4/24/07 PB Packet

TOWN OF ACTON
INTERDEPARTMENTAL COMMUNICATION
TOWN MANAGER'S OFFICE

****

DATE: 4/13/2007

TO: Planning Board

FROM: Don P. Johnson

SUBJECT: Zoning Moratorium

****

In accordance with the provisions of MGL, Chapter 40A, Section 5, you are hereby notified that the Board of Selectmen seeks a zoning amendment that would institute a temporary moratorium on cellular towers while the Town studies siting options. The proposed amendment would be substantially in the form of the attached draft amendment.

The Selectmen consider this an urgent matter and have asked that the Planning Board expedite its portion of the procedural process.

If you have any questions, please feel free to call the Manager's Office or contact the Chairman of the Board of Selectmen.

Don

Cc: Roland Bartl, Planning Director
Board of Selectmen

Proposed Warrant Article to Establish a Temporary Moratorium on the Permitting of Wireless Communications Facilities Including Towers, Antennas and Related Equipment used for Transmitting or Receiving Telecommunications Signals within the Town of Acton

WHEREAS, the U. S. Congress enacted the Telecommunications Act of 1996 (the "Telecom Act") to, among other things, remove regulatory barriers and encourage competition among wireless communications companies to promote the development of nationwide wireless communications networks;

WHEREAS, in response to the efforts of the wireless industry to site wireless communications facilities throughout Massachusetts following the enactment of the Telecom Act, the Town added Section 3.10 to the Town's Zoning Bylaw to regulate the siting, construction, size and modification of wireless communications facilities within the geographical boundaries of the Town of Acton ("Acton");

WHEREAS, since the Town first adopted said Section 3.10, the wireless telecommunications industry has experienced rapidly evolving technology, a demand for a substantially expanded range of wireless communications services, and a resulting increase in demand for siting additional wireless facilities;

WHEREAS, many Acton residents and public officials have become concerned that said Section 3.10 and the Town's related land use regulations currently in effect are no longer adequate for the appropriate regulation of such changing wireless communications industry, nor do they provide sufficient definitive criteria with which the Town's Planning Board and Zoning Board of Appeals can properly evaluate and condition the siting and design of these new generations of wireless telecommunications facilities;

WHEREAS, believing it prudent and appropriate for the Town to address the aforesaid concerns, on April 10, 2007, Town Meeting voted to ask the Town's Board of Selectmen to form a committee (the "Wireless Study Committee") to conduct a comprehensive study to review, re-evaluate and consider possible amendments to the current provisions of the Zoning Bylaw governing the permitting and construction of new wireless communications facility towers to adequately and appropriately address the aforesaid concerns;

WHEREAS, the Town believes that a temporary moratorium on the further filing and processing of permit applications for new wireless communications facilities proposed to be sited within Acton that currently require a special permit from the Planning Board under said Section 3.10 is necessary to allow the Wireless Study Committee sufficient time to undertake a comprehensive study and analysis with respect to regulating the siting within Acton of wireless communications facilities and, if appropriate, develop proposed amendments to said Section 3.10 and other applicable provisions of the Zoning Bylaw and/or other applicable laws and regulations governing land use within Action that will

update the regulation of, including but not limited to, the location, height, size, appearance and other aspects of wireless communications facilities;

NOW, THEREFORE, BE IT RESOLVED that the amendment to the Zoning Bylaw set forth below be adopted to establish a temporary moratorium on the issuance of permits for wireless communications facilities proposed to be sited within Acton in order for the Town to update its zoning and land use policies governing wireless telecommunications facilities to be able to address the demands of the rapidly changing wireless communications industry.

IN FURTHERANCE OF THIS RESOLUTION, the following changes to the Zoning Bylaw of Acton are hereby enacted:

1. Add the following new Section 3.11 to the Zoning Bylaw:

"Section 3.11 Temporary Moratorium on Wireless Communications Facilities Including Towers, Antennas or And Related Equipment used for Transmitting or Receiving Telecommunication Signals Within in the Town.

3.11.1 Purpose

The purpose of the temporary moratorium is to give the Town time to conduct a comprehensive study to review, re-evaluate and consider possible amendments to the current provisions of this Bylaw governing the permitting and construction of new wireless communications facility towers to adequately and appropriately address the concerns of the Town that such current provisions of this Bylaw are no longer adequate for the appropriate regulations of the rapidly changing technologies and service demands of the wireless communications industry in a manner consistent with the Federal Telecommunications Act of 1996 (the "Telecom Act").

3.11.2 Justification

There have been significant changes in the federal law regulating wireless communications facilities since the enactment of the Telecom Act; and

Since the enactment of the Telecom Act and the Town first regulated Wireless Communications Facilities through the adoption of Section 3.10 of this Bylaw, the wireless telecommunications industry has experienced rapidly evolving technology, a demand for a substantially expanded range of wireless communications services, and a resulting increase in demand for siting additional wireless facilities; and

The Town of Action has a limited number of potential sites which would be suitable for the construction of wireless communications facilities; and

Said Section 3.10 and the Town's related land use regulations currently in effect are no longer adequate for the appropriate regulation of such changing wireless communications

industry, nor do they provide sufficient definitive criteria with which the Town's Planning Board and Zoning Board of Appeals can properly evaluate and condition the siting and design of these new generations of wireless telecommunications facilities; and

The Town needs adequate time to conduct a comprehensive study to review, re-evaluate and consider possible amendments to the current provisions of this Bylaw governing the permitting and construction of new Wireless Communications Facilities to adequately and appropriately address the concerns of the Town that such current provisions of this Bylaw are no longer adequate for the appropriate regulations of the rapidly changing technologies and service demands of the wireless communications industry.

Now, therefore, and consistent with the rationale provided above and consistent with the Town's powers and authority under the Massachusetts Zoning Act and the Telecom Act, and the Town's coincident obligations thereunder, the Town adopts the following temporary moratorium with respect to the permitting of Wireless Communications Facilities.

3.11.3 Temporary Moratorium Provisions

For so long as this temporary moratorium remains in effect, no wireless communications facility or structure appurtenant or accessory to a wireless communication facility shall be constructed, nor shall any building permit, special permit, variance or site plan approval decision for any such facility be issued in the Town of Acton.

3.11.4 Temporary Moratorium Expiration

Unless extended, continued or modified by a subsequent action of Town Meeting, the provisions of this temporary moratorium shall expire upon either of the first to occur of: (a) the adoption by Town Meeting of (i) any amendment to Section 3.10 or (ii) any other amendment to this Bylaw's wireless communications provisions that explicitly rescinds or replaces this moratorium, and the approval of any such amendment(s) by the Massachusetts Attorney General, or (b) April 15, 2008.

3.11.5 Exemptions

Wireless Communications Facilities and upgrades thereto that are currently allowed and for which no special permit is required as provided in Section 3.10.5 (Categorical Exemptions) are also exempt from the provisions of this temporary moratorium.

Zoning Freezes

Section 6 of MGL Chapter 40A, Massachusetts Zoning Act, creates two kinds of so-called zoning "freezes" (i.e., temporary exemptions from certain types of zoning bylaw amendments; they are referred to as freezes because they effective "freeze" in place certain provisions of the zoning bylaw): (1) non-plan freezes and (2) plan freezes.

Non-Plan Freezes. Section 6 provides that an amendment to a zoning bylaw does not apply to any use lawfully begun, or any building permit or special permit issued "***before the first publication of notice of the public hearing on such ...bylaw [amendment] required by section five [of the Zoning Act]***." This provision means that a zoning bylaw amendment adopted by Town Meeting in accordance with the procedures and time periods set forth in Section 5 of chapter 40A is deemed to be effective – and hence binding on any use not lawfully begun and on any project for which a building permit or any required special permit has not been issued – as of the date of that first published notice. Thus Acton's proposed wireless communications facility moratorium, if properly approved by Town Meeting, will apply to any new wireless communications facility for which neither a building permit nor a special permit is issued prior to the date on which the Acton Planning Board publishes the first legal notice of its public hearing on the proposed moratorium amendment to the Zoning Bylaw, unless such new wireless communications facility is protected by a plan freeze described below.

Plan Freezes. Section 6 creates two categories of plan freezes: (1) a definitive subdivision plan freeze and (2) an ANR plan freeze. These so-called plan freezes are a very powerful tool for a developer, since as the court said in Long v. Board of Appeals of Falmouth, 32 Mass.App.Ct. 232, 238 n.7 (1992), "[a]s we interpret the statute, it has the potential for permitting a developer, or at least a sophisticated one, to frustrate municipal legislative intent by submitting a plan not for any purpose related to subdivision control and not as a preliminary to a conveyance or recording but solely for the purpose of obtaining a freeze."

Definitive subdivision plan freeze. The fifth paragraph of Section 6 provides that a parcel of land is entitled to have all zoning provisions (i.e., use, density, bulk, dimensional, parking etc.) in effect on the date that there is submitted to the Planning Board a definitive plan (or a preliminary plan followed by submission of a definitive plan within seven months), written notice of such submission is given to the Town Clerk, and such definitive plan is eventually endorsed by the Planning Board, frozen for a period of eight years following such submission date (that 8-year period is extended by the length of any town-imposed moratorium on construction or the issuance of permits). This provision means that a zoning bylaw amendment adopted by Town Meeting will not be effective, and hence will not be binding on, any parcel of land for which a definitive subdivision plan is submitted to the Planning Board and notice given to the Town Clerk as provided above prior to the actual date and time on which Town Meeting votes to approve the zoning bylaw amendment, until 8 years have passed.

ANR Plan Freeze. The sixth paragraph of Section 6 provides that a parcel of land is entitled to have all zoning ***use*** provisions in effect on the date that that there is submitted to the Planning Board a so-called "Approval Not Required Plan, written notice of such submission is given to the Town Clerk, and such ANR plan is eventually endorsed by the Planning Board, frozen for a period of three years following such submission date (that 3-year period is extended by the length of any town-imposed moratorium on construction or the issuance of permits). This provision means that a zoning bylaw amendment regulating the use of property adopted by Town Meeting will not be effective, and hence will not be binding on, any parcel of land for which an ANR plan is submitted to the Planning Board and notice given to the Town Clerk as provided above prior to the actual date and time on which Town Meeting votes to approve the zoning bylaw use amendment, until 3 years have passed. Although an ANR plan freeze only freezes use regulations, case law has ruled that an ANR plan use freeze may also extend to bulk and dimensional regulations that may, when applied to the use protected by the freeze, have the practical effect of prohibiting the protected use.

Perhaps needless to say, these plan freezes have generated a substantial volume of litigation, the results of which generally turn on specific facts.