fourth provider and no lower than seventy-five (75) feet from the bottom of the tower as shown on the site plans dated July 28, 2014, as modified by this Order. Defendant Town of Boothbay expressly understands and agrees that if it proceeds with the use of the monopole for public service communication links, it will pay for all of its own equipment and for all reasonable connection fees to the monopole infrastructure and all its utility costs at the site, including, without limitation, all electrical costs.

/s/ Mary E. Costigan
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Attorney for Defendants Town of Boothbay and the
Boothbay Board of Appeals

SO ORDERED.

DATED THIS ____ DAY OF _____, 2014.

Nancy Torresen

United States District Court Judge