

**BEFORE THE PLANNING BOARD
TOWN OF ACTON, MASSACHUSETTS**

JAN 17 2006

Application of :)
Omnipoint Communications, Inc.)
a wholly owned subsidiary of)
T-Mobile, USA, Inc.) Application Filed on or about
and) June 29, 2006
The Church of the Good Shepherd)
)
to build)
)
a Wireless Communication Facility)
at 164 Newtown, Acton, Massachusetts)
)

**CITIZEN'S BRIEF IN OPPOSITION
TO THE ABOVE CAPTIONED APPLICATION**

This Brief outlines arguments to be presented at a hearing scheduled to consider the above captioned Application during an opportunity for Citizens to comment on the Application, on the date on which such hearing may be scheduled.

BACKGROUND

The above captioned Application (hereinafter the Application) was filed with the Planning Board on or about June 29, 2006. We understand that various extensions of time for the hearing have been negotiated between the Applicant and the Planning Board, and that a hearing on the Application is currently scheduled for January 23, 2007.

FACTS

1. The Application is by Applicant Omnipoint Communications, Inc. and T-Mobile, USA, Inc. for permission to build a Wireless Communications Facility at 164 Newtown.

Acton, Massachusetts. The proposed Facility consists of a tower proposed to be 100 feet tall (hereinafter the Cell Tower), other antennas, equipment boxes, and a chain link fence surrounding the Facility. A proposed roadway provides access to the Facility. The Registered Landowner of the site of the proposed Facility is The Church of the Good Shepherd.

2. A Survey Plan was filed as part of the Application. A copy of the Survey Plan was obtained from the Engineering Department of The Town of Acton, Massachusetts. A review of the Survey Plan reveals the following facts:

3. The scale of the Survey Plan indicates that 1 inch represents 50 feet, however on the copy available the 50 foot scale is 15/16 inch, indicating that 1 inch represents about 53.3 feet.

4. Measurement of four (4) lines whose length is indicated on the Survey Plan indicates that the average of the four lines gives a scale of 1 inch represents 53.5 feet.

The lines measured are:

Newtown Road Property Line, 315.36 feet, 5.875 inches, scale 53.68 feet to the inch:

Arlington Street Property Line, 295.13 feet, 5.5 inches, scale 53.66 feet to the inch:

West Property Line, 159.12 feet, 3.0 inches, scale 53.04 feet to the inch

South-West Property Line 295.24 feet, 5.5 inches, scale 53.68 feet to the inch

Average: 53.5 feet to the inch

5. Setbacks of 100 feet and 200 feet are indicated on the Survey Plan as circles, and are centered on a point apparently located at a center of the Cell Tower in the middle of the Facility.

6. The 200 foot setback is shown as 3 12/16 inches in radius, indicating a scale of 53.3 feet per inch.

7. The 100 foot setback is shown as 1 14/16 inches in radius, indicating a scale of 53.3 feet per inch.

8. The 200 foot setback is shown on the Survey Plan as substantially tangent to a DWELLING UNIT at 14 Arlington Street (tax map D-3 parcel 17) which is owned by James and Catherine Monahan. The Survey Plan incorrectly shows this parcel as owned by Registered Landowner Church of the Good Shepherd.

The Residence at 14 Arlington Street includes a doghouse located between the DWELLING UNIT at 14 Arlington Street and the required setback from a Lot line with Dong and Sun, and the signature of James Monahan hereinbelow attests to this fact..

9. A chain link fence encloses, substantially, a square which is 40 feet by 40 feet. Each side of the enclosed square is approximately 20 feet from the Cell Tower of the Facility at the near point of the side.

10. A Lot line between the land of Registered Landowner Church of the Good Shepherd and Dong and Sun is shown South West of the Cell Tower of the Facility with a setback of 106 feet from the Cell Tower. The near point of the Facility to the Lot line is the South West corner of the fence of the Facility, and this corner of the Facility is shown as substantially 50 feet closer to the Lot line, that is it is about 56 feet from the Lot line.

11. Registered Landowner Church of the Good Shepherd formerly owned the land of Dong and Sun, and retains an easement, referred to by the Application Survey Plan as "Easement B of Plan 9 of 2001", which grants Registered Landowner Church of the Good Shepherd the following:

"Grantor (The Church of the Good Shepherd) reserves the exclusive right to use the Easement Areas, including without limitation: (1) for access, utilities, parking, education, meditation, recreation, and similar uses, (2) to cut, clear, or otherwise manage the trees and vegetation within the Easement Areas, and (3) to install, repair, maintain, improve, and use driveways, parking areas, and other structures and amenities within the Easement Areas; provided that such actions or uses are consistent with local, state, and Federal

regulation, and further provided that the Grantor shall indemnify and hold Grantee harmless for any loss, claim, action, or damage arising, directly or indirectly, from the use of said easements. Absent a recorded agreement between Grantor and Grantee to the contrary, no construction or placement of any building(s) shall occur within the Easement Areas.”

Reference:

Deed Recorded at Deed Book 3859 Page 259, dated October 17, 2001, recorded October 19, 2001.

Deed recorded at Deed Book 37242 Page 491, dated December 2, 2002, recorded December 3, 2002,

Plan 9 of 2001, recorded January 5, 2001, Acton Engineering Ref. 3603

deeds and plan recorded at Middlesex Southern District Registry of Deeds

12. The Easement B is shown as substantially 50 feet wide with substantially parallel sides, and is bounded on the South West side by the aforesaid land with the DWELLING UNIT at 14 Arlington Street (tax map D-3 parcel 17) which is owned by James and Catherine Monahan.

ARGUMENT

THE APPLICATION IS DEFECTIVE ON ITS FACE AND THEREFORE SHOULD BE DENIED

I. The Application is in Violation of Acton Zoning Bylaw Section 3.10.6.4

Acton Zoning Bylaw Section 3.10.6.4 states:

“The Wireless Communication Facility shall be separated from any existing residential BUILDING by a horizontal distance that is at least twice the height of the facility, unless the residential BUILDING and the facility are located on the same lot.”

The proposed Cell Tower is 100 feet tall, and so “twice the height of the facility” is 200 feet. The statement in the Zoning Bylaw Section 3.10.6.4 “**The Wireless Communication Facility shall be separated from any existing residential building by a horizontal distance**” means that the 200 foot distance from the “**Facility**”, not from a geometric point located at the center of the Cell Tower as is shown in the Survey Plan. Rather, the 200 foot setback must be drawn from points of the chain link fence of the **Facility**.

When correctly drawn, the 200 foot setback intersects the DWELLING UNIT at 14 Arlington Street approximately 30 feet into the residence from the North wall of the DWELLING UNIT, as shown on the Survey Plan. Accordingly, the Application is in violation of the Zoning Bylaw 3.10.6.4, and so is defective on its face, and therefore should be denied.

Further, when the 200 foot radius setback is drawn incorrectly as centered on the actual Cell Tower, as shown in the Survey Plan, the 200 foot radius setback will still intersect the DWELLING UNIT at 14 Arlington Street, as the Survey Plan does not give dimensions locating the DWELLING UNIT at 14 Arlington Street, and the dimensions of the base of the Cell Tower are not specified in the Application. As shown by Applicant, the 200 foot radius setback is substantially tangent to the North wall of the DWELLING UNIT. The dimensions of the base of the 100 foot high Cell Tower are not shown, but may be as large as ten (10) feet square and made of concrete in order to support a 100 foot tall Cell Tower.

The setback must be drawn from the edges of the Cell Tower base, not as shown from a hypothetical point centered beneath the Cell Tower. The dimensions of the base move the setback over a few feet and cause the setback to intersect the DEWLLING UNIT located at 14 Arlington Street.

Accordingly, the Application is in violation of the Zoning Bylaw 3.10.6.4, and so is defective on its face, and therefore should be denied.

Even further, the Application is defective under Acton Zoning Bylaw Section 5.2.7.1 which states:

“Height in feet, STRUCTURES -- Height in feet shall be the vertical distance measured from the mean of the finished ground level adjoining the entire STRUCTURE to the highest extension of any part of the STRUCTURE.”

The height of the STRUCTURE, that is the Applicant’s proposed Cell Tower, is stated to be of height 100 feet. However, no mention of the requirements of Section 5.2.7.1 which requires that “Height in feet shall be . . . measured from the mean of the finished ground level adjoining the entire STRUCTURE”. No elevation diagram of the elevation variation through the Facility is given in the Application.

The required “mean of the finished ground level adjoining the entire STRUCTURE” is not set out in the Application.

The “mean of the finished ground level adjoining the entire STRUCTURE” may be below the base of the Cell Tower, the Applicant may be measuring his height of 100 feet from a higher point than the required “mean of the finished ground level”, and so the legal height as required by Section 5.2.7.1 may exceed the stated 100 feet.

For example, in order to support the 100 foot tall Cell Tower without guy wires, as is planned by Applicant, the base may be a large concrete structure, and may be as much as ten (10) feet square. Alternatively, the “mean of the finished ground level” may be interpreted to be taken at the border of the Facility at the proposed 40 foot by 40 foot chain link fence, and if so, the “mean of the finished ground level” will be substantially lower than the foot of metal parts of the Cell Tower. The 100 foot height must be measured from the “mean of the finished ground level adjoining the entire

STRUCTURE”, and Applicant is totally silent as from where his 100 foot height is measured.

The setback boundaries must be increased in the event that the legal height required by Section 5.2.7.1 exceeds whatever height the Applicant refers to.

An increase in the presently 200 foot setback will clearly cause the setback to intersect the DWELLING UNIT located at 14 Arlington Street if the setback is measured from the fence of the Facility as it should be. Also, the setback will intersect the DWELING UNIT even if the setback is measured from the Cell Tower base, and not from a hypothetical geometric point centered under the Cell Tower, as is shown on Applicant’s Survey Plan, as the setback at 200 feet is shown to be substantially tangent to the DWELLING UNIT on Applicant’s Survey Plan.

Accordingly the Application is incomplete in that measurement of “height” is not sufficiently spelled out, and therefore the Application is defective on its face and should be denied.

Still further, The residence BUILDING at 14 Arlington Street includes a doghouse located between the Dwelling Unit at 14 Arlington Street and the required setback from the Lot line with Dong and Sun. A BUILDING as used in Zoning Bylaw Section 3.10.6.4 is defined by the Acton Zoning Bylaw Section 1.3.3 as:

“BUILDING: A STRUCTURE enclosed with exterior walls, built or erected with any combination of materials, whether portable or fixed, having a roof, to form a STRUCTURE for the shelter of persons, animals, or property.”

In contrast, the Acton Zoning Bylaw at Section 1.3.5 defines a DWELLING UNIT as “DWELLING UNIT: A portion of a BUILDING designed as the residence of one FAMILY.”

The doghouse part of the “residential BUILDING” set out in Acton Zoning Bylaw Section 3.10.6.4 must be outside of the required 200 foot setback. The doghouse is in fact closer to the Facility, as shown in Applicant’s Survey Plan, than the required 200 foot setback. Accordingly, since the doghouse is within the 200 foot setback, the Application is defective on its’ face because it is in violation of Action Zoning Bylaw Section 3.10.6.4, and so should be denied.

Section 3.10.6.4 refers to a BUILDING which is defined as including housing for animals, and did not use the defined term DWELLING UNIT. Accordingly, the Application violates Section 3.10.6.4 by including the doghouse within the required 200 foot setback.

The aforesaid stated violations of Acton Zoning Bylaw Section 3.10.6.4 are incurable by simply editing or re-writing the Application because they depend upon the geometry of the proposed Facility, and the location of the DWELLING UNIT and BUILDINGS at 14 Arlington Street, Acton.

II. The Application is in Violation of Acton Zoning Bylaw Section 3.10.6.2

Acton Zoning Bylaw Section 3.10.6.2 states:

“In all Residential Districts, the Wireless Communication Facility shall be set back from all LOT lines at least the distance equal to the height of the facility, but not less than the otherwise applicable minimum yard requirement.”

When, according to the Survey Plan, the 100 foot setback is drawn from the edge of the Facility as is required by Section 3.10.6.2, the 100 foot setback will cut the LOT line with the land owned by Dong and Sun, and labeled on the Survey Plan as “Easement “B” as shown on Plan #9 2001”, and intrude on the land owned by Dong and Sun.

Registered Landowner Church of the Good Shepherd holds an Easement on the land indicated on the Survey Plan as “Easement “B” as shown on Plan #9 2001”, as set out in the FACTS section hereinabove in this Brief.

The undersigned Citizens of Acton respectfully point out that there is no exception in Acton Zoning Bylaw Section 3.10.6.2 for an Easement. The plain meaning of the words of Section 3.10.6.2 are violated if the 100 foot setback cuts a LOT line.

Accordingly, the Application is in violation of Acton Zoning Bylaw Section 3.10.6.2, and is therefore defective on its face, and should be denied.

This violation of Acton Zoning Bylaw Section 3.10.6.2 is incurable by simply editing or re-writing the Application because it depends upon the geometry of the proposed Facility, and the location of the LOT line.

III. The Application is in Violation of Acton Wetlands Bylaws, Chapter F Section F8.3, “Setbacks for Activities”

Acton Bylaw Chapter F, Environmental Protection, Section F8.3 states, in relevant part:

“F8.3 (2) 50 foot buffer of undisturbed natural vegetation.”

“F8.3 (3) 75 foot setback to the edge of driveways, roadways, and structures.”

“F8.3 (5) 100-foot setback for underground storage of gasoline, oil, or other fuels and hazardous materials.”

The Application is in violation of Section F8.3(2).

Examination of Applicant's Survey Plan shows that there is a Proposed Treeline surrounding the Facility, and that all trees within the Proposed Treeline are to be cut. Further examination of Applicant's Survey Plan shows Wetland Boundaries marked by small circles as Wetland boundary points, and labeled "WF" followed by a designation.

Measurement of Applicant's Survey Plan reveals that the following Wetlands boundary points are less than one (1) inch from the Proposed Treeline, that the scale of the Survey Plan is substantially 50 feet per inch, and therefore the Wetlands boundary points are closer to the Proposed Treeline than the required 50 feet, and therefore in violation of Section F8.3 (2): WF1A, WF2A, WF3A, WF3, and WF4.

Violation of Section F8.3 (2) cannot be cured by editing or re-writing of the Application as it depends simply on the geometry of the Facility, The Proposed Treeline, and the Wetlands boundary points.

The Application is in violation of Section F8.3(3).

The Acton Planning Department stated: "Acton's wetlands bylaw requires that structures be a minimum of 75' off wetlands, this project does not appear to meet that setback requirement", in their submission dated August 3, 2006.

The Application is in violation of Section F8.3(5).

At Section III of the Application, entitled "The Facility", Applicant states: "Three (3) Base Transceiver Station (BTS) cabinets, one (1) battery rack, and one (1) power and telephone cabinet will be installed on a concrete pad and located within the proposed 38' x 38' fenced compound"

Note, the fenced Facility is shown on the Application Survey Plan as a "40 foot by 40 foot fenced area."

As shown in the Application Survey Plan, all of the Facility enclosed by the fence is within the 100 foot wetland setback required by Acton Bylaw Chapter F, Section F8.3 (5). In sharp contrast, the Facility should be outside of the wetland setback.

No evidence or information is given in the Application concerning any hazardous materials in the electronics cabinets or battery rack.

The cabinets and the battery rack may contain hazardous materials within the meaning of Acton Bylaw Chapter F, Section F8.3 (5). Further, the “power and telephone” cabinet may contain an emergency motor generator which has a storage tank for hydrocarbon fuel to operate an internal combustion engine. No information as to the nature and amount of any such hazardous material is stated in the Application.

The absence of any information concerning the nature and amount of any such hazardous material is a violation of Acton Bylaw Chapter F, Environmental Protection, Section F8.3 (5)

Accordingly, the Application is defective on its face as it does not address adequately the setback requirements of Acton’s Wetlands Bylaw, Chapter F section 8.3

IV. The Application is Incomplete

The Application is incomplete in that there is no Evidence submitted with the Application that Registered Landowner Church of the Good Shepherd has agreed to the Application. In fact, a letter dated May 16, 2006, and executed by the Senior Warden of Registered Landowner Church of the Good Shepherd states “This letter does not bind The Church of the Good Shepherd to enter into a license agreement with T-Mobile.” This letter clearly shows that the present Application is premature, and therefore should be denied.

In the absence of a binding agreement that the landowner agrees to the construction set forth in the Application, the Application is defective and should be denied.

V. Immediate Decision is Requested

Numerous of the above mentioned defects on the face of the Application cannot be cured by editing or re-writing the Application, because they depend only on the geometry of the proposed site, and on the location of abutting and otherwise near property.

Accordingly, the undersigned Citizens of Acton request a prompt decision denying the Application, where the decision is based on the incurable defects in the Application.

RELIEF REQUESTED

The below named citizens of Acton, Massachusetts, respectfully urge that for the reasons stated hereinabove the Application be denied.

Submitted by Citizens of Acton whose signatures appear hereinbelow:

1. Catherine E Monahan, Address 14 Arlington St., Date 1/15/07
2. James F. Monahan, Address 14 Arlington St, Date 1-15-07
3. Heather Wood, Address 183 Main St., Date 1/15/07
4. Judy Nolan, Address 7 Lincoln Drive, Date 1-15-07
5. Jan Sab, Address 7 Lincoln Drive, Date 1-15-07
6. Deborah Matthews, Address 11 Lincoln Drive, Date 1-15-07
7. Mary Abbott, Address 26 Fort Pond Rd., Date 1-15-07
8. Ralph E. Abbott, Address 26 Fort Pond Rd., Date 1-15-07
9. James Sufferi, Address 23 Arlington St, Date 1-15-07
10. Melanie Huggin, Address 47 Jackson Dr., Date 1-16-07
11. Joe H, Address 47 Jackson Dr., Date 1-16-07
12. Willa B. Tuffe, Address 23 Arlington St, Date 1-16-07

Prepared for the above, by A. Sidney Johnston, Attorney

A. Sidney Johnston 16 January 2007
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FOR
PLANNING BOARD

Mr. Garry Rhodes, Building Commi
Town of Acton, Massachusetts
472 Main Street
Acton, MA 01720

RE: Application for Special Permit
for a Telecommunications Facility (Cell Tower) at 164 Newtown

hepherd

Dear Mr. Rhodes:

Pursuant to Acton Zoning Bylaw Section 11.1.1, the Citizens of Acton who signed the Attached document styled "CITIZEN'S BRIEF IN OPPOSITION TO THE ABOVE CAPTIONED APPLICATION" Complain that the Planning Board is considering the above referenced Application; that the Application is defective on its face because it is in violation of the Acton Zoning Bylaw as more particularly set out in the attached document; and therefore the Application should be denied.

The Citizens point out that at public hearings the Acton Planning Board has taken positions that are in opposition to the positions set forth in the attached CITIZEN'S BRIEF IN OPPOSITION TO THE ABOVE CAPTIONED APPLICATION. Your action is required to resolve this dispute.

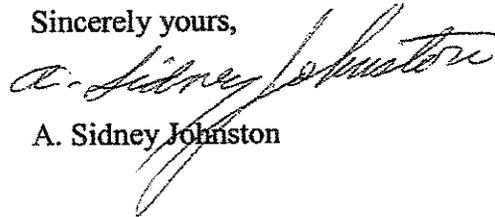
The Citizens hereby request that the Building Commissioner take action to "prevent . . . violation of this bylaw" as set out in Section 11.1.1 by the Planning Board granting the aforesaid Application.

We look forward to hearing from you within the 14 days set out in Section 11.1.1.

CESARI AND MCKENNA, LLP

Acton Building Commissioner
January 17, 2007
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Sincerely yours,

A handwritten signature in cursive script that reads "A. Sidney Johnston". The signature is written in black ink and is positioned above the printed name.

A. Sidney Johnston

ASJ:A

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