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October 21, 2024

Thorne Palmer, Town Clerk
Town of Charlemont
P.O. Box 605
Charlemont, MA 01339

Re: Charlemont Annual Town Meeting of May 28, 2024 -- Case # 11476
Warrant Article # 25 (Zoning) [1]

Dear Mr. Palmer:

Article 25 - Under Article 25 the Town amended the zoning bylaws, Section 44, "Personal Wireless Service Facilities" (PWSF) by-law to make specific identified changes. The revisions include requiring a special permit for a PWSF in the right of way; requiring proof of a gap in coverage in the installation area; and requiring an applicant to conduct a balloon or crane test at the proposed location for the cell tower.

We approve Article 25 from the May 28, 2024 Charlemont Annual Town Meeting because it is not in conflict with state law. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). In addition, we offer comments to the Town regarding federal and state law applicable to personal wireless communication facilities in order to ensure the proper application of the amended PWSF by-law.

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 (7) preserves state and municipal zoning authority to regulate personal wireless service facilities, subject to the following limitations:

1. Zoning regulations "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. §332 (c)(7) (B) (i) (I)

2. Zoning regulations "shall not prohibit or have the effect of prohibiting the provisions of personal wireless services." 47 U.S.C. § 332 (c) (7) (B) (i) (II).

[1] By agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Article 25 for 45-days until October 23, 2024.

3. The Zoning Authority "shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332 (c) (7) (B) (ii).

4. Any decision "to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332 (c) (7) (B) (iii).

5. "No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning emissions." 47 U.S.C. § 332 (c) (7) (B) (iv).

Federal courts have construed the limitations listed under 47 U.S.C. § 332(7) as follows. First, even a facially neutral by-law may have the effect of prohibiting the provision of wireless coverage if its application suggests that no service provider is likely to obtain approval. "If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect'…." Town of Amherst, N.H. v. Omnipoint Communications Enters, Inc., 173 F.3d 9, 14 (1st Cir. 1999).

Second, local zoning decisions and by-laws that prevent the closing of significant gaps in wireless coverage have been found to effectively prohibit the provision of personal wireless services in violation of 47 U.S.C. § 332(7). See, e.g., Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 20 (1st Cir. 2002) ("local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute"); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108, 117 (D. Mass. 2000) (by-law resulting in significant gaps in coverage within town had effect of prohibiting wireless services).

Third, whether the denial of a permit has the effect of prohibiting the provision of personal wireless services depends in part upon the availability of reasonable alternatives. See 360 Degrees Communications Co. v. Bd. of Supervisors, 211 F.3d 79, 85 (4th Cir. 2000). Zoning regulations must allow cellular towers to exist somewhere. Towns may not effectively ban towers throughout the municipality, even under the application of objective criteria. See Virginia Metronet, Inc. v. Bd. of Supervisors, 984 F. Supp. 966, 971 (E.D. Va. 1998).

In addition, Section 6409 of the Middle-Class Tax Relief and Job Creation Act of 2012 requires that "[A] state or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." (emphasis added). The Act defines "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves: (1) collocation of new transmission equipment; (2) removal of transmission equipment; or (3) replacement of transmission equipment. The Act applies "[n]otwithstanding section 704 of the Telecommunications Act of 1996." The Act's requirement that a local government "may not deny, and shall approve, any eligible facilities

request" means that a request for modification to an existing facility that does not substantially change the physical dimensions of the tower or base station must be approved. Such qualifying requests also cannot be subject to a discretionary special permit. The Town should consult with Town Counsel with any questions regarding application of the by-law.

Further, state law also establishes certain limitations on a municipality's authority to regulate wireless communications facilities and service providers. Under General Laws Chapter 40A, Section 3, wireless service providers may apply to the Department of Telecommunications and Cable for an exemption from local zoning requirements. If a telecommunication provider does not apply for or is not granted an exemption under c. 40A, § 3, it remains subject to local zoning requirements pertaining to cellular towers. See Building Comm'r of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 722 (2000). The Town should consult with Town Counsel to ensure the proper application of the PWSF by-law, as discussed herein.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute.

Very truly yours,

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cc: Town Counsel Brian W. Riley