

RYE TOWN COUNSEL'S

STATEMENT RE: VERIZON'S CONTINUANCE

When Verizon's Attorney read my September 13, 2018 memorandum describing what I discovered about the state land at the end of 0 Port Way when I visited the area on September 5, he sent me two emails objecting to this information being part of the ZBA record, which had been closed by the ZBA. The second email sent at about 3:00 pm on Friday, September 14 included a paragraph which I interpreted as a suggestion that Verizon would be open to exploring the state land alternative.

At about 4:30 p.m. on Friday, September 14, Verizon's attorney and I had a long conversation about other alternatives. I gave Verizon's counsel some new information which became available after the September 4 ZBA meeting about possible access to the Condron parcel. The conversation ended with Verizon's attorney stating that he would discuss with Verizon officials whether or not to devote time to exploring these alternatives.

On Monday morning September 17, I sent Verizon's attorney additional information extracted from my files from the 1995 Condron v. Town of Rye litigation. (This is not the new information mentioned in the above paragraph, which at this time must remain confidential).

At 1:16 p.m. on Tuesday, September 18 Verizon's counsel called me and said that Verizon would like to have the applications continued for 90 days to work with the town to further explore three options: (1) 0 Port Way town land; (2) Condron; (3) state land in vicinity of end of Port Way. I said I would recommend the applications be continued. At 1:25 p.m. I called Planning and Zoning Administrator Reed and told her that the request for a continuance would be forthcoming and to tell the board chairs that I recommended it be granted. At 1:33 p.m. Verizon's counsel sent the continuance request to Ms. Reed. (Note. The time of my calls is verified by my cell phone call application.)

Applicants frequently request continuances, which the land use boards routinely grant. When that occurs, the Planning and Zoning Administer notes the request on the agenda and notifies interested parties of the continuance. The applicant and interested parties do not show up, and the continuance is then formally voted upon by the board the night of the meeting. In essence, that is what happened here.

On September 18 only three (3) members of the ZBA attended because two (2) others mistakenly thought the meeting had been cancelled. The continuance was granted. One person has asserted that a continuance requires all five (5) members to be present. That is incorrect, three (3) is a quorum, sufficient to grant a continuance.

The continuance is being criticized by parties who assume that the ZBA would have denied the Verizon applications on September 18; that the denials would be upheld by the federal court; and

that the real reason for the delay is to allow Verizon to strengthen its position in the litigation. The criticism is misplaced.

First, a denial on September 18 would have immediately set the town and Verizon in an adversarial position headed to court. That would have made a joint pursuit of viable alternatives more difficult to affect.

Second, there is no assurance that a federal court will sustain a denial. The parties who assert that the federal court sustaining a denial is a “slam dunk” are non-lawyers who may be blinded by their own vehement opposition to the Brackett Road site.

Third, before agreeing to recommend the continuance, I considered the possible effect of a continuance on my ability to defend the town in the event the ZBA denied the relief required for 120 Brackett Road. The delay will not adversely affect the town’s position if these alternatives prove to be unworkable. The ZBA record is closed. The record does not contest that 0 Port Way and the Condron parcel have access issues. With respect to the state land, the towns defense of a possible denial by the ZBA does not “sink or swim” on the availability of that land.

Fourth, the critics appear not to understand that the ZBA’s record will not be the only evidence the federal court will use to make a decision on effective prohibition, including whether the carrier has diligently pursued other alternatives. The parties may develop and introduce evidence extrinsic to the record on this issue. The federal court litigation will likely involve experts, expert reports, interrogatories and depositions, all part of extensive pretrial discovery. Any information Verizon gains during the continuance is evidence it would have been able to develop and introduce had a denial been voted on September 18.

Fifth, I believe that, if these other alternatives do not materialize, the delay will place the town in a stronger position. For obvious reasons, I am not going to reveal litigation strategy in a public statement.

Sixth, the criticism assumes a road layout process to provide access to 0 Port Way is a simple matter. The critics may not understand that a layout by the selectmen requires town meeting approval or that it may be challenged in court. Residents of Port Way and Holland Drive have indicated they will organize to oppose a cell tower at 0 Port Way.

In conclusion, the need for better cellular service in the north part of Rye was documented by the board of selectmen in the December 17, 2017 town newsletter. Rye will not be able to lawfully deny every cell tower proposal that comes along that is opposed by neighbors (as most proposals are). There will eventually be one or perhaps more cell towers in this part of Rye. The opportunity to explore these options further may result in solving the coverage gaps in this part of town with one tower reasonably distant from homes and not too obtrusive to the view shed. Without the continuation such an opportunity would have been missed.

Michael L. Donovan, Esq.
Rye Town Attorney
9/24/2018

