

DRAFT

Date: _____

Gregory Niemyski, Chairman
Acton Planning Board
472 Main Street
Acton, MA 01720

RE: Verizon Wireless (the "Applicant");
820 Main Street, Acton, Mass. Assessor Map C5, Lot 60 (the "Property");
Agreement for Withdrawal of Application for Special Permit for Wireless
Communications Facility.

ATTN: Roland Bartl, Town Planner
Kristen Alexander, Assistant Town Planner
Eva K. Taylor, Town Clerk

Dear Chairman Niemyski:

~~I am writing to inform the Planning Board that Verizon Wireless is withdrawing its application for the above-referenced special permit pursuant to Section 16 of MGL Chapter 40A. The Applicant acknowledges that the withdrawal of its Application can be made without prejudice only with the approval of the Planning Board.~~

I am writing to inform the Planning Board that Verizon Wireless is willing to withdraw its Application for the above-referenced Special Permit at the subject Property (a/k/a the "Capizzi Site"), on the following terms and conditions:

- 1). The Planning Board shall not make a decision or otherwise take final action on the Application until the earliest occurrence of the following two events: 1) The fiber optic upgrades are installed by Verizon New England and successfully connected to the Verizon Wireless base station facility located at 982 Main Street (the McKay/Crown Tower Site) or 2) August 31, 2007. The Applicant agrees to extend the deadline for final action by the Planning Board, accordingly.
- 2). The Applicant agrees that it will not file a new application for Property owned by Capizzi at 820 Main Street, Acton, prior to September 1, 2009.
- 3). The Applicant acknowledges and agrees that for purposes of M.G.L. Ch. 40, S. 16 the terms of this withdrawal shall have the same effect as a denial of the Application by the Planning Board, with the denial effective August 31, 2007.
- 4). This withdrawal agreement shall be filed in the Town Clerk's Office.

Please feel free to contact me with any questions or comments you may have on this withdrawal.

Sincerely,

James A. Valeriani
Attorney for the Applicant
Verizon Wireless

Agreed and Accepted
Acton Planning Board
Affirmative Vote Dated _____

_____ (Chairman Niemyski)
_____ (Vice Chairman Schaffner)
_____ (Clerk Starzec)
_____ (Member Martin)
_____ (Member Densen)
_____ (Member Mertz)

Copies to: Mr. Daniel Fitzpatrick, Real Estate Manager, Verizon Wireless
Mr. David Velez, Vitalsite Services
Mr. Wayne Pastel, Esquire, Attorney for Property Owner, Orlando P. Capizzi, Trustee, Main Street Realty Trust.

Roland Bartl

From: Roland Bartl
Sent: Friday, June 22, 2007 12:36 PM
To: Planning Board
Subject: FW: Acton - Verizon Wireless application

Hi:

Attached is the decision extension agreement to 8/31/07 signed by Verizon's attorney.

GREG: Would you please co-sign it and send it back by e-mail or fax (978-264-9630). If fax please call to tell us its coming. The signed agreement needs to be filed with the Town Clerk.

With that I believe the meeting on Tuesday is cancelled, and we will give appropriate cancellation notices.

Also attached is Verizon's draft agreement towards withdrawal that was attached to Mr. Valeriani's e-mail below of 6/21/07 - 2:33 PM. Work in progress. I have placed it on the 7/10 agenda for discussion.

As a general heads-up: The 7/10 meeting has on it a hearing on the special permit application by the Town of Acton (Recreation Department) for the Elm Street field lighting replacement under section 5.3.5.3 of the zoning bylaw. Please make sure to attend so that we have the statutory 2/3 minimum membership present for special permits. Thank you

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

-----Original Message-----

From: James Valeriani [mailto:jamesvaleriani@comcast.net]
Sent: Friday, June 22, 2007 10:32 AM
To: Roland Bartl
Subject: RE: Acton - Verizon Wireless application

Hi Roland: Here is a signed decision-extension to 8/31/07.

I'll fax it as well.

I imagine we'll speak in a week or so. In the meantime, I'll relay the contents/suggestions in your email memo to Verizon Wireless.

Bye for now and have a good weekend.

Jim V.

James A. Valeriani
Attorney at Law

6/22/2007

10 Arthur Road
Wakefield, MA 01880
ph. (781) 587-0206
fx. (781) 587-0207
jamesvaleriani@comcast.net

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Thursday, June 21, 2007 4:50 PM
To: James Valeriani
Subject: RE: Acton - Verizon Wireless application

Hi, Jim:

I discussed the matter with the Chairman.

Please send/fax me a formal agreement to extend the decision deadline to August 31, 2007. From the Board's perspective an extension is helpful as fewer than the eligible voting members can attend the meeting on June 26. Allowing to end of August is good as attendance over the summer is sometimes sketchy due to vacation schedules. In the meantime Verizon may have it all installed at Butterbrook Farm and can then with confidence withdraw, hopefully with agreement not file until April 2010. Chairman Niemyski feels adamant about this - more so than I had anticipated. By the time you get to the end of August you are a good long way into the third year anyway. Please reconsider this one.

With your extension agreement, the June 26 meeting will be cancelled due to lack of quorum and the Board will take up your draft withdrawal agreement for discussion on July 10. You will then hear back from me. The Chairman and I do not expect to take any final action before the Board's last meeting in August (8/28) without contacting you first.

For now would you please send me a letter - by tomorrow if possible - that grants the Planning Board an extension of the decision deadline until August 31, 2007.

Thankfully Yours,

Roland

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

-----Original Message-----

From: James Valeriani [mailto:jamesvaleriani@comcast.net]
Sent: Thursday, June 21, 2007 2:33 PM
To: Roland Bartl
Subject: RE: Acton - Verizon Wireless application

Hello Roland: Please review and discuss this revised withdrawal draft as necessary with Chairman Niemyski. Please note that the terms of this draft would not be effective as to my client until signed by me and delivered to the Planning Board.

As I've previously indicated, Verizon Wireless would be willing to extend the deadline for a decision if the Planning Board requires additional time to consider these withdrawal terms.

Thanks for your continued efforts.

Sincerely,

6/22/2007

Jim Valeriani

James A. Valeriani
Attorney at Law
10 Arthur Road
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ph. (781) 587-0206
fx. (781) 587-0207
jamesvaleriani@comcast.net

From: James Valeriani [mailto:jamesvaleriani@comcast.net]
Sent: Thursday, June 21, 2007 11:25 AM
To: 'Roland Bartl'
Subject: RE: Acton - Verizon Wireless application

Hi Roland: As a follow-up to the email below and our brief conversation yesterday, I've relayed the topics of our discussion to Verizon Wireless's Real Estate Group but I don't anticipate having a response until late today or Friday morning. Just wanted to let you know as you indicated you would prefer some type of response by today.

I'll let you know as soon as I hear back.

Jim V.

James A. Valeriani
Attorney at Law
10 Arthur Road
Wakefield, MA 01880
ph. (781) 587-0206
fx. (781) 587-0207
jamesvaleriani@comcast.net

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Wednesday, June 20, 2007 10:14 AM
To: James Valeriani
Subject: FW: Acton - Verizon Wireless application

Jim:

The June 26 date is coming up early next week. I am just wondering where you are with this and if my suggestion for withdrawal is acceptable. Please let me know. If acceptable, it would be great to receive it rather sooner than later, so that the Board knows whether to hold the meeting or to cancel.

Thank you

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

-----Original Message-----

From: Roland Bartl
Sent: Friday, June 15, 2007 1:37 PM
To: 'James Valeriani'

6/22/2007

Cc: Kristin Alexander; Kim DelNigro
Subject: RE: Acton - Verizon Wireless application

Dear Jim:

The Planning Board closed the public hearing this past Tuesday. Members also discussed your draft withdrawal letter. The sense of the meeting is a desire for more clarity, or in the alternative to write denial of the special permit application. Cappizzi's unwillingness to withdraw the ANR plan or waive his rights under the ANR plan was acknowledged and regretted. Cappizzi seems to be an unintended potential beneficiary. In any case, the Board would like at least Verizon to step back from the ANR protections since Verizon initiated them in the first place. Subsequently, I have spoken with Town Counsel about the terms of withdrawal, whereby the Board wishes to accomplish the same result as a denial - i.e. that Verizon will not or cannot apply again in short order. I understand that this would not be Verizon's intention, but the Board wants to be reassured.

I don't like ending this with a decision of denial. So, with the help of Town Counsel's suggestions, let me have one more stab at what would satisfy the Board in a withdrawal letter so as to not vote a decision of denial.

we would be perfectly happy if your withdrawal would state in its main paragraph:

"I am writing to inform the Planning Board that Verizon Wireless is withdrawing with prejudice its application for the above-referenced special permit. The Applicant acknowledges and agrees that for purposes of M.G.L. Ch. 40, S. 16 this withdrawal has the same effect as a denial of the application by the Planning Board. The Applicant further agrees that it will not file a new application for property owned by Cappizzi at 820 Main Street, Acton prior to April 1, 2010."

Your withdrawal letter should be notarized as to the Applicant's free will and intent. I hope this is agreeable. The Planning Board has tentatively reinstated its meeting on June 26 in the event it must vote on a denial, instead. But, I think everybody would be much happier to stay at home. Thank you for your patience through this process and for working with the Board towards a resolution of the issues at the 982 Main Street site, which made Verizon's application obsolete. This outcome is how the Bylaw was intended to work, and I am grateful for your willingness to work with us to achieve the goal of minimizing towers in Acton.

Best regards -

*Roland Barti, AICP
Planning Director, Town of Acton
472 Main Street
Acton, MA 01720
978-264-9636*

-----Original Message-----

From: James Valeriani [mailto:jamesvaleriani@comcast.net]
Sent: Tuesday, June 12, 2007 4:40 PM
To: Roland Barti
Cc: Kristin Alexander; Kim DelNigro
Subject: RE: Acton - Verizon Wireless application

Thanks for the reply, Roland.

I have modified the draft withdrawal language to include an acknowledgement that it can only be without prejudice with the approval of the Planning Board. I hope this additional language is satisfactory. I'll fax this memo and the

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attached letter to Kim's attention at your office. Hopefully it is received in time for tonight's hearing.

If the Board were to vote to accept the withdrawal with prejudice, then the first paragraph of MGL 40A S. 16, would govern the process for any reapplication which, as you know, could not be made within a two year period unless there are specific and material changes to the Application. Although I'm not aware of any alternative projects by Verizon Wireless, I am inclined to advise against agreeing to more specific language in a withdrawal that goes beyond what is required under MGL 40A, S. 16.

I hope the Board finds this draft acceptable and, if so, I'll finalize with Verizon Wireless and submit for the Board's final consideration and vote.

Given the status of the application and the positive developments at the existing site at 982 Main Street, I don't plan on attending tonight's hearing, but would be available to discuss any further comments/concerns over the next few days in our efforts to finalize this process.

I'd like to thank you, the Planning Department and the members of the Planning Board for your time and efforts over these past several months.

Sincerely,

Jim Valeriani

James A. Valeriani
Attorney at Law
10 Arthur Road
Wakefield, MA 01880
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jamesvaleriani@comcast.net

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Tuesday, June 12, 2007 3:08 PM
To: James Valeriani
Subject: RE: Acton - Verizon Wireless application

Jim:

I forwarded your message to the Chairman, but haven't heard back from him. He must be tied up in meetings or such. So I can't tell you whether or not your attendance might be required. I will be off to meetings myself from hereon through the rest of the day. Kristin and Kim will be at the Planning Board meeting for me.

Personally, I think your letter is short and sweet. I would like to see added (in these or similar words) an acknowledgement that the withdrawal is made because the need for the facility has gone away in light of the resolution reached at 982 Main, and that Verizon does not intend to file another application for the site in the foreseeable future. The latter to satisfy the Chairman's concern as previously discussed.

With that included, your attendance may not be needed. You have explained the Cappizzi's desire to retain their rights under the ANR plan.

Your withdrawal letter should be on formal letter head and signed. You can fax it or e-

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mail it as attachment - because I at meetings please e-mail to planning@acton-ma.gov.

If you fax it please call Kim to let her know to get it from fax machine upstairs.

Thank you

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

-----Original Message-----

From: James Valeriani [mailto:jamesvaleriani@comcast.net]

Sent: Tuesday, June 12, 2007 9:52 AM

To: Roland Bartl

Cc: Kim DelNigro; Kristin Alexander

Subject: Acton - Verizon Wireless application

Hello Roland: Thank you for your email of last Thursday and for taking a moment to speak with me on Friday on the status of the upcoming continued hearing this evening. I'm copying Kim and Kristen from your office, as well, to ensure this memo is received by you and Chairman Niemyski prior to or at tonight's hearing. After reviewing this information, please let me know via email or telephone (781 587 0206) whether your department or the Planning Board feels there is a need for me to attend tonight's hearing (I don't believe my attendance is necessary).

After further discussion with Verizon Wireless, based on the recent developments at the existing site at 982 Main Street involving the efforts of the McKays to grant the easement document to Verizon New England, and the efforts of Crown Castle to make the site "telco ready" and to provide updated structural information on the reserved antenna capacity of the existing tower structure, (and we remain hopeful such cooperative efforts will continue into the future), Verizon Wireless is willing to consider withdrawing its application for a special permit for a wireless communications tower at 820 Main Street. Given the language of Section 16 of MGL 40A (red highlight below), I believe any withdrawal letter should be brief and unambiguous in its statement, notwithstanding the long hearing process, and I'd suggest the following draft language which I have recommended to my client for inclusion in the withdrawal letter:

RE: Verizon Wireless (Applicant);
820 Main Street, Acton, Mass.;
Assessor Map C5, Lot 60;
Withdrawal of Application for Special Permit for Wireless
Communications Facility.

Dear Chairman Niemyski:

I am writing to inform the Planning Board that Verizon Wireless is

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withdrawing its application for the above-referenced special permit pursuant to Section 16 of MGL Chapter 40A. I understand that a notice of this withdrawal will be filed in the Town Clerk's Office, as well.

Please note that this foregoing "withdrawal language" is draft language that is being considered by the Applicant and at this time it is being relayed to the Planning Department and Planning Board for review and comment and that a formal withdrawal will not be considered effective until placed on my letterhead, signed by me as the Attorney for the Applicant, Verizon Wireless, and delivered to the Planning Board, care of your department.

As I mentioned last week, after further discussions with the Capizzi's and their Attorney, Wayne Pastel, the Capizzi's indicated to me a desire to not withdraw the ANR plan filing that served to "freeze" the use of the land under the zoning bylaw in effect prior to the recent zoning amendment warrant articles at the town meeting and special town meeting. I'm not aware of any proposed or other possible uses that may be under consideration by the property owners, and I don't think any are being contemplated by the owners at this time, but apparently their feeling is it may be worthwhile to preserve any benefits, however short in duration, that may result from the freeze implemented by the ANR filing.

I understand you may forward this email memo to Chairman Niemyski for his review. Given the foregoing information, and given the Capizzi's position on maintaining the ANR Plan freeze, I don't know of any reason for me or any other representative of Verizon Wireless to be in attendance at tonight's hearing. It would be my expectation that the hearing would be "closed" this evening and that either a formal withdrawal by Verizon Wireless as the applicant or a final decision by the Planning Board would be rendered by June 28th, which was the "decision" deadline agreed-to at the last hearing in May.

Thank you for your continued patience and cooperation in this effort and please feel free to contact me by phone or email with any questions or comments.

M.G.L.A. 40A § 16

⇒§ 16. Final unfavorable decisions by permit granting authorities; reconsideration; withdrawal of petitions for variance or applications for special permit

No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit

granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

Any petition for a variance or application for a special permit which has been transmitted to the permit granting authority or special permit granting authority may be withdrawn, without prejudice by the petitioner prior to the publication of the notice of a public hearing thereon, but thereafter be withdrawn without prejudice only with the approval of the special permit granting authority or permit granting authority.

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From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Thursday, June 07, 2007 5:45 PM
To: James Valeriani
Subject: [SPAM]Acton - Verizon Wireless application

Jim:

This is excerpt from the last meeting minutes re: the Verizon application hearing:

IV. Verizon Wireless, 820 Main Street - Public Hearing Continuation

Mr. Niemyski opened the public hearing at 7:45 PM and, with discussion and updates of the subject matter, the motion was made to continue the public hearing on June 12, 2007 at 8:30 PM in the Acton Memorial Library and the decision deadline to June 28, 2007. The Planning Board voted all in favor.

Even though the continuation is another couple weeks out, I think it may be good to start reviewing and discussing a withdrawal agreement so that we are ready for it if the time is right for you on 6/28. I'd hate to see another extension just because we have run out of time to agree on the terms of the agreement. It may be all simple enough. But, I have learned

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over the years that the devil is in the details.

Regards -

*Roland Bartl, AICP
Planning Director, Town of Acton
472 Main Street
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6/22/2007