

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Nancy E. Glowa
First Assistant
City Solicitor



Arthur J. Goldberg
Supervising Legal Counsel

Legal Counsel
Birge Albright
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CITY OF CAMBRIDGE

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

October 10, 2000

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

Re: Regulation of telecommunications facilities;
Council Order #3 dated 9/18/00

Dear Mr. Healy:

The City Council requested a report on the powers of regulation open to the city on telecommunications facilities, specifically towers and telecommunications "hotels." I understand hotel in this context to mean a building, not necessarily including an antennae on it, that may house more than one telecommunications company's equipment.

These issues are addressed in large part in my July 14 response to Council Order #15 of 6/19/00, copy attached. The City can, and does, regulate both towers and telecommunications hotels at Zoning Ordinance section 4.32(g)(1) and footnote 49 thereto (copy attached), pursuant to its authority under G.L.c.40A. The federal Telecommunications Act provides some limitations on how municipalities may exercise their zoning powers to regulate these facilities however, as stated in the July 14 opinion.

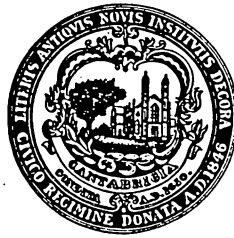
Very truly yours,

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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:

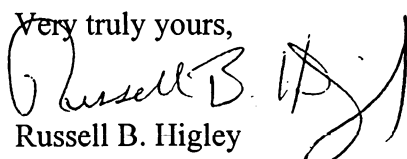
The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

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

by deleting the existing Section 4.32 - Transportation, Communication and Utility Uses, paragraphs e and g in their entirety, and substituting therefore the following:

			Res												
			C,C-1												
			2, 2A	Off	Bus			Bus B	Bus	Ind		Ind			
	Open	Res A	Res	2B, 3	1,2,3	A-1	Bus	B-1	C	A-1	Ind	B-1	Ind	Ind	
	Space	1&2	B	3A	3A	A-2	A	B-2	C-1	A-2	A	B-2	B	C	

4.32 Transportation, Communication and Utility Uses

e. Radio and Television transmission station, including towers

no no no no no no no no no no sp8 sp no sp sp

g. Utilities

1. Telephone exchange (including, switching, relay and transmission facilities serving mobile communications systems) and any towers or antennas accessory thereto⁴⁹

no sp sp sp sp sp sp sp sp sp sp sp sp sp sp

2. Transformer station, substation, gas regulator station, or pumping station

no sp sp sp sp sp sp sp sp sp sp sp sp sp sp

In Section 4.40 Footnotes to the Table of Use Regulations, add a new Footnote 49 as follows:

49. But not including a tower facility as a principal use, serving multiple operators, or as a freestanding structure on a lot.

In reviewing a special permit application for mobile communications facilities in particular, the Board of Zoning Appeal shall consider the following in reaching its determination:

1. The scope of or limitations imposed by any license secured from any state or federal agency having jurisdiction over such matters.
2. The extent to which the visual impact of the various elements of the proposed facility is minimized: (1) through the use of existing mechanical elements on a building's roof or other features of the building as support and background, (2) through the use of materials that in texture and color blend with the materials to which the facilities are attached, or (3) other effective means to reduce the visual impact of the facility from off the site;
3. Where it is proposed to erect such a facility in any residential zoning district, the extent to which there is a demonstrated public need for the facility at the proposed location, the existence of alternative, functionally suitable sites in non-residential locations, the character of the prevailing uses in the area, and the prevalence of other, existing mechanical systems and equipment carried on or above the roof of nearby structures. The Board of Zoning Appeal shall grant a special permit to erect such a facility in a residential zoning district only upon a finding that non residential uses predominate in the vicinity of the proposed facility's location and that the telecommunication facility is not inconsistent with the character that does prevail in the surrounding neighborhood.

In granting a special permit the Board of Zoning Appeal shall set forth in its decision under which circumstances or procedures, if any, the permittee shall be allowed to replace and upgrade its equipment without the necessity of seeking a new special permit.

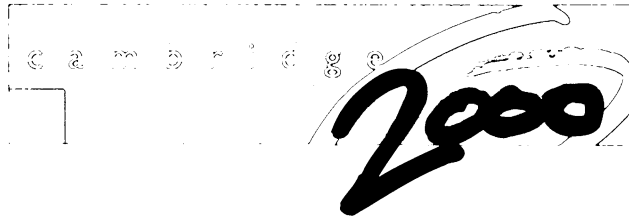
In City Council May 12, 1997.

Passed to be ordained as amended by a yeas and nays vote:- Yeas 9; Nays 0; Absent 0.

D. Margaret Drury,
City Clerk

ATTEST:-

9.



CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager

Richard C. Rossi, Deputy City Manager

October 16, 2000

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 00-76, regarding a report on regulation of telecommunications facilities, received from City Solicitor Russell B. Higley.

Very truly yours,

Robert W. Healy
City Manager

RWH/mec
Attachment



2000 Things 2 Do in 2000

S 328

Consent Agenda # 9

Relative to Awaiting Report Item Number
00-76, regarding a report on regulation
of telecommunications facilities

In the City Council October 16, 2000

PLACED ON FILE