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April 21, 2005

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Cambridge, MA 02141

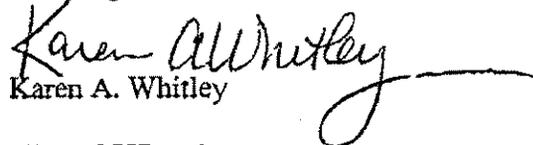
Re: Christopher Whitley v. The Town of Acton, et al.
Middlesex Superior Court, C.A. No. 04-4904

Dear Sir or Madam:

Enclosed for docketing and filing with regard to the above-referenced matter, please find the following documents:

1. Motion of Plaintiff, Christopher Whitley, for Judgment on the Pleadings;
2. Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings;
3. Defendants' Opposition to Plaintiff's Motion for Judgment on the Pleadings and Cross-Motion to Dismiss with attached Affidavits and case law;
4. Opposition of Plaintiff to Cross-Motion of Defendants to Dismiss;
5. Plaintiff's Assented-To Motion for Expedited Hearing; and
6. Superior Court Rule 9A(b)(2) Document Listing Title of Documents Filed.

Sincerely,


Karen A. Whitley

Enclosure

cc: Daniel C. Hill, Esq. (w/enclosures)(via facsimile and US mail)
KAW/kjb - 428640

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

TRIAL COURT
SUPERIOR COURT DEPT.

CHRISTOPHER WHITLEY,
Plaintiff,

vs.

THE TOWN OF ACTON, JONATHAN
WAGNER, KENNETH KOZIK, RICHARD
FALLON, GARRY RHODES, and ZONING
BOARD OF APPEALS OF THE TOWN OF
ACTON,

Defendants.

CIVIL ACTION NO.
2004-4904

**OPPOSITION OF PLAINTIFF TO CROSS-MOTION
OF DEFENDANTS TO DISMISS**

The plaintiff, Christopher Whitley, respectfully submits this opposition to the "Cross-Motion to Dismiss" of defendants, The Town of Acton and the Zoning Board of Appeals of the Town of Acton ("ZBA").¹ In his Complaint, plaintiff has appealed the decision of the ZBA to deny his request to erect a sixty-two foot amateur radio antenna support structure. Because the ZBA relied on a bylaw that was preempted by federal law,² the plaintiff served a Motion for Judgment on the Pleadings on March 9, 2005. On April 12, 2005, the Town and the ZBA filed their Opposition to the Motion for Judgment

¹ The individual defendants have not opposed the Motion for Judgment on the Pleadings or joined in the Cross-Motion to Dismiss. See Opposition, p. 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, and cross-move for dismissal of the Complaint....")

² Indeed, in numerous public oral and written statements, representatives of the Town have conceded that the original bylaw is "deficient" and non-compliant with federal law.

on the Pleadings and a Cross-Motion to Dismiss on the grounds that the Town had passed a new bylaw on April 5, 2005 that rendered plaintiff's claims moot.

Defendants' Cross-Motion should be denied because:

- 1) the Attorney General has not yet approved the new bylaw and, on review, both the Attorney General and this Court would have ample grounds to reject the bylaw so that the original bylaw would remain in effect;
- 2) the plaintiff has asserted claims for damages which are unaffected by the passage of the new bylaw; and
- 3) the defendants' reliance on affidavits and facts outside the pleadings requires that the Court permit plaintiff to conduct discovery pursuant to Mass. R. Civ. P. 56(f).

BACKGROUND

As set forth in his Complaint, plaintiff sought in the fall of 2004 to erect an antenna support structure to facilitate his desired amateur ("ham") radio communications. The structure and antenna were not expected at that time to exceed 62 feet in height. The plaintiff was instructed by the Building Commissioner and by a member of the Board of Selectmen to pursue a variance, even though plaintiff advised a Selectman in July 2004 and Mr. Rhodes in the fall of 2004 of his concern that the height restriction in the bylaw violated PRB-1. As a result, the plaintiff was required to provide notice, via certified mail, to all of the twenty-seven abutters within 300 feet of his property line. Plaintiff was further required, at his own expense, to publish notice of the hearing in the local newspaper for two consecutive weeks. At the hearing, the plaintiff presented a booklet, prepared at his own expense, for each member of the ZBA which provided detailed

information in support of his request for a variance. The presentation materials referred to PRB-1, the federal regulation that requires municipalities to "reasonably accommodate" amateur radio operations and to impose the "minimum practicable regulation."

On November 23, 2004, the ZBA filed its decision denying plaintiff's application. Plaintiff timely appealed by filing his Complaint on December 13, 2004 pursuant to Mass. G.L. c. 40A, § 17, which required that he seek judicial review of the decision of the ZBA within twenty days. See also ZBA Decision, p. 2 ("Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17 within twenty (20) days after this decision is filed with the Acton Town Clerk.") The defendants filed an Answer to plaintiff's Complaint on January 7, 2005.

In February 2005, plaintiff learned that a hearing was scheduled before the Town of Acton's Planning Board to discuss a proposed bylaw amendment relating to amateur radio installations. Plaintiff and many other amateur radio operators were permitted to provide public comment about the text of the proposed amendment. In response to the public's concerns about certain restrictions in the proposed bylaw, the Planning Board revised the proposed bylaw and submitted the text of the amendment for inclusion in the Warrant for the Town of Acton's Annual Town Meeting as Article 25A.

On March 1, 2005, a Planning Board member called plaintiff to alert him that one of the members of the Board of Selectmen had requested to speak to the Planning Board in order to present an alternative bylaw ("Article 25B"). Not only was the March 8, 2005 meeting to discuss Article 25B not properly noticed for two consecutive weeks in the local newspaper, but there were many other defects with the process, including the fact

that the proposed alternative bylaw was not available sufficiently in advance to permit the public adequate time to review, and there was no opportunity for public comment at the meeting.

On April 5, 2005, Article 25B was approved by 2/3 vote of the attendees at Town Meeting.

ARGUMENT

I. The Plaintiff's Claims Are Not Mooted by Virtue of the Adoption of Article 25B at Town Meeting.

When a municipality seeks to amend a bylaw, it must secure final approval from the Attorney General's office in order for the bylaw to remain effective. Mass. G.L. c.40A, § 5; Mass. G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32, the Town has thirty (30) days to submit the bylaw packet to the Attorney General for review, including proof that all procedural requirements have been satisfied. The Attorney General then has ninety (90) days to approve or deny the proposed bylaw, or may take no action, or may notify the Town Clerk of any defect in the procedural requirements, whereby the ninety-day period is suspended to receive claims from citizens that the defect was misleading or prejudicial. Mass. G.L. c. 40, § 32. If the Attorney General rejects the bylaw amendment, then the prior bylaw is revived. Mass. G.L. c. 40A, §5 ("The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by ... town meeting.... If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote.")

The new bylaw, Article 25B, was adopted by the Town on April 5, 2005. Upon information and belief, the Attorney General has not concluded its review of the new bylaw in this case as of the date of this filing. When the review is conducted, there is a real probability that the Attorney General will reject the bylaw, and the original bylaw will govern. The Attorney General could reasonably determine that the procedural defects surrounding Article 25B were sufficiently prejudicial to invalidate the Town's approval of the new bylaw. See Mass. G.L. c. 40A, § 5 (requiring two weeks' notice of a public hearing at which there is opportunity for public comment). Moreover, the new bylaw as approved is significantly more restrictive than the simple height restriction found in the original bylaw and is likely preempted by PRB-1 because it is self-evidently not the "minimal practicable regulation."³ For example, the bylaw restricts the location, number, and setback requirements of various types of antennae, sets an arbitrary height restriction of 100 feet, and requires an amateur radio operator seeking to erect a taller tower to engage in a time-consuming and costly process before a Board that has no guidelines by which to ensure compliance with PRB-1.

In light of these concerns, it may be appropriate for the Court to determine whether the new bylaw complies with PRB-1 and state law, even after the Attorney General's office conducts its review. Under these circumstances, the passage of the new bylaw at Town Meeting does not eliminate the "live" or "actual" controversy between the parties and does not render plaintiff's claims moot.

³ Indeed, the fact that the Planning Board for the Town of Acton presented a much less restrictive bylaw in the form of Article 25A confirms that Article 25B is not the "minimal practicable regulation."

II. The Plaintiff's Claims Are Not Moot Because He Sustained Actual Damages.

Regardless of the amendment of the bylaw, plaintiff's case is not moot because he has asserted valid claims for damages. A case is moot when the plaintiff "no longer has a personal stake in the outcome of the controversy." *Boston and Maine Corp. v. Brotherhood of Maintenance of Way Employees*, 94 F.3d 15, 20 (1st Cir. 1996). Where, as here, a plaintiff asserts that conduct prior to an amendment of a troublesome statute or bylaw caused him damages, the plaintiff continues to have a personal stake in the outcome of the controversy, and his claims are not moot. This well-recognized exception to the mootness doctrine applies where a claim for damages remains to be adjudicated. *Taunton Dog Track, Inc. v. State Racing Comm'n*, 424 Mass. 54, 60 n.8 (1997)(amendment of statute did not render claims moot because of pending claims for damages); *Boulangier v. Dunkin Donuts, Inc.*, 442 Mass. 635, 639 n.8 (2004)(former franchise owner's declaratory judgment action regarding noncompete covenant was not moot even though two-year restriction had passed because he also sought damages for alleged wrongful refusal to excuse him from covenant not to compete); *Leominster Materials Corp. v. Town of Lancaster*, 56 Mass. App. Ct. 820, 824 n. 16 (2002)(where town moved to dismiss the appeal on the grounds of mootness and plaintiff opposed on grounds that it could prove and recover damages if it prevailed on appeal, court acknowledged that "[n]o conclusion about whether this appeal is moot can be made without resolving the factual and legal issues raised by LMC's claim that it would be entitled to damages if it prevailed in this appeal."), *rev. denied*, 438 Mass. 1110 (2003); *Schaer v. Brandeis Univ.*, 48 Mass. App. Ct. 23, 25 (1999)(there was no suggestion of

mootness, even though student would have graduated at the time the case was heard, because plaintiff had asserted money damages), *aff'd*, 434 Mass. 472, 475 n.2 (2000); *Jiles v. Dept. of Correction*, 55 Mass. App. Ct. 658, 661 n.5 (2002)(case is not moot where, in addition to injunctive and declaratory relief, complaint includes demand for damages); see *Schlembach v. Empire Blue Cross and Blue Shield*, 1998 WL 817686*1 (S.D.N.Y. Feb. 18, 1998) (“[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable”, quoting *Stokes v. Village of Wurstboro*, 818 F.2d 4, 6 (2d Cir. 1987)); *United Artists Theatre Circuit, Inc. v. Sun Plaza Enterprise Corp.*, 1998 WL 938732 *3 (E.D.N.Y. Nov. 5, 1998) (claims for damages were still “live” requiring denial of summary judgment motion).

Plaintiff’s Complaint specifically claims that he has suffered damages as a result of the defendants’ wrongful conduct. See, e.g., Complaint, ¶¶ 2, 4, Prayers for Relief D&E. The amendment of the bylaw does not affect or resolve these claims for damages, and the case is therefore not moot.

III. If The Court Is Inclined to Deny the Motion for Judgment on the Pleadings, Further Discovery Should Be Permitted Pursuant to Mass. R. Civ. P. 56(f)

As noted in the *Town of Lancaster* case, “[n]o conclusion about whether this appeal is moot can be made without resolving the factual and legal issues raised by [plaintiff] that [he] would be entitled to damages if [he] prevailed in this appeal.” See 56 Mass. App. Ct. at 824 n. 16. Plaintiff has sought damages, including attorneys’ fees, as a result of the bad faith or gross negligence of various defendants, who were aware, or should have been aware, of the mandates of PRB-1, and nevertheless interpreted the original bylaw in a manner that utterly failed to accommodate plaintiff’s ham radio operations. Plaintiff is entitled to explore, through discovery, the state of knowledge of

each of the decision-makers and to examine the decision-making process to prove his damages. Additionally, the defendants have submitted several affidavits and numerous attachments alleging facts outside the corners of the plaintiff's complaint. Consequently, should the Court decline to enter judgment on the pleadings in plaintiff's favor, an opportunity for discovery should be allowed pursuant to Mass. R. Civ. P. 56(f).

CONCLUSION

For the reasons set forth herein and in plaintiff's Motion for Judgment on the Pleadings and Memorandum in Support, the plaintiff respectfully requests that the Motion for Judgment on the Pleadings be allowed as to each of the individual defendants, none of whom opposed it. With regard to the Town of Acton and the Zoning Board of Appeals, the plaintiff requests that their Cross- Motion to Dismiss be denied and that plaintiff's Motion for Judgment on the Pleadings be allowed. In the alternative, plaintiff requests that the Court set a discovery schedule pursuant to Mass. R. Civ. P. 56(f).

Respectfully submitted,

CHRISTOPHER WHITLEY,

By his attorney,

Karen A. Whitley
Karen A. Whitley (BBO# 564742)
Hanify & King, Professional Corporation
One Beacon Street
Boston, MA 02110
(617) 423-0400

CERTIFICATE OF SERVICE
I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL HAND ON *and fax on 4/21/05*
Karen A. Whitley

DATED: April 21, 2005

428626

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

TRIAL COURT
SUPERIOR COURT DEPT.

CHRISTOPHER WHITLEY,
Plaintiff,

vs.

THE TOWN OF ACTON, JONATHAN
WAGNER, KENNETH KOZIK, RICHARD
FALLON, GARRY RHODES, and ZONING
BOARD OF APPEALS OF THE TOWN OF
ACTON,

Defendants.

CIVIL ACTION NO.
2004- 4904

PLAINTIFF'S ASSENTED-TO MOTION FOR EXPEDITED HEARING

The plaintiff, Christopher Whitley, respectfully requests that the Court set an expedited hearing date on his Motion for Judgment on the Pleadings and the Defendants' Cross-Motion to Dismiss. As grounds therefore, Mr. Whitley states as follows:

1. This case is brought under Mass. G.L. c. 40A, §17 to appeal the decision of the Zoning Board of Appeals for the Town of Acton which denied plaintiff's request for a variance of certain height restrictions on an antenna support structure for amateur radio operations. Plaintiff claims that the defendants wrongfully relied upon a bylaw that was unlawful and inconsistent with federal and state law and regulations, including a regulation known as PRB-1.
2. The plaintiff served a Motion for Judgment on the Pleadings in this matter on March 9, 2005. The plaintiff agreed to extend the time for a response

to the Motion until April 11, 2005, with the understanding that the Town would assent to plaintiff's request for an expedited hearing on the Motion. On April 5, 2005, a new bylaw was passed at Acton's Town Meeting. The Town claims that the new bylaw renders plaintiff's claims moot.

- 3. Pursuant to Mass. G.L. c. 40A, §17, "all issues in any proceeding under this section shall have precedence over all other civil actions and proceedings."
- 4. Counsel for the defendants has assented to this motion.

In light of the foregoing, the plaintiff requests that a hearing on his Motion and the Cross-motion in the above-captioned matter be set as soon as possible.

Respectfully submitted,

CHRISTOPHER WHITLEY,
By his attorney,

Karen A. Whitley
 Karen A. Whitley (BBO# 56474.1)
 Hanify & King, P.C.
 One Beacon St.
 Boston, MA 02110
 (617) 423-0400

ASSENTED TO:

THE TOWN OF ACTON, JONATHAN WAGNER,
 KENNETH KOZIK, RICHARD FALLON, GARRY RHODES,
 and ZONING BOARD OF APPEALS,
 By their attorney,

Daniel C. Hill (by KA)
 Daniel C. Hill (BBO# 644885)
 Anderson & Kreiger, LLP
 43 Thomdike Street
 Cambridge, MA 02141
 (617) 252-6575
 DATED: April 21, 2005

CERTIFICATE OF SERVICE
 I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL AND ON *any fax on 4/21/05*
Karen A. Whitley

425918

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

TRIAL COURT
SUPERIOR COURT DEPT.

CHRISTOPHER WHITLEY,

Plaintiff,

vs.

THE TOWN OF ACTON, JONATHAN
WAGNER, KENNETH KOZIK,
RICHARD FALLON, GARRY RHODES,
and ZONING BOARD OF APPEALS OF
THE TOWN OF ACTON,

Defendants.

CIVIL ACTION NO.
2004- 4904

SUPERIOR COURT RULE 9A(b)(2)
DOCUMENT LISTING TITLE OF DOCUMENTS FILED

Pursuant to Superior Court Rule 9A(b)(2), the following is a list of the documents
filed on this date:

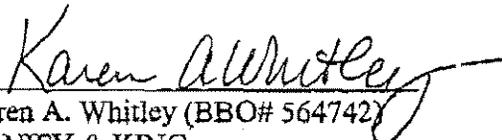
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5. Plaintiff's Assented-To Motion for Expedited Hearing.

Respectfully submitted,

CHRISTOPHER WHITLEY,

By his attorney,


Karen A. Whitley (BBO# 564742)
HANIFY & KING,
Professional Corporation
One Beacon Street
Boston, MA 02108-3107
(617) 423-0400

DATED: April 21, 2005

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