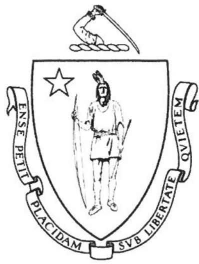

GREAT BARRINGTON TOWN CLERK
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THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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

November 8, 2023

Jennifer L. Messina, Town Clerk
Town of Great Barrington
334 Main Street
Great Barrington, MA 01230

**Re: Great Barrington Annual Town Meeting of May 1, 2023 - Case # 10937**
**Warrant Articles # 30, 31, 32, 33, 34, 35, 36, and 38 (Zoning)**
**Warrant Articles # 24, 29, and 39 (General)** [1]

Dear Ms. Messina:

**Article 38** – Under Article 38, a citizen's petition article, the Town voted to add to the Town's "Wireless Telecommunications Overlay District" a new Section 9.3.16.5 that declares all wireless telecommunications facilities (WTF) applications to be incomplete until the FCC completes an environmental review of existing WTF and updates its regulations based on the result of its review. As explained in more detail below, we disapprove Article 38 because it is a prohibition on wireless communications facilities in violation of the federal Telecommunications Act of 1996, 47 U.S.C. § 332 (c) (7) (TCA). See Town of Amherst, N.H. v. Omnipoint Communications Enters, Inc., 173 F.3d 9, 16 (1st Cir. 1999) (state and local laws are preempted, under the Supremacy Clause of the Federal Constitution if they are read and applied so as effectively to preclude personal wireless service).

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Id. at 795-96, 798-99. During our review of Article 38, we received correspondence urging us to approve the by-law asserting that it protects the public from health and safety issues associated with WTF. We appreciate these communications as they have aided our review. However, we must disapprove Article 38 for the reasons explained below.

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[1] In a decision issued to the Town on August 1, 2023, we approved Articles 29, 30, 31, 32, 33, 34, 35, and 39; took no action on Article 24 because it was not a by-law amendment, and by agreement with Town Counsel under G.L. c. 40, § 32, we extended our deadline for a decision on Article 38 for an additional ninety days until November 8, 2023.

In this decision we describe the by-law amendments; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we disapprove Article 38.

## I. Summary of Article 38

Under Article 38 the Town amended Section 9.3.16 to add a new paragraph 5 that deems all WTF applications incomplete until the FCC completes its review of WTF and updates its regulations to include measures that comply with the results of the FCC's review as follows:

> WTF applications, will be considered incomplete until the FCC completes the DC Circuit Court- mandated Environmental Review of the entire 800,000 to I million WTF roll out to the conditions as stated in the NEPA policy Act 169[1] I including studies from scientists independent from industry, who have fully investigated millimeter wave 5G small cell technology safety; and that the FCC regulations have been updated to include measures that comply with the results of this review; and, that the Town of Great Barrington shall consider reasonable alternatives such as fiber optic.
>
> 1 The FCC is required by the National Environmental Policy Act of 1969, among other things, to evaluate the effect of emissions from FCC-regulated transmitters on the quality of the human environment. On August 9, 2019, the D.C. Circuit Court of Appeals, in its Ruling in Case 18-1129, vacated FCC Order l 8-30's deregulation of small-cell Wireless Transmission Facilities(s) [sWTFs} and remanded this to the FCC. In Case 18-1 129, the judges stated that "the FCC failed to justify its determination that it is not in the public interest to require review of [sWTF] deployments" and ruled that "the Order's deregulation of [sWTFs] is arbitrary and capricious." The FCC was mandated to do this review in two court rulings which are submitted into the record: one in 2019 in Case 18-1129, Keetoowah et al. v FCC; and another in 2021 in Case 20-1025, EHT/CHD v. FCC. To date the FCC has not complied.
>
> https://scientists4wiredtech.com/2019/08/federal-court-overturns-fcc-overturns-fcc-order- bypassingenvironmental-r https://www.fcc.gov/document/dc-circuit-decision-environmental-helath- trust-v-fcc
>
> Definition: Wireless Telecommunications Facilities means the plant, equipment and property including, but not limited to, cables, wires, conduits, ducts, pedestals, electronics, and other appurtenances used or to be used to transmit, receive, distribute, provide or offer wireless telecommunications service. October I, 2019, the D.C. Circuit Court of Appeals in Case No, 18-1051, Mozilla et al. v. FCC, confirmed internet "Services" to be reclassified by the FCC as Title I, unregulated "Information Services". At present, only wireline and wireless telephone and text transmissions are classified as Title II, regulated "Telecommunications Services". Title I and Title II applications, therefor, need to be regulated differentially by local planning boards and commissions. Every new [wireless telecommunications

facility ("WTF")] must undergo NEPA review, and that WTF applications cannot be batched for such purpose.

## II. Attorney General's Standard of Review of Zoning By-laws

Our review of Article 38 is governed by G.L. c. 40, § 32. Under 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.") "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "

Article 38, as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

## III. Article 38 Conflicts with the TCA' Prohibition on Local Laws that Prohibit or Have the Effect of Prohibiting the Siting of Wireless Telecommunication Facilities

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 (c) (7) (TCA) preserves state and municipal zoning authority to regulate personal wireless service facilities. However, the TCA imposes limitations on that authority as follows:

1. Zoning regulations "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. §332 (c) (7) (B) (i) (I)

2. Zoning regulations "shall not prohibit or have the effect of prohibiting the provisions of personal wireless services." 47 U.S.C. § 332 (c) (7) (B) (i) (II).

3. The Zoning Authority "shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332 (c) (7) (B) (ii).

4. Any decision "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." 47 U.S.C. § 332 (c) (7) (B) (iii).

5. "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 emissions." 47 U.S.C. § 332 (c) (7) (B) (iv).

While the TCA does not define what constitutes a "prohibition" or an "effective prohibition" of WTF, the Federal courts have construed the limitations listed under 47 U.S.C. § 332 (c) (7) as follows. First, even a facially neutral by-law may have the effect of prohibiting the provision of wireless coverage if its application suggests that no service provider is likely to obtain approval. "If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect'. . . ." Town of Amherst, N.H. v. Omnipoint Communications Enters, Inc., 173 F.3d 9, 14 (1st Cir. 1999).

Second, local zoning decisions and by-laws that prevent the closing of significant gaps in wireless coverage have been found to effectively prohibit the provision of personal wireless services in violation of 47 U.S.C. § 332(7). See, e.g., Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 20 (1st Cir. 2002) ("local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute"); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108, 117 (D. Mass. 2000) (by-law resulting in significant gaps in coverage within town had effect of prohibiting wireless services).

Third, whether the denial of a permit has the effect of prohibiting the provision of personal wireless services depends in part upon the availability of reasonable alternatives. See 360 Degrees Communications Co. v. Bd. of Supervisors, 211 F.3d 79, 85 (4th Cir. 2000). Zoning regulations must allow cellular towers to exist somewhere. Towns may not effectively ban towers throughout the municipality, even under the application of objective criteria. See Virginia Metronet, Inc. v. Bd. of Supervisors, 984 F. Supp. 966, 971 (E.D. Va. 1998).

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'").

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.

In addition, on September 26, 2018, the FCC adopted FCC 18-133 ("Ruling and Order"), regarding the authority of municipalities to regulate small wireless facilities. 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 new Section 9.3.16.5 deems an application incomplete until the FCC engages in a review of WTF and amends its regulations based on the information obtained during its review. Because all applications for a WTF in Great Barrington are deemed "incomplete" until the FCC conducts this review, the permit granting authority cannot issue a permit for a WTF in the Town. Put simply, an applicant could fully comply with the Town's by-laws but will still be denied a permit because the FCC has not reviewed WTFs and amended its regulations. Section 9.3.16.5 thus establishes a condition that no WTF applicant can satisfy. This condition results in a prohibition on WTF in violation of the TCA. See Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999) (where town's criteria for granting WTF permit effectively precludes WTF no matter what applicant does there is an effective ban on WTF in violation of TCA); National Tower, LLC, v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 23 (1st Cir 2002) ("Setting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition. . . The Telecommunications Act preempts such by-law strictures."). For this reason, the new Section 9.3.16.5 runs afoul of the TCA's provisions against local laws that prohibit WTF, and we disapprove it. [2]

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[2] The petitioners cite to two case to attempt to support the legality of Article 38: United Keetowah Band of Cherokee Indians in Oklahoma v. Federal Communications Commission, 933 F.3d 728 (D.C. Cir. 2019) and Environmental Health Trust, et al. v. Federal Communications Commission, 9 F.4th 893 (D.C. Cir. 2021). However, the petitioners misconstrue these cases because neither case authorizes a town to withhold or deny a WTF while the FCC engages in a study and updates its regulations based on a future study.

## IV. Conclusion

Because Article 38 results in a complete prohibition of WTF in the Town, it conflicts with the TCA and must be disapproved.

<u>Note</u>: **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) <u>general</u> 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) <u>zoning</u> 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 David J. Doneski