



VIA FACSIMILE & U.S. MAIL

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July 10, 2007

Chairman Gregory Niemyski and
Members of the Town of Acton Planning Board
472 Main Street
Acton, MA 01720

RE: Temporary Moratorium on the Permitting of Wireless Communication Facilities

Dear Chairman Niemyski and Members of the Planning Board:

PCIA – The Wireless Infrastructure Association¹ is writing in response to the Planning Board’s May 10, 2007 decision to establish a temporary moratorium on the permitting of wireless communication facilities. While PCIA recognizes the Board’s interest in determining wireless siting policies that effectively serve the interests of the community, PCIA has serious concerns with the Board’s decision, and we believe that the moratorium directly violates section 332(c)(7) of the Telecommunications Act of 1996 (“Act” or “TCA”). We therefore urge the Board to repeal the moratorium.

I. The Telecommunications Act of 1996

On February 8, 1996, the Telecommunications Act of 1996, which updated the Communications Act of 1934 to encourage the rapid deployment of advanced services and remove barriers to entry, became law. The TCA includes language addressing state and local government authority over the siting of wireless facilities. Specifically, section 332(c)(7) of the Act requires a local zoning authority to review requests for towers within a “reasonable period of time”² and prohibits a local zoning authority from passing regulations that have the effect of “prohibiting the provision of personal wireless

¹ PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, commercial rooftops, and other facilities for the provision of all types of wireless, broadcasting and telecommunications services. With a mandate to facilitate the deployment of wireless infrastructure, PCIA and its members have partnered with communities across the nation to effect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of these communities.

² 47 U.S.C. § 332(c)(7)(B)(ii) (1996).

services” within a community.³ The TCA reserves to the state and localities certain regulatory controls consistent with these conditions.

II. Acton Moratorium Conflicts with Federal and State Case Law

Since the passage of the 1996 Act, numerous federal and state courts have consistently found that moratoria similar to the one imposed by the Planning Board violate the Telecommunications Act.⁴ In so ruling, courts have established that a moratorium can survive legal challenge under the TCA only if it is “a necessary and bona fide effort to act carefully in a field with rapidly evolving technology.”⁵ To determine whether there was a “necessary and bona fide” effort, courts consider several factors:

- 1) the length of the moratorium;⁶
- 2) the time between the adoption of the TCA and the moratorium;⁷
- 3) whether or not there are circumstances calling for deliberation and study;⁸
- 4) whether the moratorium was adopted before or after a comprehensive regulatory scheme governing tower applications was enacted;⁹
- 5) whether the moratorium suspends the acceptance and processing of applications;¹⁰ and
- 6) whether or not the moratorium operates as a de facto denial of applications.¹¹

Applying the above factors to Acton’s moratorium clearly demonstrates that the Planning Board did not make a necessary and bona fide effort in implementing the moratorium and the moratorium violates the TCA.

a. The Length of Acton’s Moratorium Delays Consideration of Permits and Effectively Prohibits Wireless Telecommunications Services.

³ *Id.* § 332(c)(7)(B)(i)(II)

⁴ See *Sprint Spectrum v. Town of Farmington*, No. 3:97 CV 863, 1997 U.S. Dist. LEXIS 15832, at *19-20 (D. Conn. Oct. 6, 1997); *Sprint Spectrum v. Jefferson County*, 968 F. Supp. 1457, 1469 (N.D. Ala. 1997); *APT Minneapolis v. Stillwater Township*, Civil No. 00-2500, 2001 U.S. Dist. LEXIS 24610, at *46 (D. Minn. June 22, 2001).

⁵ *Sprint Spectrum v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

⁶ *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18; *City of Medina*, 924 F. Supp. at 1040; *Nat’l Telecomm. Advisors v. Bd. of Selectmen*, 27 F. Supp. 2d 284, 287 (D. Mass. 1998).

⁷ *Jefferson County*, 968 F. Supp. at 1466; *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *27; *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18; *Bd. of Selectmen*, 27 F. Supp. 2d at 287.

⁸ *City of Medina*, 924 F. Supp. at 1040; *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *37.

⁹ *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *19;

¹⁰ *Jefferson County*, 968 F. Supp. at 1466; *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *28; *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18; *City of Medina*, 924 F. Supp. at 1040.

¹¹ *Jefferson County*, 968 F. Supp. at 1468; *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18.

Acton's moratorium is unlikely to survive a challenge under the TCA because it is not set to expire until either a new wireless provision is adopted or until April 15, 2008, almost one-year from the date of inception. Such one-year moratorium delays consideration of permits and effectively prohibits wireless telecommunications services in violation of § 332(c)(7)(B)(ii) and (B)(i)(I) of the Act. In *Sprint Spectrum v. Town of Farmington*, the U.S. District Court for Connecticut struck down the Town's moratorium as violating the TCA because the moratorium was set for 270 days – a full three months shorter than Acton's moratorium.¹² Even in the only two cases where courts have upheld such moratoria, the provisions were set to expire within a 6 month period of time.¹³ Clearly, Acton's moratorium extends far beyond what is practical and legally sound.

b. Acton Moratorium is Eleven Years After the TCA was Enacted.

The second factor – the length of time between the adoption of the TCA and the moratorium – also weighs against Acton's moratorium because Acton adopted its moratorium on May 10, 2007, over eleven years after the TCA became law. There is nothing to suggest that such a provision is “necessary,” as interpreted in case law to warrant its adoption so long after the ratification of the Act. In *Sprint Spectrum v. City of Medina*, a moratorium was implemented five days after the Act and upheld.¹⁴ However, in *Sprint Spectrum v. Jefferson County, Town of Farmington*, and *APT Minneapolis v. Stillwater Township*, the courts struck down moratoria that were implemented a mere fifteen months, sixteen months, and five years, respectively after the TCA was enacted.¹⁵

c. Circumstances in Acton Do Not Support a Moratorium.

Acton states that the purpose of the moratorium is to give the Town time to study its current wireless provisions 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 demand”¹⁶ This reasoning, however, does not amount to the exigent circumstances necessary to require a moratorium. Indeed, courts require much more in order to find the appropriate circumstances justifying deliberation and study. For example, in *City of Medina*, the City was faced with new government regulations dramatically changing siting provisions, so it needed time to understand and even determine “whether tall antenna towers are still necessary for the purpose at hand.”¹⁷ Comparatively, in *APT Minneapolis*, the court dismissed the Township's claims that the “rapidly advancing technologies in wireless telecommunications, such as satellite technology and stealth design, justified imposition

¹² *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *17.

¹³ *City of Medina*, 924 F. Supp. at 1040; *Bd. of Selectmen*, 27 F. Supp. 2d at 287.

¹⁴ *City of Medina*, 924 F. Supp. at 1037 (“Five days after the TCA became law, Medina City Council, seeking time to deal with an expected flurry of applications...”).

¹⁵ *Jefferson County*, 968 F. Supp. at 1466; *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18; *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *27.

¹⁶ Section 3.10 Wireless Communications Facilities, Town of Acton Zoning Bylaw.

¹⁷ *City of Medina*, 924 F. Supp. at 1040.

of the moratorium.”¹⁸ Acton is not facing such exigent circumstances as those faced by the City of Media, and rapidly advancing technology is simply not enough.

d. The Moratorium Was Adopted After a Comprehensive Regulatory Scheme Governing Tower Applications was Enacted.

Acton already has an ordinance, Section 3.10 Wireless Communications Facilities, Town of Acton Zoning Bylaw, that governs the siting of wireless facilities in the Town. Indeed, the Town has the opportunity annually to amend the bylaws to incorporate changes in the community. Given the circumstances and the comprehensive regulatory scheme that currently exists for Acton, a court is likely to find the new moratorium unnecessary. For example, in *APT Minneapolis*, where the court struck down the moratorium, the Township adopted a moratorium long after it had a comprehensive regulatory scheme to govern siting of wireless facilities.¹⁹ Similarly, in *Jefferson County*, the court declared it unreasonable for the Commission not to accept or process applications when they had adopted a “comprehensive regulatory scheme based upon the requirements of the Telecommunications Act.”²⁰ When there is an existing regulatory scheme, as there is in Acton, the immediacy and necessity for implementing a moratorium are absent.

e. The Moratorium Suspends the Acceptance and Processing of Applications.

Acton’s moratorium is also unlikely to survive a legal challenge because it states that while the moratorium is in effect no wireless facility can be constructed or permit approval decision issued during the open-ended time. In addition, the Town states that it believes a temporary moratorium on the further filing and processing of permit application is necessary. According to case law, moratoria that suspend the issuance and the processing of applications are unreasonable because the moratorium delays the permitting process for an uncertain amount of time, thus violating section 332(c)(7)(B)(ii) of the TCA which requires that the zoning authority “shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable amount of time.”²¹

f. The Moratorium Operates as a De Facto Denial of Applications.

Finally, the moratorium is unlikely to survive a challenge under the TCA because, during the moratorium, the Town of Action refuses to accept or process any wireless permit applications except for collocation requests. This refusal operates as a de facto denial because applications that are pending are not processed and new applications are refused and there is no guarantee for when either will come to fruition. As stated in by the court in *Jefferson County*, “when as here, a moratorium operates as a functional equivalent of a

¹⁸ *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *37.

¹⁹ *Id.* at *27.

²⁰ *Jefferson County*, 968 F. Supp. at 1468.

²¹ *Id.* at 1466; *APT Minneapolis*, 2001 U.S. Dist. LEXIS 24610, at *28; *Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, at *18.

denial, other procedural requirements of the Act are implicated.”²² The moratorium violates section 332(c)(7)(13)(iii) of the TCA because the moratorium acts as a denial, and the denial is issued without “writing and supported by substantial evidence contained in the written record.”²³

III. Alternatives

As indicated above, Acton’s May 10th moratorium violates the TCA in many regards. PCIA urges Acton to repeal the unlawful moratorium and instead take an alternative approach to reviewing siting policies that appropriately serve the community. The current zoning bylaw should stand while the Wireless Study Committee works with the wireless providers serving Acton to understand what is required to facilitate advanced services. This approach has successfully been implemented across the country and PCIA and its members are willing to meet with Town representatives to review our concerns and explore alternative approaches to develop appropriate siting regulations.

Sincerely,



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²² *Jefferson County*, 968 F. Supp. at 1468.

²³ 47 U.S.C. § 332(c)(7)(13)(iii).