

February 22, 2011

Joan M. Wordell, Town Clerk  
Town Hall  
78 Main Street  
Hudson, MA 01749

**RE: Town of Hudson Special Town Meeting of November 15, 2010 – Case # 5780  
Warrant Articles # 11 and 12 (Zoning)**

Dear Ms. Wordell:

**Articles 11 and 12-** We return with the approval of this Office the amendments to the Town's zoning by-laws adopted under these Articles on the warrant for the Hudson Special Town Meeting that first convened on November 15, 2010. Our comments on Articles 11 and 12 are provided in more detail below.

**Article 11** - The amendments adopted under Article 11 amend the Town's zoning by-laws by deleting the text of Section 7.1.7, "Site Plan Approval," and inserting a new Section 7.1.7, "Site Plan Approval." The proposed by-law is divided into 12 distinct sections: Section 7.1.7.1 setting forth the purpose of the proposed by-law; Section 7.1.7.2 setting forth the applicability of the proposed by-law; Section 7.1.7.3 establishing the procedures for filing an application under the proposed by-law; Section 7.1.7.4 setting forth the requirements for the plans submitted under the proposed by-law; Section 7.1.7.5 requiring that every application include a compliance and impact statement; Section 7.1.7.6 pertaining to waivers of certain requirements of the proposed by-law; Section 7.1.7.7 discussing the Planning Board's approval process; Section 7.1.7.8 authorizing a performance bond or cash security; Section 7.1.7.9 discussing changes to any approved site plans; Section 7.1.7.10 authorizing the Planning Board to establish rules and regulations and a fee schedule; Section 7.1.7.11 discussing the validity of site plan approvals under the proposed by-law; and Section 7.1.7.12 containing a severability clause. We approve the new Section 7.1.7, but offer the following comments.

Section 7.1.7.8 of the proposed by-law authorizes the Planning Board to require an applicant seeking a site plan approval to provide a bond or cash security. Specifically, § 7.1.7.8 states:

As a condition of site plan approval and in conjunction with the intent and purpose of this by-law provision, the Planning Board may require a performance bond or cash security to be posted with the Town to guarantee completion of site improvements in compliance with plans submitted and approved hereunder, or for land restoration not having to do with construction of site improvements. The amount of security shall be determined by

an estimate from the applicant's engineer, which may be verified or increased by the Planning Board or its Agent with due consideration of inflationary costs and conformance with the provisions of site plan review and approval. The Town may use the secured funds for their stated purpose in the event that the proponent does not complete all improvements in a manner satisfactory to the Planning Board as provided in the approval.

We approve Section 7.1.7.8 of the proposed by-law, but caution the Town that the bond or cash security does not become Town funds unless and until the applicant defaults on the obligation under the proposed by-law. Moreover, if the Town must use the bond or cash security to pay for work required under the proposed by-law, the Town must first make an appropriation before an expenditure is made to do the work. General Laws Chapter 44, Section 53, provides that "[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." Under Section 53 all moneys received by the Town become part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund pursuant to G.L. c. 44, § 53. The Town must then appropriate the money for the specific purpose of completing improvements. We suggest that the Town discuss the application of Section 7.1.7.8 of the proposed by-law with Town Counsel to ensure that it is applied in a manner consistent with G.L. c. 44, § 53.

Section 7.1.7.10 of the proposed by-law pertains to the administration of the proposed by-law. Section 7.1.7.10 (a) of the proposed by-law grants authority to the Planning Board to establish rules and regulations while § 7.1.7.10 (b) of the proposed by-law grants authority to the Planning Board to establish fees related to applications. Specifically, § 7.1.7.10 states, in relevant part:

The Planning Board may establish and may periodically amend rules and regulations relating to the administration of this section.

The Planning Board shall establish and may periodically amend a schedule of fees for all applications under this section including technical review fees. No application shall be considered complete unless accompanied by the required fees.

We approve § 7.1.7.10 (a) of the proposed by-law but remind the Town that it has no power to adopt rules or regulations that are inconsistent with state law. "A town may not promulgate a regulation that is inconsistent with State law." American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006). We suggest that the Planning Board discuss with Town Counsel any proposed rules or regulations to ensure that they comply with state law.

Section 7.1.7.10 (b) of the proposed by-law also allows the Planning Board to establish fees relating to site plan approval applications. We approve this portion of the proposed by-law but caution the Town that although a municipality may impose fees, it "has no independent power of taxation." Silva v. City of Attleboro, 454 Mass. 165, 169 (2009). In distinguishing

valid fees from impermissible taxes, the Supreme Judicial Court has noted that fees tend to share the following common traits: (1) fees, unlike taxes, are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) user fees (although not necessarily regulatory fees) are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. *See Silva*, 454 Mass. at 168 (citing *Emerson College v. City of Boston*, 391 Mass. 415, 424-25 (1984)). The Town may wish to consult with Town Counsel to ensure that any fees established under the proposed by-law constitute valid fees rather than impermissible taxes.

**Article 12** - The amendments adopted under Article 12 amend the Town's zoning by-laws by deleting the text of Section 5.9, "Wireless Communication Facilities," and inserting a new Section 5.9, "Wireless Communication Facilities." The new Section 5.9 establishes the requirements for the construction and use of wireless communication facilities. Section 5.9.1 describes the purpose of the proposed by-law; Section 5.9.2 discusses site selection preferences; Section 5.9.3 describes the uses allowed by special permit; Section 5.9.4 provides exemptions to the proposed by-law; Section 5.9.5 contains a severability clause; and Section 5.9.6 pertains to federal and state preemption. We approve the new Section 5.9, but offer the following comments.

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

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). Also, G.L. c. 40J, § 6B, charges the Massachusetts Broadband Institute with the task of promoting broadband access throughout the state. Municipal regulation of broadband service providers must not frustrate the achievement of this statewide policy.

Although we approve the proposed by-law adopted under Article 12, we caution the Town that its Wireless Communication Facilities by-law must be applied in a manner consistent with the applicable law outlined above. The Town should be particularly cautious in its application of the following provisions of the by-law.

## II. Analysis of Hudson’s Wireless Communication Facilities By-Law.

Section 5.9.4 of the proposed by-law provides exemptions for certain towers and antennas. Specifically Section 5.9.4 of the proposed by-law provides as follows:

1. Amateur radio towers or antennas used in accordance with the terms of any amateur radio service license issued by the Federal Communications Commission, provided that the towers or antennas are not used or licensed for any commercial purpose.

2. Towers or antennas used for the purposes set forth in Massachusetts General Laws Chapter 40A, Section 3, as amended;
3. Digital Satellite System (DDS) and television antennas for the purpose of enhancing television reception.

Section 5.9.4 (1) of the proposed by-law exempts federally licensed amateur radio operators from the proposed by-law, “provided that the towers or antennas are not used or licensed for any commercial purpose.” We caution the Town that G.L. c. 40A, § 3, does not restrict the purpose for which such antenna structures may be used. General Laws Chapter 40A, Section 3, provides in part, “No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator.” To the extent that federally licensed amateur radio operators is subject to the proposed by-law, the proposed by-law cannot “prohibit the construction or use of an antenna structure” by federally licenses amateur radio operators. Thus, we caution the Town to apply Section 5.9.4 of the proposed by-law in a manner consistent with G.L. c. 40A, § 3. We suggest that the Town discuss the application of Section 5.9.4 with Town Counsel.

**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. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.**

**If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.**

**Nothing in the Attorney General’s approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.**

Very truly yours,

MARTHA COAKLEY  
ATTORNEY GENERAL

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enc.

cc: Town Counsel (via email)

