



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

August 21, 2023

Beth R. Klein, Town Clerk
Town of Sudbury
322 Concord Road
Sudbury, MA 02110

**Re: Sudbury Annual Town Meeting of May 1, 2023 -- Case #10984
Warrant Article # 38 (Zoning)
Warrant Articles # 30, 39, and 40 (General)**

Dear Ms. Klein:

Articles 30, 38, 39, and 40 - We approve Articles 30, 38, 39, and 40 from the May 1, 2023 Sudbury Annual Town Meeting. Our comments on Article 40 are provided below.

Article 40 - Under Article 40 the Town voted to add to the Town's general by-laws a new by-law regulating the placement of small cell wireless installations (SWFs) within the Town's public ways. We approve Article 40 because it does not 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). However, the Town must apply the new by-law consistent with state and federal law regarding small cell wireless installations, as provided in more detail below.

In this decision we summarize the by-law; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and explain why, based on that standard, we approve Article 40. We also offer comments for the Town's consideration to ensure the by-law is applied consistent with federal and state law.

I. Summary of Article 40

Under Article 40 the Town added a new general by-law regulating the placement of SWFs within the Town's public ways. The by-law defines SWFs as follows:

Small Wireless Facilities (SWFs) are facilities that meet each of the following conditions as established by the FCC:

(1) The facilities:

(a) Are mounted on structures 50 feet or less in height including their antennas as defined in 47 CFR § 1.1320(d); or

(b) Are mounted on structures no more than 10 percent taller than other adjacent structures; or

(c) not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in 47 CFR § 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of 47 CFR;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 CFR § 1.1307(b).

Section 3 “Definitions.”¹

Applications for the placement of SWFs in the Town’s public ways must be submitted to the Select Board along with an application fee that is set by the Board. Section 6. The Select Board will hold a public hearing after receiving a complete application and will issue a decision on the application within 60 days for collocation of SWFs using existing poles, and 90 days for attachment of SWFs proposing new poles. Sections 7 and 8. The by-law further provides that the Select Board may “grant, grant with conditions, or deny the application” based on certain standards in the by-law, including “inadequate capacity of the pole or mounting structure and safety concerns, reliability concerns or failure to meet applicable engineering standards.” Section 8. The by-law imposes design requirements on SWFs and requires the SWFs owner to submit an

¹ 47 C.F.R 1.6002 defines terms used in Subpart U that imposes requirements on state and local governments regarding the placement, construction, and modification of personal wireless service facilities. The by-law’s definition of SWFs is the same as Section 1.6002 (l)’s definition of SWFs. See also the Federal Communications Commission (“FCC”) Declaratory Ruling and Third Report and Order (FCC 18-133), p. 9, n. # 9 defining SWFs.

annual affidavit listing, by location, all small cell wireless installations it owns in the Town and a certification regarding which SWFs remain in use. Sections 9 and 11.

We approve the new by-law adopted under Article 40 because it does not conflict with state law. However, the Town must apply the new by-law consistent with state and federal law as provided in more detail below.

II. Attorney General’s Standard of Review of General Bylaws

Our review of Article 43 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32 the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) In order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. A municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Federal Laws Applicable to SWFs

On September 26, 2018, the FCC adopted FCC 18-133 (“Ruling and Order”) regarding the authority of municipalities to regulate small wireless facilities. The FCC issued this Ruling and Order as part of its efforts to remove regulatory barriers that would unlawfully inhibit or impose barriers to the use of infrastructure necessary to support 5 G technology. [Section I.] Among other things, the Ruling and Order: (1) clarifies when a local requirement constitutes an effective prohibition on small wireless facilities; [Section III.A]; (2) establishes the standards and limits for fees and charges applicable to small wireless facilities; [Section III.B]; and (3) establishes the timeframes within which a municipality must act upon small wireless facility provider’s applications [Section IV.A].

In City of Portland et al vs. United States of America, 969 F. 3d 1020 (9th Cir. 2020), the court upheld most of the FCC’s Ruling and Order. The court upheld the FCC’s fee limitations, the time periods in which local governments must act on applications, and the FCC’s authority under the Telecommunications Acts of 1996 to remove barriers that would have prevented a wireless service provider from accessing existing utility poles. Id. at 1039, 1043-1046. In addition, the court upheld the requirement that aesthetic regulations be reasonable but overturned the FCC’s requirements that aesthetic regulations be objective and no more burdensome than those applied to other types of infrastructure. Id. at 1042-1043. The Town may wish to discuss with Town Counsel the application of the City of Portland decision to the new by-law.

Although the new by-law is adopted as a general by-law, the Town should be mindful that the federal Telecommunications Act of 1996’s [47 U.S.C. § 332 (c) (7)] preservation of state and municipal zoning authority regulating personal wireless service facilities, is subject to several limitations as follows:

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof 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.

(iv) 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 Commission's regulations concerning such emissions.

In addition, 47 U.S.C. § 253, “Removals of Barriers to Entry” provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253 (a); see ExteNet Systems, Inc. v. City of Cambridge, MA, 481 F.Supp 3d 41, 58 (D. Mass. 2020) (“Because the [city’s] Small Call Wireless Policy is not an outright ban on the provision of personal wireless service, the validity of the Policy hinges on ‘whether the [Policy] effectively prohibits the provision of wireless services’”). The Town should consult with Town Counsel to ensure that the new by-law is applied consistent with 47 U.S.C. §§ 253 and 332.

Further, 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.

The Town should consult with Town Counsel with any questions regarding the new by-law and the applicable requirements of federal law, including the FCC’s Ruling and Order.

IV. State Law Applicable to Use of the Town’s Right of Way and SWFs

The new by-law must be applied consistent with state law provisions governing the use of right of ways and governing SWFs, as detailed below.

General Laws Chapter 166, Section 25 authorizes the Select Board to establish reasonable regulations for the placement of telephone lines in or under public ways as follows:

The selectmen may, within their towns, permit telegraph, telephone or television lines to be laid under any public way or place, and may establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph, telephone or television, or for the transmission of electricity for light, or for heat or power except for the use of street railway companies, by every person having authority to place such structures in or under public ways or places, including all lines owned or used by said towns.

In addition, G.L. c. 166, § 22 provides that an applicant wishing to conduct a transmission line “upon, along, under or across a public way” must petition the Select Board in writing. Section 22 also provides for a hearing process and authorizes the Select Board to “grant to the petitioner a location for such line,” in relevant part as follows:

A company desiring to construct a line for such transmission upon, along, under or across a public way shall in writing petition the...selectmen of the town where it is proposed to construct such line for permission to erect or construct upon, along, under or across said way the wires, poles, piers, abutments or conduits necessary therefor. A public hearing shall be held on the petition, and written notice of the time and place of the hearing shall be mailed at least seven days prior thereto by the...selectmen of the town to all owners of real estate abutting upon that part of the way upon, along, across or under which the line is to be constructed, as such ownership is determined by the last preceding assessment for taxation. After a public hearing as aforesaid, the board of...selectmen may by order grant to the petitioner a location for such line, specifying therein where the poles, piers, abutments or conduits may be placed, and in respect to overhead lines may also specify the kind of poles, piers or abutments which may be used, the number of

wires or cables which may be attached thereto, and the height to which the wires or cables may run.

Further, state law establishes certain limitations on a municipality's authority to regulate wireless communications facilities and service providers under its zoning powers. Under G. L. c. 40A, § 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 regarding cellular facilities. 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.

The Town should consult with Town Counsel with any questions regarding the by-law and the applicable requirements of state law, including the G.L. c. 166, c. 40A, and c. 40J.

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 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 approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600

cc: Town Counsel Lee S. Smith