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TO: ASHLAND ZONING BOARD OF APPEALS

FROM: KATHERINE FEODOROFF, TOWN COUNSEL
ADAM J. COSTA, TOWN COUNSEL

RE: CELLULAR TOWER APPLICATION

DATE: JULY 20, 2018

In connection with the above-referenced matter, you have requested guidance as to the extent of the Board's¹ authority relative to a special permit application received by it to upgrade the wireless equipment on the existing Cedar Street water tower. The Board discretion is limited, in large part by the Spectrum Act. Provided the applicant limits the modifications in size and scope as explained more fully below, the Board cannot deny the application.

The Spectrum Act and "Substantial Change"

The Spectrum Act was enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012. The Spectrum Act provides, in pertinent part, 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. Rules were established to clarify the above mandate to ensure that the benefits of a streamlined review process for co-locations and other minor facility modifications are not unnecessarily delayed.

A modification substantially changes the physical dimensions of a tower or base station if any of the following apply:

1. **Height.**
 - a. For towers outside of a public right-of-way ("ROW"), it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater;
 - b. For towers within a ROW and for all base stations, it increases the height of

¹ Though these rules do not apply when local governments act in a proprietary capacity, e.g. when they enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, the Board is acting as a regulatory authority, i.e. as a permitting authority, rather than as a proprietor, i.e. as would the Selectmen or Town Meeting. Thus, these rules do apply to the Board's decision. See FCC Report and Order FCC 14-153, ¶ 239 ("the Section 6409(a) mandate applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their capacities as property owners").

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the tower or base station by more than 10% or 10 feet, whichever is greater; or

2. Protrusions

- a. For towers outside of a ROW, it protrudes from the edge of the tower more than 20 feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater;
- b. For towers within a ROW and for all base stations, it protrudes from the edge of the structure more than 6 feet; or

3. **Cabinets.** It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or

4. **Excavation.** It entails any excavation or deployment outside of the current site of the tower or base station; or

5. **Camouflage.** It would defeat the existing concealment/camouflage elements of the tower or base station; or

6. **Previous Approval.** It does not comply with conditions associated with the locality's prior zoning approval of construction or modification of the tower or base station, unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the previously mentioned substantial change thresholds.

Zoning Bylaw Standard

The application as submitted requests an extension of a pre-existing nonconforming use. Under Section 3.2.2 of the Zoning Bylaw, the Board must “determine... that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.” In light of the strict proscriptions of the aforesaid law, however, if it is determined thereunder that the alterations do not “substantially change” the dimensions of the facility as defined above, it is probable that the insubstantial changes will not be substantially more detrimental to the neighborhood. But such a finding ought to be made by the Board under the Zoning Bylaw nonetheless, as required. Note that the Board may also require, and may condition approval on, reasonable conditions² such as the standard conditions often incorporated into its special permit decisions, e.g. construction in compliance with the plans, restrictions on hours of outdoor construction, etc. Further, the Board may require an applicant to comply with generally-applicable building, structural, electrical and safety codes or with other laws codifying objective standards reasonably related to health and safety, and/or existing camouflage requirements.³

As a final word, be aware that the Federal Communications Commission has adopted rules which require local review to be completed within 60 days of application submittal, including any review to determine whether an application is complete, unless there is a mutually agreed upon extension. Should the locality fail to act by the deadline, the application will be deemed constructively approved.

² Extremely onerous conditions may constitute, individually or collectively, a *de facto* denial and thus may violate the Spectrum Act.

³ Local governments may not regulate wireless facilities on the basis of environmental effects of radio frequency (“RF”) emissions, so long as the facilities comply with FCC regulations concerning RF emissions. Also, when an applicant is similarly situated to other, prior applicants and seeks approval for a structure that is as (if not less) intrusive as (than) these prior towers in placement and impact, a denial may be deemed unreasonably discriminatory.