



Planning Department

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MEMORANDUM

To: Planning Board

Date: July 1, 2010

From: Roland Bartl, AICP, Planning Director

Subject: Special Permit Application for Personal Wireless Facility at 5-7 Craig Road
SBA Towers

Counsel has responded to several of our inquiries. A detailed counsel/client privileged memorandum is in confidential folder.

Counsel's review revealed a serious question as to the eligibility of this special permit application before the Planning Board. The Acton zoning bylaw, consistent with the requirements of the Federal Telecommunications Act (TCA), provides in section 3.10 for a special permit consideration for personal wireless facilities. These would be used by personal wireless services, which are defined in section 704 of the Telecommunications Act as (1) "commercial mobile services," (2) "unlicensed wireless services," and (3) "common carrier wireless exchange access services." Counsel's research shows that Clearwire does not appear to fall under any of these three regulatory categories and thus would not qualify for the special local zoning treatment that Section 704 of the TCA requires and that zoning bylaw section 3.10 provides. With Clearwire as the only locator on the proposed tower, the entire proposed facility is questionable under the Federal definitions for personal wireless facilities.

Recall: SBA Towers originally came in with two co-locators for the proposed site: Clearwire and T-Mobile. T-Mobile is clearly qualified for special local zoning treatment under Federal law, but was never responsive to relevant Board inquiries and eventually withdrew from the application. Had T-Mobile stayed in, the proposed facility may or may not have met local zoning requirements based on T-Mobiles coverage patterns; but the Board never found out. Even if T-Mobile had met the local zoning criteria, it now seems that Clearwire would have been an ineligible colocator.

We provided the Applicant with a summary version of the pertinent paragraphs in Counsel's letter so that they may reply, rebut, or refute Counsel's opinion. Because this new information transpired very recently, and the applicant has not received the summary findings until Tuesday, the Applicant may not be able to respond in time for the hearing. Regardless, the applicant should be given this opportunity to provide the Board with counter arguments.

Should Clearwire ultimately be ineligible for special zoning treatment, then the applicant should either withdraw the application or the Planning Board would have to deny it. In that event, the Planning Board might wish to consider a zoning amendment proposal that would give Town residents an opportunity to decide whether or not they want to extend special zoning considerations to companies like Clearwire.

On other points of inquiry Counsel opines as follows:

1. Computer projections can be used to demonstrate a significant gap.
2. Backhaul antennae to the extent they are necessary to fill a significant gap, would have to be approved where no practical alternative is available, whereby practical alternatives can be more expensive and less efficient technologies.
3. Tower owners are eligible applicants where there is strong connection to a personal wireless service provides through lease or collocation agreements.

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