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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

July 14, 2000

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: Suspension of permit issuance for cellular antennae in residential areas;
Council Order #15 dated 6/19/00

Dear Mr. Healy:

The above-referenced Council Order requested a report on the environmental and health impacts from cellular antennae in residential neighborhoods caused by "radio active frequency exposure." The Council Order also asked the City Manager "to ensure that no permits for cellular antennas be issued until this report is received by the City Council."

To the extent that this Council Order seeks to create a temporary moratorium on the issuance of permits for cellular antennae, in my opinion, it does not accomplish that purpose. While moratoria on cellular antennae are not per se illegal under federal law, they are not allowed without adequate justification, and they will not be allowed based on the environmental effects of radio emissions. Also, in Cambridge, the permitting of cellular antennae is governed at present by the Zoning Ordinance. Therefore, any moratorium would have to be accomplished through the formal zoning amendment process. The City Manager has no independent authority to stop permits from issuing that are required to be issued pursuant to local zoning law.

There are some specific limitations on the Council's power to enact such moratoria, and on the Council's power to create permanent regulations for such antennae. In 1996, Congress enacted the federal Telecommunications Act (47 U.S.C. §§151 et seq.). As part of that Act, a section entitled "Preservation of Local Zoning Authority" was enacted which provides, at 47 U.S.C. §332(c)(7)(B)(iv), that:

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.

Also, 47 U.S.C. §332(c)(7)(B)(i)(II) provides that:

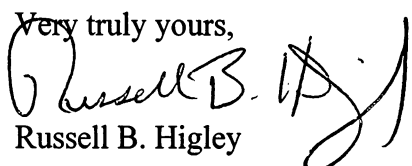
The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

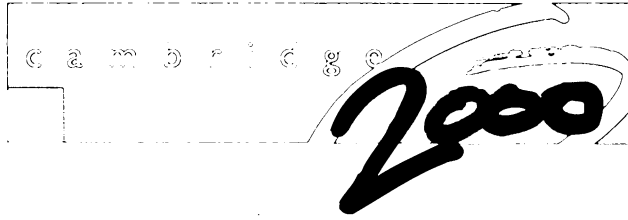
That being said, a temporary moratorium on the granting of special permits for wireless communication facilities was upheld recently in National Telecommunication Advisors, LLC v. Board of Selectmen of the Town of West Stockbridge, 27 F.Supp.2d 284 (D.Mass. 1998). Judge Ponsor of the federal district court in Massachusetts ruled that the Town's six month moratorium was reasonable, in order to allow the Town to develop reasonable regulations for the permitting of personal wireless service facilities. Id. at 287. He ruled that such a short-term moratorium did not violate the federal Act because it did not prohibit facilities (it merely delayed them) or unreasonably interfere with the rights of telecommunication companies created by the Act. In Sprint Spectrum v. City of Medina, 924 F.Supp. 1036 (W.D. Wash. 1996) a similar six month moratorium enacted in Medina, Washington was upheld as reasonable where it was enacted six days after the Act was enacted.

Some cases have voided moratoria. For instance, in Sprint Spectrum v. Jefferson County, 968 F.Supp. 1457 (N.D.Ala. 1997), a third moratorium imposed by the county was struck down as void for failing to comply with Alabama's state law requirements for enacting zoning moratoria and for not being supported by valid reasons to justify further delays, where the county had already adopted a comprehensive regulatory scheme based on the requirements of the Act.

Therefore, while moratoria on cellular antennae are not per se illegal under federal law, they must be enacted with adequate justification, and they may not be based on the environmental effects of radio emissions. Also, the environmental effects of radio frequency emissions may not be a basis for even regulating cellular antennae under federal law. If the Council seeks to further regulate antennae on other grounds recognized as valid zoning considerations, both a moratorium and permanent regulation may be permissible--within the limitations of the federal legislation. Any moratorium would have to be enacted in the manner required of zoning ordinance amendments.

Very truly yours,


Russell B. Higley



CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager

Richard C. Rossi, Deputy City Manager

July 31, 2000

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 00-44, regarding a report on the impact of cellular antennas in residential area, received from City Solicitor Russell Higley.

Very truly yours,

Robert W. Healy
City Manager

RWH/mec
attachment



2000 Things 2 Do in 2000

1
5223
Consent Agenda #11

Relative to AW Rpt. #00-44,
regarding a report on the impact
of cellular antennas in
residential areas.

In City Council July 31, 2000

PLACED ON FILE