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Lawyers Argue Silo Cell Antennae In Two Courts

by Tommy Gardner

CABOT — Lawyers for both sides of the debate over whether to allow Unicel to install cell phone antennae onto a farm silo are fighting their battles on two different fronts.

This past summer, the town Zoning Board approved wireless carrier Unicel's installation of the half-dozen antennae onto the silo at the Sousa Farm. The board pointed to a fairly new piece of legislation that aims to have affordable broadband and wireless communication statewide by 2010.

The decision was promptly appealed by neighboring property owners Wendy Jones and Andrew Leinoff, who insisted the Zoning Board ignored a setback variance in making its decision. Since then, according to the town's attorney, Charles Merriman, the parties have been "embroiled in complicated legal wrangling."

Merriman and the zoning board are sitting on the sidelines as Jones/Leinoff and Unicel fight their battles. But in a Dec. 18 telephone interview he explained some of the "esoteric" legal tactics that were employed since the summer.

According to Merriman, the board's decision was based on authority granted by Act 79 — signed into law into 2007 — that authorizes towns to look at local zoning regulations to determine the structure's impact on development patterns in the area.

The board ruled the antennae would have a "de minimis" impact on the town, that phrase coming from the Latin maxim "de minimis non curat lex," which translates as "the law cares not for small things."

Merriman said Act 79 guidelines trump the variance issue, and the board could approve the project without looking at the variance as long as it determined a de minimis impact. The town bylaws state any cell towers have to be located more than 1,500 feet from any residential structure.

Jones/Leinoff posited the board ought to have taken the variance into consideration. In August, they appealed the permit issuance to the State Environmental Court, saying the cell antennae would have a negative impact on the town.

This, said Merriman, is when things got interesting.

According to Merriman, the Telecommunications Act of 1996 restricts state and municipal governments from denying wireless facilities because of health or environmental issues.

"The opponents are intelligent, sophisticated people, and they know it's not a legal argument," he said. "Instead, they made a different argument. They said the perception of See CELL, Page Two

Cell

Continued From Page One

it affecting people's health could negatively affect property values."

In September, Unicel's lawyers responded by taking the case to federal district court, saying that since there was a health issue implicit in the plaintiff's argument, the Telecommunications Act made it necessary to move the case out of the state courts.

Charlotte Ansel, one of two attorneys from Downs, Rachlin and Martin representing Unicel, said Jones/Leinoff then engaged in "artful pleading" in order to get the case remanded back to the state courts. Artful pleading occurs when plaintiffs in an inherently federal case attempt to articulate their claim in state-law terms.

Since then, the case has become a

sort of jurisdictional tug-o-war, with Jones/Leinoff's attorney, Jared Margolis, trying to get the case back in the state court and Unicel's lawyers attempting to keep the case in federal court.

Additionally, on Oct. 31 the parties submitted a separate but related case in State Environmental Court. Margolis said he is trying to challenge the validity of Unicel's permit based on two Act 250 criteria — number eight, which scrutinizes a project's affect on area aesthetics, and number 10, which looks at whether a project complies with the town zoning plan.

"The conformance to the town plan is the bigger issue," said Margolis. "It's just not there."

Interestingly, said Ansel, Unicel filed in the same court on the same

day to challenge Jones/Leinoff's party status, questioning their "particularized interest" in the same two criteria.

Like the case in federal court, there are no time constraints on the courts to make decisions. Neither Margolis nor Ansel are making predictions as to when any decision might be made.

"We've made all our arguments regarding party status, and we feel we have solid arguments in both cases," said Margolis. Ansel declined to give any predictions or opinions.

According to Merriman, however, the outcome could be determined by the last person standing.

"We could be looking at a war of attrition," said Merriman. "And Unicel has deep pockets."