

Decision 10-02
Application for Wireless Communication Facility Special Permit
SBA Towers II, LLC
September 7, 2010

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Planning Board

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DECISION
10-02

SBA Towers II, LLC
Application for
Wireless Communication Facility Special Permit
September 7, 2010

DENIED

Decision of the Acton Planning Board (hereinafter the Board) on the application of SBA Towers II, LLC (hereinafter the Applicant) for property in Acton, Massachusetts, owned by Palmer Realty. The property is located at 5-7 Craig Road and shown on the 2007 Acton Town Atlas map H-4, parcels 13 and 45 (hereinafter the Site).

This Decision is in response to an application for a Wireless Communications Facility Special Permit, received by the Acton Planning Department on December 4, 2009 pursuant to Section 3.10 of the Acton Zoning Bylaw (hereinafter the Bylaw) and the Rules and Regulations for Wireless Communications Facility Special Permits (hereinafter the Rules).

The Applicant presented the application to the Board at a duly noticed public hearing on February 2, 2010. The hearing was continued on March 16, 2010, May 4, 2010, June 8, 2010, July 6, 2010 (without further testimony or discussion), July 20, 2010 (without further testimony or

discussion), and August 17, 2010, and then closed. Mr. Kevin S. Eriksen, Esq. represented the Applicant. Board members Mr. Ryan Bettez (Chairman), Mr. Jeff Clymer (Vice Chair), Mr. Roland Bourdon III, Ms. Kim Montella, Mr. Greg Niemyski, Ms. Margaret Woolley-Busse, and Mr. Derrick Chin were present throughout the hearing. The Chairman appointed Ms. Montella (associate member, appointed to full member as of July 1, 2010) and Mr. Chin (associate member) to sit as full Board members for purposes of hearing and deciding on this application. Mr. Clymer missed the March 16 hearing session; he certified pursuant to Ch. 79 of the Acts of 2006 that he viewed and examined all evidence of the missed session including a video tape. The minutes of the hearing and submissions on which this decision is based upon may be referred to in the Planning Department or the Town Clerk's office at the Acton Town Hall.

1 EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

- 1.1 Initial application documents as required by the Rules or additionally provided consisting of the following items:
 - A properly executed Application for a Wireless Communication Facility Special Permit, dated 11/30/09, received in the Town of Acton Planning Department on 12/4/09.
 - An application cover letter by Kevin S. Eriksen, Deschenes & Farrell, PC, dated 12/4/09.
 - A certified abutters list.
 - Filing fee.
 - Property deeds for the Site.
 - A water balance calculations summary from Tower Engineering Professionals, Inc., dated 11/25/09.
 - An earth removal calculations summary from Tower Engineering Professionals, Inc., dated 11/25/09.
 - Drainage calculations from Tower Engineering Professionals, Inc., dated 11/25/09.
 - "Affidavit of Site Acquisition Specialist" for SBA Towers, J-M. Pinard, dated 11/18/09.
 - An "RF Engineering Affidavit" for Clearwire US LLC, Anoop Jaikumar, with two attached coverage maps, dated 10/28/09.
 - An "Affidavit of Radio Frequency Expert" for T-Mobile USA, Inc., Don Nguyen, with two attached coverage maps, dated 10/28/09.
 - FCC web page with Clearwire license information, dated 9/8/09.
 - FCC web page with T-Mobile license information, dated 9/6/09.
 - "Towair Determination Results" pertaining to proposed tower location registration with the FAA, undated.
 - A letter from Kevin S. Eriksen, dated 12/7/09, with attached FAA "Determination of No Hazard to Air Navigation, dated 11/30/09.
 - A letter from Kevin S. Eriksen, Deschenes & Farrell, PC, dated 1/7/10, with attached MassDOT Aeronautics Division's letter and Airspace Review form, dated 12/21/09.
 - A letter from Kevin S. Eriksen, dated 1/26/10, with attached revised engineering plans.
 - A plan entitled "SBA, Acton 2, MA11845-S, 5 Craig Road, Acton, MA 01720, Proposed 170' Monopole" drawn by Tower Engineering Professionals, consisting of 12 sheets (T-1, N-1, C-1, C-1A, C-1B, C-1C, and C-2 through C-7&2, and Z-1, 2, 3 and 4), in tabloid size, date stamped 1/21/10 (originally submitted plan date stamped 12/2/09).
 - A plan entitled "Acton 2, MA11845-S, 5 Craig Road, Acton, MA 01720, Middlesex County" drawn by Tower Engineering Professionals, consisting of 4 sheets (C-1 through C-4) in full plan sheet size, date stamped 1/21/10 (originally submitted plan date stamped 12/2/09).
 - Balloon Test Report by Tower Engineering Professionals, date issued 1/25/10.

1.2 Supplemental items and documentation submitted by the Applicant after the start of the hearing:

- A letter from Kevin S. Eriksen, dated 2/11/10, with attached:
 - Revised "Affidavit of Site Acquisition Specialist" for SBA Towers, Peter LaMontagne, dated 2/2/10.
 - Tower photo simulations.
- A letter from Kevin S. Eriksen, dated 2/18/10, with four attached Clearwire coverage maps.
- A letter from Kevin S. Eriksen, dated 2/23/10, with attached "Affidavit of Radio Frequency Expert" for T-Mobile, Shaikh Mahmood, dated 2/2/10 with two attached coverage maps.
- FAA "Determination of No Hazard to Air Navigation, dated 2/22/10.
- A letter from Kevin S. Eriksen, dated 3/11/10, with attached two coverage maps for T-Mobile.
- A letter from Kevin S. Eriksen, dated 3/12/10, with attached revised plans first listed under Exhibit 1.1 above, revised to 3/10/10.
- Statement on behalf of applicant by Christopher Fagan, RF Engineer, received 3/16/10.
- Letter from property owner (Leonard Palmer) concerning historic use of Site for truck and trailer parking, with aerial photographs, dated 3/17/10.
- A letter from Kevin S. Eriksen, dated 4/1/10, with attached data table from Clearwire.
- A letter from Kevin S. Eriksen, dated 4/6/10, with ten itemized attachments (response memos to application review, revised photo simulations, T-Mobile letter of intent, property owner statement concerning a silo type tower, etc.).
- A letter from Kevin S. Eriksen, dated 4/6/10, with additional response comments to application review.
- Abutter comment page, marked up by J.-M. Pinard (SBA Towers), received 4/22/10.
- SBA Tower (Peter LaMontagne) inquiry with Acton Town Manager regarding locating of a tower at 8 Forest Road (Acton transfer station site), dated, 4/30/10.
- A letter from Clearwire (J.-M. Pinard) regarding status of other surrounding Clearwire facilities, dated 5/4/10.
- A letter from SBA Towers (J. Laskey) regarding alternative sites off Laws Brook Road, dated 5/4/10.
- A letter from Kevin S. Eriksen, dated 6/1/10 regarding alternative Acton Water District land location.
- A letter from Kevin S. Eriksen, dated 6/1/10, with attached:
 - Revised plans first listed under Exhibit 1.1 above, further and final revised to 5/28/10.
 - Clearwire coverage plots for Site and for alternative sites.
 - 5/24/10 Acton Town Manager response to inquiry regarding 8 Forest Road alternative site (Acton Dump/Transfer station).
- Letter from ADS Environmental Engineering, LLC to Kevin S. Eriksen regarding alternative tower location at WR Grace site off Laws Brook Rd., dated 6/7/10.
- Letter from property owner (Leonard Palmer) concerning the removal hazardous materials from the Site, dated 6/8/10.
- E-mail memos from Kevin s. Eriksen regarding the status of Clearwire's other surrounding locations, dated 6/9/10 and 6/10/10.
- Letter from Brett Roland to Peter LaMontagne declining the locating of a tower at the Adesa Concord site, dated 6/22/10.
- Copy of 9/18/2009 letter from Suzanne Toller, Davis Wright Tremaine LLP (Clearwire Counsel) to Jonathan Kramer concerning Clearwire, its license status, and related matters.
- A letter from Kevin S. Eriksen, dated 7/19/10, requesting a hearing continuation.
- Letter from Jane J. Whang of Davis Wright Tremaine LLP (Clearwire Counsel), dated

7/26/10, to Sara G. Schnorr (the Board's counsel) concerning Clearwire's service, its FCC license and its status under the Federal Telecommunications Act of 1996. and related matters

1.3 Memoranda from The Board's technical consultant, David Maxson of Broadcast Signal Lab, LLP, dated:

- 3/12/10.
- 4/2/10.
- 4/30/10.
- 5/3/10.
- 5/4/10.
- 5/25/10 (Pl. Dept. received date).

1.4 Interdepartmental communication received from:

- Acton Building Commissioner, dated 12/18/09.
- Acton Tree Warden & Municipal Properties Director, dated 12/21/09.
- Acton Finance Director, dated 12/23/09.
- Acton Historical Commission, dated 1/13/10 and 2/10/10.
- Acton Health Department, dated 1/25/10.
- Engineering Department, dated 1/25/10.
- Acton Police Chief, dated 1/26/10.
- Acton Fire Chief, dated 1/26/10.
- Acton Planning Department, dated 1/26/10, 3/12/10, 4/29/10, 6/2/10, and 7/1/10.

1.5 Letters and memos received from Parties in Interest:

- Jim and Kathy Quinn, dated 1/20/10, 3/12/10, 5/23/10, and 8/15/10.
- Maglothin, Weir, and Ward families, dated 1/27/10.
- Richard E. Jussaume, Jr., dated 1/27/10 and 6/3/10.
- Maryann Shea, dated 1/28/10.
- Julie and Justin Weir, dated 1/29/10.
- Fred Tipton, dated 1/29/10.
- Peter Grover, dated 3/3/10.
- Justin Weir, dated 3/11/10, with additional materials received on 3/16/10.
- Michael Maglothin, dated 5/2/10, with view shed and coverage images attached.
- Tian Hao, dated 5/2/10.
- Michael Maglothin – affidavit dated 6/7/10.
- Michael Maglothin – presentation “SBA Tower/Clearwire Acton Proposal Criteria Analysis”, dated 6/8/10.
- Notes from a party in interest, received 6/8/10.
- Michael Maglothin to Brett Roland (Adesa Concord), dated 6/9/10, with aerial view.
- Fred Tipton, dated 6/29/10, with attachment concerning Femtocells, including a later follow-up also dated 6/29/10.

1.6 Other:

- Letter from EBI Consulting, Subject: Invitation to Comment pursuant to Section 106 of the National Historic Preservation Act, with attachments, dated 12/11/09.
- Response letter to the above from the Acton Planning Director, dated 12/21/09.
- US Court of Appeals, 1st Circuit case 313F 3d 620 (2002) Second Generation Properties v. Town of Pelham, NH (provided by a public hearing attendee).
- E-mail chain regarding supplemental data from Clearwire (Kevin Eriksen, David Maxson), dated 4/1/10 to 4/9/10.
- Memorandum from the Board to the Acton Town Manager inquiring about 8 Forest Road

(Town transfer station) as a site for a wireless communication facility tower, dated 6/17/10, with attachments.

- Reply to above memorandum from Town Manager, dated 6/25/10, noting that the Board of Selectmen will presently not entertain the placement of a wireless communications tower at 8 Forest Road.
- E-mail chain regarding tower height tension (Kristin Alexander, Roland Bartl, David Maxson), dated 4/1/10 to 4/9/10.
- E-mail from Sara G. Schnorr to Kristin Alexander, dated 6/8/10 responding to Board Planning Department staff inquiries.
- E-mail chain regarding status of future proposed sites (Roland Bartl, Sara Schnorr, Kevin Eriksen) dated 6/9/10 to 6/29/10.
- FCC Declaratory Ruling in the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks (FCC 07-30), released 3/23/2007.
- **Confidential and Privileged Attorney-Client communication:** Letters from Sara G. Schnorr of Edwards Angell Palmer & Dodge LLP (the Board's counsel) to the Board dated 6/24/10 and 8/17/10.

Exhibits 1.1 and 1.2 are referred to herein as the Plan.

2 FINDINGS AND CONCLUSIONS

Based upon its review of the exhibits and the record of the proceedings the Board finds and concludes that:

- 2.1 The Applicant proposed a new wireless communication facility tower on a 3.8-acre Site on Craig Road. The site consists of two parcels owned jointly by Palmer Realty. The tower is proposed on the easterly 1.07-acre parcel that the owner uses partially for truck and trailer parking.
- 2.2 The Site is within an industrial park in the Light Industrial District (LI) and in Zone 2 of the Groundwater Protection District. The site is generally available for a wireless communication facility subject to the standards, conditions, and special permit criteria and requirements of section 3.10 of the Bylaw.
- 2.3 The Applicant, SBA Towers, does not constitute a Personal Wireless Service Carrier under the definitions set forth in sections 3.10.3.9 and 3.10.3.11 of the Bylaw. SBA's initial application proposed two tenants on the Tower: T-Mobile and Clearwire. T-Mobile does constitute a Personal Wireless Service Carrier under the definitions set forth in sections 3.10.3.9 and 3.10.3.11 of the Bylaw, but Clearwire does not constitute a Personal Wireless Service Carrier under the definitions set forth in sections 3.10.3.9 and 3.10.3.11 of the Bylaw; rather Clearwire constitutes a provider of wireless broadband Internet access services, licensed by the Federal Communications Commission (FCC) to provide "information services", not "personal wireless services."
- 2.4 At the May 4, 2010 public hearing session, the Applicant withdrew T-Mobile from the application leaving Clearwire as the sole remaining tenant on the proposed tower.
- 2.5 While much hearing discussion, evidence, and testimony accumulated concerning the aesthetics of the proposed tower, the coverage area, the need for personal wireless services in this location, its effect on the surrounding neighbors, various technical details, alternatives and the like, the most fundamental jurisdictional question emerged relatively late in the hearing process and only after the Applicant had withdrawn T-Mobile:
Is Clearwire either a Personal Wireless Service Provider under the definitions set forth in sections 3.10.3.9 and 3.10.3.11 of the Bylaw, or a provider of "functionally equivalent services" otherwise entitled to benefit from the local zoning restrictions imposed by section

704 of the Federal Telecommunications Act of 1996, and therefore eligible for special permit consideration under section 3.10 of the Bylaw?

2.6 Relevant criteria of the Bylaw, Section 3.10 are:

Under "Purposes" –

3.10.1.1 To allow Personal Wireless Facilities in accordance with and as required by the Federal Telecommunications Act of 1996 and in acknowledgment of M.G.L. Chapter 40A, Section 3.

Under "Applicability" –

3.10.2.1 This Section 3.10 shall apply to all reception and transmission Facilities that aid, facilitate, and assist with the provision of Personal Wireless Services;
and

3.10.2.2 No such Facility shall be erected or installed except in compliance with the provisions of this Section 3.10.

Under "Special Permit for Facilities" –

3.10.6.12 A Tower approved hereunder shall be used only for the transmission of signals for Personal Wireless Services, except with the specific authorization of the Planning Board.

- a) The Planning Board may approve or require the installation of transmission devices owned, operated, or used by the Town of Acton or any of its agencies, and may allow such devices to extend above the otherwise applicable maximum Tower height. The Planning Board may waive or modify the approved appearance provision of Subsection 3.10.5.3 for such devices.
- b) The Planning Board may also approve the installation of communication devices by entities other than Personal Wireless Service Carriers as secondary occupants of a Facility that are subject to Planning Board termination upon six months notice of the Planning Board, provided that they do not interfere with the Personal Wireless Services and that the intent of this Bylaw to maximize Co-location of Personal Wireless Service Providers is not compromised.

2.7 After testimony from the Applicant, review of correspondence from Clearwire's legal counsel, and opinion from the Board's own legal counsel, the Board concludes that Clearwire is neither a Personal Wireless Service Provider under the definitions set forth in sections 3.10.3.9 and 3.10.3.11 of the Bylaw, nor a provider of "functionally equivalent services" otherwise entitled to benefit from the local zoning restrictions imposed by section 704 of the Federal Telecommunications Act of 1996; and that Clearwire, therefore, is not eligible for a special permit under section 3.10 of the Bylaw except under the narrow circumstances described under section 3.10.6.12.b) as a secondary occupant or co-locator on a tower while not interfering with personal wireless service carriers and subject to 6-month termination notice by the Board.

2.8 After withdrawal of T-Mobile from the application, the only prospective tenant on the proposed Personal Wireless Facilities Tower was Clearwire, an ineligible entity to locate on a Tower by itself. The Board cannot grant a special permit to build a Tower where the only tenant is an ineligible entity.

3 BOARD ACTION

Therefore, the Board voted unanimously at its September 7, 2010 meeting to **DENY** the requested special permit for a wireless communications facility.

4 APPEALS

Appeals, if any, shall be made pursuant to M.G.L., Ch. 40A, S. 17 and shall be filed within 20 days after the date of filing this decision with the Town Clerk.

Signed on behalf of the Acton Planning Board



Roland Bartl, AICP, Town Planner
for the Acton Planning Board

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Eva Taylor, Town Clerk

Date

Copies furnished:

Applicant - certified mail #
Town Engineer
Natural Resource Director
Police Chief
Historical Commission

Building Commissioner
Municipal Properties Director
Town Manager
Acton Water District
Assistant Assessor

Health Director
Town Clerk
Fire Chief
Owner
Information Technology

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