

5/10/07
#1

ATTACHMENTS

1. JANUARY 18,2007 MEMO FROM ROLAND BARTL TO THOMAS SCHNORR
2. PALMER & DODGE - TELECOMMUNICATIONS EXPERIENCE
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4. EARLY CITIZEN'S PETITION (SEE ITEM #4)
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6. LAWYERS WEEKLY USA DECEMBER 13,1999 (RE 3RD CIRCUIT DECISION)
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8. MORATORIUM WARRANT

CONCERNED ACTON RESIDENTS

WILL TUFFIN
JANICE TUFFIN
JIM MONAHAN
CATHY MONAHAN
JOE HIGGINS
MELANIE HIGGINS
MICHAEL DENSON
DAVE BENSON
LARRY FILLION
ANYA FILLION
MARTY HIRSCH
JOELLEN HIRSCH
JUDY NOLAN
JIM NOLAN
DEB MATTHEWS
AL MATTHEWS
ROSEMARY HRYNIEWICH
JACK KIELY
NAN KIELY
RALPH ABBOTT
MARY ABBOTT
BETSEY PURCELL
ANN SUSSMAN
WILLIAM HRYNIEWICH
CHERYL HRYNIEWICH
ERNEST ANDERSON
THELMA PANETTA
MARY MURPHY
DORIS ROY
MARTHA BASIL

ATTACHMENT I

Roland Bartl

From: Roland Bartl
Sent: Thursday, January 18, 2007 5:25 PM
To: 'tschnorr@eapdlaw.com'
Cc: Manager Department
Subject: Town of Acton proposed zoning affecting wireless services

Dear Tom:

Steve Anderson and Don Johnson suggested that I contact you concerning the two attached proposed zoning articles for the April Annual Town Meeting here in Acton. One is draft article generated here on behalf of the Planning Board with amendments to the existing zoning regulations for wireless facilities. Please review it and offer your comments and suggestions. For context you can look up the Acton Zoning Bylaw at: <http://doc.acton-ma.gov/dsweb/Get/Document-12979/2006+Zoning+Bylaws+REDUCED.pdf> and the zoning map at: <http://doc.acton-ma.gov/dsweb/Get/Document-13158/zoning+map+2006.jpg>

The other is a petition article filed by residents in reaction to a proposed facility in their neighborhood. The application for that facility has recently been withdrawn, but the petition still stands. Please also comment on it as you might see it in relation to the TCA, and regulations and case law stemming from it. I am concerned that the petition proposal eliminates too much territory. The petition seeks to eliminate all residentially zoned land from consideration for cell towers. Acton's commercial and industrial districts are too few, too small, and too narrow to sufficiently fill coverage gaps. That leaves some Town owned land zoned ARC (Agriculture Recreation Conservation) to perhaps fill the gaps. But, while ARC allows cell towers, much of that land is conservation restricted, wetlands, scenic areas and the like, leaving in fact little or none that the Town might find suitable.

The Planning Board will hold the zoning public hearing on February 13.

Thank you for your help -

*Roland Bartl, AICP
Town Planner, Town of Acton
472 Main Street
Acton, MA 01720
978-264-9636*

ATTACHMENT 2

FORWARDS ANGELL PALMER & DODGE

TELECOMMUNICATIONS

Telecommunications

The telecommunications industry is an area in which our firm's experience is uncommonly deep. Our nationally recognized practice in this area ranges from traditional telephony and cable television to bundled broadband video/voice/data services; from conventional mobile phone service to WiFi; from terrestrial to satellite; and from twisted pair to optical networks.

We have been involved in hundreds of M&A transactions, debt financings and equity investments involving public and private companies in the telecom industry. In addition to handling transactional matters in this industry, we regularly provide intellectual property, bankruptcy, litigation, securities and other ongoing legal services to our telecom clients.

Set forth below are a few recent examples of our activities in the telecommunications industry:

- We serve as corporate securities counsel to wireless infrastructure provider American Tower Corporation. Among other matters, we advise American Tower on corporate governance best practices, Sarbanes-Oxley compliance, public company reporting, tender offers, debt repurchases, and securities offerings. We have represented American Tower in billions of dollars of equity and debt offerings, including its initial public offering and offerings of high-yield and convertible notes.
- We negotiated and implemented a successful reorganization of regional CLEC FDN Communications, including a discounted debt buyback, freeze-out merger and recapitalization that was the subject of a successfully defended lawsuit, as well as a new \$54 million equity issuance, competitor acquisition and subsequent leveraging to fund a distribution to stockholders.
- We advised the lead private equity investors in the \$250 million first round financing of XM Satellite Radio.
- We serve as outside transaction counsel to Dobson Communications Corporation (NASDAQ: DCEL) and its two wholly-owned subsidiaries Dobson Cellular Systems, Inc. and American Cellular Corporation. Dobson is a leading provider of rural and suburban wireless communications services in the United States. We regularly represent Dobson in its acquisitions, sales and exchanges of cellular systems.
- We represented FrontierVision Partners, then the largest venture-backed cable operator, in the acquisition of hundreds of cable television systems and the negotiation of an \$800 million senior credit facility.

Our clients in the telecommunications industry include the following:

- Alta Communications
- American Tower Corporation
- Bank of America Capital
- Cavalier Telephone Company
- Cleveland PCS
- Columbia Capital
- Dobson Communications
- Great Hill Partners
- M/C Venture Partners
- Spectrum Equity Investors



EDWARDS ANGELL PALMER & DODGE LLP

ATTACHMENT 3**AREAS OF PRACTICE**

- Real Estate
 - Affordable Housing

EDUCATION

- University of Virginia School of Law, J.D.
- Wesleyan University, M.A.T.
- Harvard University, B.A.
cum laude

BAR ADMISSIONS

- Massachusetts

LANGUAGES

- German

PROFESSIONALS

Thomas G. Schnorr

Partner



tschnorr@eapdlaw.com

Boston - Federal
Tel 617.239.0363
Fax 617.439.4170

Tom Schnorr, a partner with the firm, focuses his practice on complex real estate acquisition, development, land use, and financing matters, particularly for clients in the affordable housing, biomedical, and telecommunications industries.

Notable Experience

- Represented *Roxbury Tenants of Harvard Association, Inc.* in connection with its acquisition, rehabilitation, and refinancing of the Mission Park complex (775 affordable rental apartments, 40,000 square feet of medical office space, and a 1,380-car subsurface parking garage) from Harvard University and Citicorp Real Estate. Work involved obtaining Chapter 121A public approvals from the Boston Redevelopment Authority and negotiating and closing \$18 million in low-income housing tax credit equity provided by the Massachusetts Equity Fund, \$48.6 million in MassHousing mortgage financing, and \$10 million in mortgage financing from Brookline Savings Bank.
- Represented *E.T.C. Development Corporation* in connection with its rehabilitation and refinancing of the Vivendas Apartments, South End Apartments, and Victoria Apartments in Boston (approximately 400 affordable housing rental units in all). Work included obtaining Chapter 121A approvals, negotiating and closing the advance partial defeasance (before the permitted redemption date) of the original tax-exempt bond financing for the Victoria Apartments project, and negotiating and closing an aggregate of \$21,578,000 in low-income housing tax credits provided by the Massachusetts Housing Equity Fund and \$51,139,000 in MassHousing mortgage financing.
- Represented *Amgen Inc.* in connection with its acquisition, permitting, development, and leasing of the state-of-the-art 300,000-square-foot Amgen Center bioscience building at Kendall Square in Cambridge.
- Represented *Genzyme Corporation* in negotiating the build-to-suit lease for the company's new 300,000-square-foot headquarters building in Cambridge Research Park.

- Represented *AT&T Wireless Services, Inc.* as it has sought zoning approvals for its network of more than 200 wireless telecommunications facilities in the Greater Boston area. That work has involved appearing before hostile zoning and planning boards, as well as negotiating with municipalities to amend their zoning bylaws to accommodate the wireless industry.

Other Distinctions

Fulbright Fellow, Munich, Germany (1970-71)

To the Town of Acton Planning Board:

We, the undersigned neighbors of the Church of the Good Shepherd on 164 Newtown Road, hereby petition you to refuse the cell tower "special permit" request at that location. There are many reasons for our opposition, ranging from practical to aesthetics to the negative impact on housing values. To review these in detail:

1. **Insufficient public notice.** Over the past few weeks, word of this proposal has spread basically word of mouth from neighbor to neighbor. Many neighbors couldn't believe they hadn't known about this proposal, or about the first planning board meeting on Aug 22. Prior to the first meeting, only direct abutters had been notified. In our opinion, this is a neighborhood issue encompassing hundreds of homes, not just the dozen or so abutters.
2. This is the first cell tower going up in a **100% residential** Acton neighborhood. This would be a serious precedent. This tower will be completely out of character within our neighborhood. We are further concerned about any low-level persistent buzzing or humming noises associated with the tower - as this neighborhood is 100% residential, this noise could become the background noise at several abutting homes.
3. Our understanding is that this proposal is for a Monopole style Cell tower, which will be 100 feet tall, located in a 1,400 square foot equipment facility behind the Church. Particularly in the winter (but year round for many neighbors), this will become part of our normal backyard views. **Aesthetically this is unacceptable.**
4. There is much debate on the health issues related to cell towers (and our understanding is that the telecommunications providers themselves prefer not to build a tower within 1,000 feet of schools). We also understand that, due to federal law regarding utilities, the unknown health issues may not be used as a reason to block a cell tower. However, on a more practical basis, this broadly perceived health impact will have a direct **negative impact on property values.** Other factors such as visual impact, aesthetics, noise, safety, nuisance value, and changes in the character of a neighborhood also **negatively impact property values.**
5. **Unnecessary duplication of towers.** We believe there is another cell tower already scheduled to be built just 2 miles from this Church of the Good Shepherd location - the other tower to be built right on Route 2 by a corporate office park near Central Street. This office park seems a sensible location designed for maximum benefit of the many people and businesses clustered around Route 2. Even if a second tower is "optimal" from T-Mobile's point of view, the fact that there will be a tower in such close proximity adds to the argument against putting another one in a residential neighborhood.
6. **Town-wide planning.** As taxpayers, we believe that cell tower access points should be a town resource. By allowing not-for-profits to capture these profits, we are throwing away a valuable town resource. In a town that struggles constantly with budget overrides, this seems like poor husbandry of our town resources. Town wide planning would also allow for optimal placement of cell towers, rather than a patchwork created by random entities willing to lease their land.

Also on the town resource front, one of the primary abutters is the Acton school district. The town of Concord just turned down a cell permit application earlier this year, as they did not want the tower to impact future development potential. Allowing the Church of the Good Shepherd to proceed allows them to reduce the value of one of our town resources.

As awareness of this issue spreads, our opposition is growing. If passed, this special permit will set a dangerous precedent, with corporate interests placed ahead of those of town residents. Please join us in opposing the placement of this cell tower at the Church of the Good Shepherd.

EDWARDS ANGELL PALMER & DODGE LLP

101 Federal Street Boston, MA 02110 617.439.4444 fax 617.439.4170 eapdlaw.com

TO: Roland Bartl, AICP, Acton Town Planner
CC: David R. Rodgers
FROM: Thomas G. Schnorr
DATE: February 22, 2007 **CLIENT-MATTER NO.:** 200228-1
RE: Proposed Amendments to Acton's Wireless Communications Facilities Zoning Bylaw

I have quickly reviewed the proposed amendments to Section 3.10 (Special Requirements for Wireless Communications Facilities) (the "Section 3.10 Amendments") and the December 8, 2006, citizens petition (the "Citizens Petition") proposing that the Zoning Bylaw be amended to make wireless facilities a prohibited use in residential districts and near public schools and playgrounds that you sent to me by email on January 18, 2007. My comments on both follow.

Section 3.10 Amendments

Set forth below are my comments on the Section 3.10 Amendments. I believe my comments and suggested edits are self-explanatory, but if not, please give me a call and I'll explain my thoughts in more detail:

A. New sentences added to the end of Subsection 3.10.6.1:

I would recommend revising the first line of the new sentences being added to the end of Section 3.10.6.1 to read as follows (my suggested new language appears in italics):

"For purposes of determining the height of a Wireless Communication Facility, the height shall be the higher of the two vertical distances measured as follows: ..."

B. New Subsections 3.10.6.2 and 3.10.6.3:

I understand the rationale for limiting facilities to "stealth monopoles", but wonder if the Town would want to consider modifying the second sentence to give the Planning Board the authority, through the special permit process, the ability to approve other types of truly "stealth structures"? I know that Subsection 3.10.5.1 allows stealth facilities that consist of facilities entirely enclosed within a building or structure, but there are other types of stealth structures that some towns have found acceptable; these would include antenna structures designed to look like light poles or flag poles, and structures designed to resemble natural features such as trees or

Memo

rock outcroppings (although I must admit that some “trees” look awful, but others work quite well.

I would recommend revising new Subsection 3.10.6.3: to read as follows (again, my suggested new language appears in italics):

“Wireless Communication Facilities shall be located, designed, and constructed to include a stealth monopole that is, or that is engineered to be structurally extendable to be, the maximum height allowed under section 3.10.6.1 above capable of accommodating the maximum number of technically feasible co-locator antennae in the portion of the pole above the tree line, as well as an equipment shelter or other enclosed space physically able to, or capable of being enlarged to, fully accommodate the maximum number of wireless service transmitters and other equipment necessary for the maximum number of technically feasible co-locators at the site.”

C. New subsection e) added to the end of Section 3.10.6.5 (being renumbered to 3.10.6.7):

I would revise this new subsection to read as follows (again, my suggested new language appears in italics):

“The Planning Board may require long-term easements, leases, licenses, or other enforceable legal instruments that fully support a Wireless Communications Facility at its maximum potential technical capacity, including sufficient space for facility base equipment to accommodate the maximum number of technically feasible co-locators at the site, adequate access and utility easements to the facility from a public STREET, and the right for the maximum number of technically feasible telecommunication service provider co-locators to co-locate on the facility and the right to upgrade the utilities and equipment as needed for maintaining and improving service and capacity.”

D. and E.: I have no comments.

Citizens Petition

The Citizens Petition seeks to amend the Zoning Bylaw to make wireless communications facilities a prohibited use in all Residential Zoning Districts and within 1,000 feet of any “Public School building or playground or estate held by either a School District or the Town of Acton for the construction of a public school building or playground.”

As discussed below, I have a number of concerns about the ambiguity of the language of the proposed new Section 3.10.4.7. I am also concerned that the Citizens Petition’s no-build zone around school and playgrounds (which suggests a health concern) and its absolute prohibition of wireless facilities in residential districts and near school and playgrounds may expose the Town to challenge by a wireless carrier claiming that these provisions violate Section

704 of the Federal Telecommunications Act of 1996 (“Section 704”), which among other things preempts local zoning regulations or decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions and provides that a town may not, through zoning or other local bylaws, impose and enforce regulations in a manner that prohibits or has the effect of prohibiting wireless communications services from being provided in the town.

Language Concerns about Section 3.10.4.7:

First, how is the 1,000 foot prohibited area to be measured? From the walls of the school buildings or the exterior perimeter or the playground or from the property boundary lines of the parcel or parcels on land on which the school building or playgrounds are located?

Second, in the phrase “Public School building or playground” is “playground” intended to be limited to mean only “public school playgrounds”? Would town-owned or privately owned playgrounds and playing fields be included or not?

Third, it strikes me that the thinly disguised purpose for this provision is the citizens’ deeply felt belief that the RF emissions from wireless facilities are a danger to health, particularly the health of children (see more on this point in my discussion below about my Section 704 concerns). But why is it then limited to only public schools. I know that there is at least one private school in town. From a land use planning perspective it seems to me to distinguish between public and private schools makes no sense.

Fourth, what does the phrase land “held by either a School District or the Town of Acton for the construction of a public school building or playground” mean? Does it mean land owned by a school district or the Town that is identified in a five year plan as intended for school building or playground use, or would it have to mean land that was expressly acquired, and approved by a Town Meeting vote, for the purpose of using it school building or playground use? Could it mean any Town-owned land that the Selectmen or Planning Board or even a citizens petition has discussed as possibly being available for school building or playground use?

Section 704 Concerns.

RF Emissions. As noted above, Section 704 and the case law that has evolved under it over the past 10 years makes it clear that a town may not regulate the placement of a wireless facility for reasons that are based, directly or indirectly, on the perceived environmental or health effects of radio frequency emissions, as long as the wireless provider in fact complies with applicable Federal radio frequency emission rules. As I mentioned in my discussion above about the ambiguity of some of the language in the proposed new Section 3.10.4.7, I believe the 1,000 foot setback from schools and playgrounds is in essence a thinly disguised attempt by the citizens to regulate the location of wireless facilities based upon the citizens’ belief that wireless emissions are dangerous and unhealthy. This concern become greater if the citizens group has at

any time indicated in any of its materials or presentations to the Town residents or Town boards mentioned RF emissions concerns or health concerns. Thus for example, if a prospective wireless carrier could prove, by clear and convincing evidence, that there in fact existed a substantial wireless service coverage gap in the Town and that the only location physically capable of filling that gap was closer than 1,000 feet to a school or playground but the Planning Board and/or ZBA prohibited the site due to the 1,000 foot setback, I have no doubt that the carrier would file a lawsuit challenging the validity of the 1,000 foot setback arguing that it was a mere pretext for the Town to regulate wireless facilities locations on the basis of the Town's perceived health concerns about the facility's RF emissions.

Effective Prohibition of Wireless Services. As noted above, Section 704 and the case law that has evolved under it over the past 10 years makes it clear that a town may not adopt and/or enforce zoning bylaws in any manner that prohibits or has the effect of prohibiting wireless services being provided in the town. The Citizens Petition, when viewed in light of the Massachusetts Zoning Statute (M.G.L. Chapter 40A) and Section 10.5 of the Acton Zoning Bylaw, takes a giant first step toward violating that provision of Section 704.

Section 10 of Chapter 40A provides that a town permit granting authority cannot (i.e., does not have the statutory authority to) grant a use variance unless the town's zoning bylaw explicitly authorizes the town's permit granting authority to grant use variances. As you know, Section 10.5 of the Acton Zoning Bylaw provides that variances authorizing a use not permitted in a particular zoning district shall not be granted. In other words, not only does the Acton Zoning Bylaw not allow the ZBA to grant use variances, it explicitly prohibits the ZBA from granting them.

This means that as a result of Chapter 40A and Section 10.5 of the Acton Zoning Bylaw, the Citizens Petition would have the effect of imposing an absolute ban on wireless communications facilities within residential zoning districts and the 1,000 foot setback areas around every school and playground. A quick look at the Town's Zoning Map shows that residentially zoned areas alone make up a substantial portion of the Town's land area. Since the Citizens Petition would therefore put all residential areas "off-limits," wireless carriers would be forced to try to site their facilities in the Town's business, commercial and industrial districts (except for portions of those districts within the 1,000 foot school/playground setback areas).

Without undertaking a detailed analysis of the topography and tree canopy throughout the Town, an RF analysis of what portions of the Town currently do and don't have wireless service coverage and whether there exist, as a matter of fact any "significant coverage gaps," and whether there exist any sites within the business, commercial and industrial zoning districts that would meet the geographic and technical requirements for wireless facilities that could close any such coverage gaps, I can't conclusively tell you whether or not the absolute ban on placing sites in residential districts and the 1,000 foot setback proposed by the Citizens Petition, together with the existing Federal environmental constraints on placing wireless sites in wetlands, conservation lands and protected animal habitats, would violate Section 704. I can tell you, however, that if a

wireless carrier could, by clear and convincing factual evidence (the courts are not in complete agreement as to exactly what specific evidence needs to be presented), demonstrate that (i) there were one or more significant coverage gaps in the Town, (ii) that those service gaps could not be closed by siting a facility in a business, commercial or industrial zoning district due to the technical constraints of wireless technology and the surrounding geography and foliage, but (iii) those significant service gaps could be closed only by placing a facility in a residential district or within the 1,000 foot setback were technically favorable conditions existed, then I have no doubt that the carrier would file a lawsuit challenging the validity of the new bylaw provisions, arguing that it had the effect of prohibiting wireless service in the Town.

I hope my comments are helpful.



ATTACHMENT 6

Law/Legal:

Town Can Reject Cell Phone Towers

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Posted:
22 February 2001

LAWYERS WEEKLY USA

December 13, 1999 Cite this Page: 99 LWUSA 1105

National Law:

Town Can Reject Cell Phone Towers

Where a town zoning board would not allow a cellular phone tower in a residential area, this didn't violate the Telecommunications Act of 1996, says the Third Circuit in reversing a U.S. District Court.

Over the past 10 years, towns have been trying to regulate where cell phone towers are located. The towers can exceed 250 feet in height and are often placed in residential areas or in the middle of a scenic view. There are expected to be over 100,000 towers in the U.S. within a few years. Although at first courts made it difficult for towns to stop cellular towers from being built, municipalities are now having increasing success. Experts say that the Third Circuit's decision is the latest in a series of cases to establish the power of local zoning authorities over the placement of towers.

"The pendulum has swung back to the middle. The courts seem to be striking a better balance between municipalities and the needs of the industry," says John Wilson of Rochester, N.Y., who successfully represented a municipality in a recent Second Circuit case. (Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630; 99 LWUSA 521; Search words for LWUSA Archives: Cross and Yesawich.)

"There was a time when the industry would roll over city councils and say, 'The Act permits us to put up towers at our convenience,'" agrees municipal lawyer Fritz Knaak of Vadnais Heights, Minn. "This case shows that courts now better understand the arguments and are willing to defer to a municipality's judgment." The decision should give towns more leverage in negotiations with phone companies.

"Municipalities clearly have the upper hand," says attorney L. Steven Emmert, who successfully represented Virginia Beach, Va., in a recent Fourth Circuit case. (AT&T Wireless PCS v. City Council of Virginia Beach, 155 F.3d 423; 98 LWUSA 745; Search words for LWUSA Archives: Gibson and Golembeck.)

"Providers are becoming more conciliatory at the zoning board level because the risks of litigation are less clearly tipped in their favor than they originally thought," agrees Wilson. Attorneys for cellular phone companies complain that the courts are making it too difficult for their clients to get towers approved.

"This case follows the trend of courts raising the bar on what a provider needs to prove in order to get a site developed," says Kenneth Baldwin, who practices in Hartford, Conn. "I don't understand how any provider can really meet the burden imposed by this court."

Residential Area

The town in this case passed an ordinance restricting cell towers to light industrial areas. A cell phone company requested a zoning variance permitting it to erect a 160-foot tower in a residential district. When the board denied the variance, the company sued under the Telecommunications Act, arguing that the denial had "the effect of prohibiting the provision of wireless services." (47 U.S.C. Sect. 332(c)(7)(B)(i)(II).)

But the court disagreed.

"[T]he [Act's] 'effect of prohibiting' clause [does not] encompass every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services...To do so would provide wireless service providers with a wildcard that would trump any adverse zoning decision...

"[A] provider whose application has been denied...must show two things. First...that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network... The provider's showing on this issue will...have to include evidence that the area the new facility will serve is not already served by another provider..."

"Second, the...applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."

In a second case decided a few days later, the court applied the same two-part test, but remanded the case for additional findings as to whether the proposed tower would fill a "significant gap."

High Threshold

Lawyers say requiring companies to show that a proposed tower will fill a "significant gap" in service imposes a difficult new restriction on cell phone towers. "The case establishes an awfully high threshold for providers who claim that a municipality is prohibiting wireless services, because they have to show that there's no access to the national telephone network by any provider" in that area, says Nancy Essex, a municipal attorney who works in Raleigh, N.C.

In effect, the court is saying "that a municipality's authority to deny a provider's application becomes greater when it is beaten to the punch by another provider," says Ted Kreines of Tiburon, Calif., a consultant to local governments on wireless planning and editor of the newsletter PlanWireless. In addition, "the factual inquiry about 'least intrusive alternatives' is going to make these cases much less susceptible to summary judgment," says Emmert.

The result, say defense lawyers, will be slower development and increasing costs. "We're going to need more coverage, not less, in the future, and the tougher it is to get towers erected, the slower the system develops," says Baldwin. Companies will be forced to design cell phone towers which are disguised as trees or flagpoles or worked into existing structures, says Stoneham, Mass., attorney Greg Higgins, who represents phone companies. "The downside is these technologies cost two to five times as much as standard development costs - and this translates into higher prices for the consumer."

What Towns Should Do

Experts say there are a number of things municipalities can do to make it more likely

that their zoning decisions will be upheld. A front-page article on this issue appears at 97 LWUSA 529; Search words for LWUSA Archives: Dam and Linder.

* Preempt problems.

The best way to handle conflicts over cell towers is to try to avoid them altogether. Towns should bring in consultants before the issue arises, says Knaak. That way, a list of available sites can be compiled in advance and it won't look like the town is intentionally trying to keep towers out.

Working out problems early in the process can benefit companies, too, says Essex. "This case shows that it's in a provider's interests to come to a local government early and get a whole network approved, because when the provider needs one last tower to complete a pattern and fill a gap, the fact that there's only one available site isn't going to be enough to justify a tower."

* Don't forget the details.

Although courts are becoming more likely to reaffirm local zoning authority, municipalities still need to be meticulous about observing procedural proprieties, says Essex. "A lot of the challenges to municipalities have been on a procedural basis. Make sure that an order rejecting an application contains the grounds for the decision, and that decisions are made within a reasonable time," she cautions.

Also, it's vital for towns to buttress their case with supporting documentation and testimony. "The most important factor when you're in court is to have a full record developed below," says municipal attorney Kirk Wines of Seattle. "If you build a careful record at the hearing level, the court is more likely to back you up."

* Hire experts.

Another step that more and more municipalities are taking is to counter companies' use of expert testimony with their own. "Be sure to retain your own experts," says Philip Lope of Zelienople, Pa., who represented the town in the Third Circuit case.

Municipalities should consider getting an expert to testify on such issues as "the quality of service, the nature of the gap in service, other feasible, less intrusive alternatives to the proposed tower, and whether other providers are able to supply service without requiring a zoning variance," suggests John Pestle, a municipal attorney from Grand Rapids, Mich.

Other useful experts might include a radio frequency engineer who can challenge the company's technological assertions and an appraiser to testify about effects of the proposed tower on property values, says Wines.

* Ask for alternatives.

Cities and towns should take advantage of the burden placed on companies by challenging them to show that no less intrusive alternatives are available, says Wilson. In this case, "the court said that there are alternatives to every cell site - no court has ever come right out and said that before. They've danced around it, alluded to it, but here the court says, 'Don't just bring us one option,'" says Kreines. But towns shouldn't get overconfident without having the facts to back up the assertion that less intrusive alternatives are available, warns Emmert.

"If localities abuse their position, the courts are going to stop giving them deference and say, if you really think there is a less intrusive alternative, prove it," he says.

U.S. Court of Appeals, 3d Circuit. APT Pittsburgh L.P. v. Penn Township, No. 98-3519. November 8, 1999. Lawyers Weekly USA No. 9917124 (20 pages). Click here to order this opinion.

U.S. Court of Appeals, 3d Circuit. Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, No. 98-6484. November 19, 1999. Lawyers Weekly USA No. 9917132. (11 pages). Click here to order this opinion.

To order a copy of either opinion, call 800-933-5594.

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DATE and TIME this paper received by Registrars.

The Commonwealth of Massachusetts

ANNUALS

PETITION FOR A SPECIAL TOWN MEETING

pursuant to General Laws, Chapter 39, section 10.

TOWN ACTON, MA

OBJECT OR SUBJECTS REQUESTED FOR ACTION AT THE MEETING:

To be filled in by petitioners. If space is insufficient, attach additional page of description to each petition form before signatures are gathered.)

WHEREAS: Wireless Communication Facilities for telephone communication (hereinafter Cell Towers) are necessary for the use of modern telephones including cell-phones; and Cell towers are taller than most residential homes; and Cell towers are maintained in a large cleared parcel of land which makes their presence visible for a considerable distance; and Cell towers are unsightly as objects near residential homes; and Cell Towers have equipment near their base which makes objectionable loud noises; and Cell Towers in a Residentially zoned area contribute to a reduction in value of homes in the vicinity of a Cell Tower, and Cell Towers should not be placed near Public Schools; and

WHEREAS: Present the zoning Bylaw of the Town of Acton (hereinafter Acton) permit construction of Cell Towers near Public Schools and in areas zoned Residential:

IT IS HEREBY RESOLVED: to amend the zoning Bylaw of Acton to prohibit construction of Cell Towers in areas near Public Schools and in areas zoned Residential.

IN FURTHERANCE OF THIS RESOLUTION: that construction of Cell Towers is to be prohibited in areas near Public Schools and in areas zoned Residential in Acton, the following changes to the Zoning Bylaw of Acton are hereby enacted:

1. Article 37, Section 3.4.10 of the Table of Principal Uses", change the entry for "Wireless Communication Facility" under the column "Residential Districts" to "N" at all entries.
 - 1.1. Add to Article 37 Section 3.10 "Special Requirements for Wireless Communication Facilities" the following new section:

"3.10.4.7 Any Wireless Communication Facility must be located more than 1,000 feet from any Public School building or playground or real estate held by either a School District or the Town of Acton for the construction of a public school building or playground."
 - 1.2. The Acton Board of Selectmen is hereby requested to form a committee to study the present Zoning Bylaw Article 37 "Wireless Communication Facilities" and to propose improvements thereto.

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 Acton 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.