

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

TRIAL COURT
SUPERIOR COURT DEPT.
CIVIL ACTION NO. 2004-4904

CHRISTOPHER WHITLEY,)
)
)
 Plaintiff.)
)
 v.)
)
 THE TOWN OF ACTON, JONATHAN)
 WAGNER, KENNETH KOZIK, RICHARD)
 FALLON, GARRY RHODES, and the)
 ZONING BOARD OF APPEALS OF THE)
 TOWN OF ACTON,)
)
 Defendants.)

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS AND**

CROSS-MOTION TO DISMISS

This is an appeal from a decision of the Acton Zoning Board of Appeals (“the Zoning Board”) denying a variance to exceed applicable height limitations under the Acton Zoning Bylaw in order to construct a 62-foot amateur radio tower and antenna structure on Whitley’s property at 20 Silver Hill Road, Acton. The Complaint also challenges the validity of the Zoning Bylaw in light of federal and state statutes that provide special accommodation for amateur radio communications.¹

The defendants Town of Acton and the Acton Zoning Board of Appeals (the “Town”) oppose the plaintiff Christopher Whitley’s (“Whitley”) Motion for Judgment on the Pleadings,

¹ In 1985, the Federal Communications Commission issued a declaratory ruling, known as “PRB-1,” later codified at 47 CFR §97.15(e), which provides *limited* federal pre-emption for the siting of amateur radio towers. The regulation requires local governments to reasonably accommodate amateur radio communications.

and cross-move for dismissal of the Complaint pursuant to Mass. R. Civ. P. 12(b)(1), on the following grounds:

- (a) Whitley's appeal has been rendered moot by recent amendments to the Acton Zoning Bylaw that effectively permit Whitley to construct his proposed amateur radio tower and antenna as of right;
- (b) Being moot, Whitley's claim for declaratory judgment must be dismissed for lack of an "actual controversy" as required under G.L. c. 231A, §1;
- (c) Being moot, Whitley's appeal from the Zoning Board's denial of a variance is not justiciable, and Whitley lacks standing as a "person aggrieved" under G.L. c. 40A, §17; and
- (d) The Court lacks subject matter jurisdiction over moot issues and claims.

FACTS

Whitley applied for, and was denied, a variance from the dimension regulations under the Acton Zoning Bylaw, to construct a 62-foot antenna support structure comprising of a 52-foot retractable tower and a ten-foot antenna (hereinafter, the "radio tower"). Complaint, ¶¶17, 22-24. At the time Whitley applied for a variance, the Zoning Bylaw prohibited any radio tower in excess of 36 feet in Whitley's zoning district, the R-4 zone. See, Zoning Bylaw, §§3.10.3, and 5.2. On December 13, 2004, Whitley initiated this action, appealing the Zoning Board's variance denial pursuant to G.L. c. 40A, §17, and seeking a declaration pursuant to G.L. c. 231A, §1 that: (i) the Zoning Bylaw and the height restrictions contained therein are pre-empted by federal law, and (ii) therefore, the Zoning Board's denial of the variance exceeded its authority and must be annulled.

Upon being served the Complaint, Town Counsel and Town officials reviewed the Town's existing bylaws that govern the permitting and siting of amateur radio towers and structures, and analyzed whether such bylaws and regulations were consistent with applicable federal and state law. See, Affidavit of Roland Bartl, ¶¶4-5, attached hereto. The Planning Board held a public hearing on February 22, 2005 to consider proposed zoning changes for the permitting of amateur radio towers, which Whitley attended. Bartl Affidavit, ¶¶6-7. Whitley served his Motion for Judgment on the Pleadings on the Town on March 11, 2005.²

On April 4, 2005, Acton Town Meeting adopted two amendments to the Zoning Bylaw affecting the siting of radio towers. See, Affidavit of Eva Bowen, Town Clerk, and Article 25B from the Town Meeting warrant, attached hereto.³ Article 25B added a new section to the provisions governing accessory uses, §3.8.3.6, and permits radio towers as an accessory use in any zoning district by right, subject to certain reasonable conditions, including a 100-foot height limitation. See, Article 25B. Taking Whitley's allegations in his Complaint as true, none of the conditions affect Whitley's eligibility or ability to construct a 62-foot amateur radio tower by right. The Town has requested expedited approval of the Zoning Bylaw amendments from the Attorney General. See, G.L. c. 40A, §5. The Attorney General must either approve or disapprove a bylaw amendment within 90 days of the Town's submission of the amendment. G.L. c. 40, §32.

² With Town Meeting convening on April 5, 2005, Whitley consented to an extension of the time for the Town to respond to his Motion for Judgment on the Pleadings.

³ Matters outside the pleadings may be considered by the Court where the defense of subject matter jurisdiction is raised pursuant to Mass. R. Civ. P. 12(b)(1). Callahan v. First Congregational Church of Haverhill, 441, Mass. 699, 709-710 (2004). The consideration of matters outside the pleadings does not necessarily convert a motion to dismiss for lack of subject matter jurisdiction to one for summary judgment. Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 108-109 (1995).

ARGUMENT

I. The Plaintiff's Claims are Moot, and the Complaint Should Be Dismissed.

In his Complaint, Whitley seeks the annulment of the Zoning Board's decision denying a dimensional variance on grounds that the decision and the applicable provisions of the Zoning Bylaw are in conflict with federal law, and that said provisions are violative of G.L. c. 40A, §3 on their face. Complaint, ¶¶32, 35, and Prayer B. Since the applicable Zoning Bylaw provisions have been substantially amended, with the effect of allowing Whitley's proposed radio tower by right under zoning, the Complaint should be dismissed as moot, and due to Whitley's lack of standing.

It is well established that “[p]arties are not entitled to decisions upon abstract propositions of law unrelated to some live controversy. [citations omitted] This rule applies with special force where an adjudication is sought upon the constitutionality of some statute or ordinance as ‘it is almost the undeviating rule of the courts, both state and federal not to decide constitutional questions until the necessity for such decision arises in the record before the court.’” Cole v. Police Chief of Fall River, 312 Mass. 523, 526 (1942), appeal dismissed sub nom. Cole v. Violette, 319 U.S. 581 (1943), quoting, Baker v. Grice, 169 U.S. 284, 292 (1898). Under G.L. c. 231A, §1, upon which Whitley rests Count II of his Complaint, an “actual controversy” must exist for the court to exercise jurisdiction over the matter. G.L. c. 231A, §1.

In the context of a zoning appeal, if the need for a zoning variance is obviated by a subsequent zoning amendment adopted *after* the zoning board's decision on the variance, an appeal from that decision is considered moot and dismissal of the appeal is appropriate. Sullivan v. Board of Appeals of Canton, 348 Mass. 793, 794 (1965) (subsequently-adopted zoning

amendment rendered defendant's two-family house conforming, and therefore the variance obtained for the two-family use became unnecessary and the appeal became moot). In a recent case with similar facts to those in the instant action, the Land Court dismissed a constitutional challenge to a provision of Provincetown's zoning bylaw that prohibited adult entertainment on the plaintiff's property. After the plaintiff brought suit challenging the bylaw, the Town deleted that bylaw provision and added an "adult entertainment" provision, rendering the controversy moot. Erenberg v. Town of Provincetown, Land Court Misc. 281704 (January 6, 2005) (Piper, J.), copy attached hereto. The Court observed that under the revised zoning bylaw, adult entertainment was permitted "as of right" on the plaintiff's land, and that in light of the amendments, there was no longer an "actual controversy pursuant to G.L. c. 231A, §1.

Here, there is no "live" controversy regarding the application of the Zoning Bylaw to Whitley's proposed amateur radio tower - the zoning amendments adopted on April 4, 2005 obviated the need for the variance that was denied to Whitley. As such, an "actual controversy" doesn't exist and the Court should dismiss Count II for lack of subject matter jurisdiction. Moreover, it would be inappropriate for the Court to annul a decision and issue a declaratory judgment regarding the legality of a zoning bylaw and a zoning board's decision that no longer has any relevance or impact upon the parties. Sullivan, 348 Mass. at 794.

Finally, only persons "aggrieved" by zoning decisions have standing to prosecute an appeal under the Zoning Act. G.L. c. 40A, §17; Marashlian v. Board of Appeals of Newburyport, 421 Mass. 719, 721 (1996). "A plaintiff is a 'person aggrieved' if he suffers some infringement of his legal rights." Marashlian, 421 Mass. at 721. Here, Whitley does not suffer from the infringement of his legal rights because the decision appealed from no longer has any relevancy

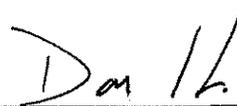
to his ability to construct a 62-foot radio tower on his property.⁴ As such, in addition to his claims being moot, the Complaint should be dismissed for lack of standing.

Conclusion

For all the reasons stated herein, the Complaint is moot and should be dismissed. The amendments to the Zoning Bylaw have rendered Whitley's claims challenging the validity of the Zoning Bylaw and the Zoning Board's decision moot, leaving Whitley with no "actual controversy" on which to rest his declaratory judgment claim. Furthermore, the zoning amendments, obviating Whitley's need for a dimensional variance, puts an end to Whitley's status as a "person aggrieved" for purposes of maintaining standing to prosecute his G.L. c. 40A, §17 appeal. As such, Whitley's Motion for Judgment on the Pleadings should be denied, and the Town's Cross-Motion to Dismiss for lack of subject matter jurisdiction should be allowed and judgment should enter for the Town.

DEFENDANTS,

By their attorneys,



Stephen D. Anderson, Esq. (BBO #018700)
Daniel C. Hill, Esq. (BBO #644885)
ANDERSON & KREIGER, LLP
43 Thorndike Street
Cambridge, MA 02141
617-252-6575

⁴ Massachusetts courts have considered the sufficiency of a plaintiff's standing in a zoning appeal in the context of a motion to dismiss for lack of subject matter jurisdiction (Rule 12(b)(1)). See, Watros, supra; Christensen v. Boston Redevelopment Auth., 2001 WL 1334189, *1 (Mass. Super. 2001) (Fahey, J.), copy attached hereto.

CERTIFICATE OF SERVICE

I hereby certify that I have served of a copy of the foregoing Opposition and Cross-Motion on the parties of record listed below by mailing a copy, first class mail, postage prepaid this 12th day of April, 2005.

Karen A. Whitley, Esq.
Hanify & King,
Professional Corporation
One Beacon Street
Boston, MA 02108-3107



Daniel C. Hill, Esq.

G:\DOCS\ACT\Whitley\AP\Opp to 12C Mot.doc