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June 16, 2009

Chilmark Board of Selectmen
P.O. Box 119
Chilmark, MA 02535

RE: Federal Telecommunications Act

Dear Members of the Board:

You have asked me to summarize the impact of the Federal Telecommunications Act (47 U.S.C. § 151 (et. seq.) ("TCA") on a town's ability to regulate cell towers under local law assuming for purposes of this letter only, that Chilmark has a significant gap in coverage in the availability of cellular service.¹

In brief summary, Congress enacted the TCA in 1996. 47 U.S.C. § 332(c)(7) of the TCA provides as follows:

"Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a . . . local government . . . over decisions regarding the placement, construction and modification of personal wire service facilities."²

Notwithstanding that the TCA grants deference to local control, the TCA then places specific limitations on a town's

¹ I am also aware that a DAS proposal is currently being considered by a town committee. I take no position on that proposal, or whether its acceptance or rejection would be legally justifiable.

² The term "personal wire services" is defined to include cellular telephone services, personal communication services, and mobile radio and paging services, among other technologies.

ability to regulate cell towers. Included among those limitations are the following:

"a.) . . . local government shall not . . . unreasonably discriminate among providers of functionally equivalent services; [or] . . . prohibit or have the effect³ of prohibiting the provision of personal wireless services;

b.) . . . local government . . . shall act on any request for authorization to place, construct, or modify personal wire service facilities within a reasonable time after the request is duly filed . . .;

c.) [a]ny decision by a . . . local government . . . to deny a request to place, construct or modify personal wire service facilities shall be in writing and supported by substantial evidence contained in a written record; and

d.) [n]o . . . local government . . . 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 . . . regulations concerning such emissions."

The Massachusetts Supreme Judicial Court ("SJC") examined the limits of a town's ability to regulate telecommunications facilities in Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478 (1999). The SJC emphasized that Congress, under the TCA, sought "to facilitate the spread of . . . new technologies nationwide." Id. at 479. The SJC also stated that one of the central purposes of the TCA is to eliminate "coverage gaps" which:

"prevent customers from receiving and sending signals, and when customers pass through a coverage gap their calls are

³ This provision has been interpreted by the courts as applying to significant gaps in coverage.

disconnected. Such gaps not only inconvenience current customers, but may also impede the spread of technology by making it less useful and less attractive to potential customers. . . ." Id. at 480.

Acknowledging that the TCA "recognizes and protects local autonomy regarding [personal wire service] facility placement," the SJC concluded that "Congress enacted the [limitations set forth in the TCA Act] to prevent local authorities from 'masking hostility to wireless communication facilities with unreasoned denials that make only vague references to applicable legal standards. . . .'" Id. at 491.

Since the 1999 SJC decision, there have been numerous decisions by other Massachusetts courts and the federal courts⁴ analyzing the limits of Massachusetts communities to regulate personal wireless service facilities under the TCA. In National Tower v. Plainville Zoning Board of Appeals, 297 F.3d 14 (2002), the First Circuit Court of Appeals recognized that:

"[F]ederal courts now routinely hear cases brought under the [TCA] by those who wish to construct cellular antenna towers and have been denied permission to do so by local town officials" Id. at 14.⁵

In the Plainville case, the zoning board of appeals denied a permit for the construction of a cell tower even though the applicant claimed there was a gap in coverage. The First Circuit summarized the purpose of the TCA as follows:

"The [TCA] is an exercise in cooperative federalism and represents a dramatic shift in the nature of telecommunications regulations . . . It is undisputed that in this case there is a significant coverage gap. The argument that no tower is needed is unavailable to the

⁴ Under the TCA, an appeal from a denial of a personal wireless service facility may be brought in federal court. An appeal to state courts is also allowed pursuant to G. L. c. 40A, § 17.

⁵ Omnipoint's lawsuit challenging Aquinnah's denial of a cell tower was also brought in federal court.

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town. Several courts have held that local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute (cites omitted).” Id. at 19-20.

The Court cautioned that “[s]etting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition (cite omitted). The [TCA] pre-empts such bylaw strictures.” Id. at 23.

In a 2008 decision, the United States District Court for the District of Massachusetts stated the standard as follows:

“The [TCA] requires that ‘the regulation of the placement, construction and modification of personal wireless services facilities by any . . . local government . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services (cite omitted).’ To prove a violation of the ‘effective prohibition’ provision [the provider] must show that (i) the town zoning decisions and ordinances prevent the closing of significant gaps in the availability of wireless services (cite omitted), and (ii) ‘further reasonable efforts are so likely to be fruitless that it is a waste of time to even try (cite omitted).’” Industrial Communities & Electronics, Inc. v. O’Rourke, 582 F. Supp. 2d 103, 108 (D. Mass. 2008).

The Court noted that the proponent is required to: comply with wetlands and other local by-laws; attempt to maximize, to the extent possible, compliance with zoning; and explore alternative sites. Once a significant gap in coverage is found to exist:

“The burden is on the telecommunications provider to show that a permit denial is impermissible because there are no alternative sites and to do so it must develop a record demonstrating that it has made a full effort to evaluate the other available alternatives and the alternatives are not feasible to service customers. In order for a site to be an alternative sufficient to forestall a claim of

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effective prohibition, it needs to be available and technically feasible." Id.

The Court concluded:

"The great strength of the [TCA] lies in its balanced sensitivity to accommodating the national policy of providing wireless services to all Americans with the equally important policy favoring local control by locally elected officials over zoning matters.

Here, there is a coverage gap in Somerset. Accordingly [the provider] will be permitted to construct a wireless communication tower within the town. Just where that tower will be located, however, is largely, but not entirely up to the ZBA . . ." Id. at 112.

In summary, if a significant gap in coverage exists, a town may: a.) reasonably regulate the location of a cell facility; b.) require a provider to explore alternative sites; and c.) impose reasonable conditions to mitigate the impact of the facility. However, the TCA precludes a Town from effectively prohibiting the construction of a facility.

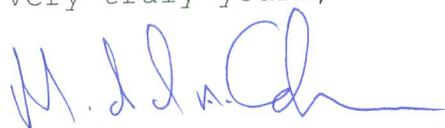
There are numerous resources (celltowerinfo.com) and court cases which have addressed these issues. I am also enclosing publications from the Federal Communications Commission which more fully explore various technical issues relating to cell service. This letter is not meant to be an exhaustive analysis of the TCA, but rather provides a brief summary of the current state of the law (as it pertains to a community) which is assumed to have a significant gap in cell phone coverage.

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Please call me with any questions.

Very truly yours,



Michael A. Goldsmith

MAG/jmh
Enclosures

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