TOWN OF TEMPLETON
TOWN CLERK
CAROL A. HARRIS
Telephone (978) 894-2758
Fax (978) 894-2802

MAILING ADDRESS
P.O. BOX 620
E. TEMPLETON, MA 01438

OFFICE ADDRESS
160 PATRIOTS ROAD
E. TEMPLETON, MA 01438

DATE: October 8, 2019

TO: TOWN OF TEMPLETON CITIZENS

FROM: TOWN CLERK'S OFFICE

RE: ZONING BY-LAWS

The Attorney General has made her decision on Article 13 of the Annual Town Meeting which was held May 15, 2019. It is as follows:

Article 13 - We approve Article 13 from the May 15, 2019 Templeton Annual Town Meeting. Our comments regarding Article 13 are provided below.

Article 13 - Article 13 deletes Article XL, "Wireless Communication Facilities and Towers" from the Town's general by-laws and amends the Town's zoning by-laws to add a new Section 9, "Wireless Communications Facilities and Towers," to require a special permit for wireless telecommunication facilities. We approve the new Section 9 but offer the following comments for the Town's consideration.

I. Applicable Law

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 (c) (7) preserves state and municipal zoning authority to regulate personal wireless service facilities, subject to the following limitations:

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).

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).

State law also establishes certain limitations on a municipality's authority to regulate wireless communications facilities and service providers. Under General Laws Chapter 40A, Section 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 pertaining to cellular towers. 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.

In addition, 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. Such qualifying requests also cannot be subject to a discretionary special permit.

Although we approve the by-law adopted under Article 13, the Town must apply its "Wireless Communications Facilities and Towers" by-law in a manner consistent with the applicable law outlined above. In particular, Section 9-3 requires that a wireless communications facility shall only be erected, constructed, installed or operated upon the grant of a special permit, unless otherwise exempted under Section 9-3. The Town cannot apply the special permit requirement to eligible facilities requests for modification to existing facilities which qualify for required approval under Section 6409 of the Act, as described above. We also urge the Town to consult closely with Town Counsel regarding the appropriate response to applications for collocation in light of these recent amendments.

II. Specific Comments on the New Section 9

1. Section 9-3 - Special Permit Required, Review Criteria and Exemptions

Section 9-3 (B) provides that all special permit applications will be reviewed by the Board of Health and Conservation Commission "who will submit their written recommendations within 45 days." (emphasis added). General Laws Chapter 40A, Section 11, provides for the boards listed in the statute, including the Board of Health and Conservation Commission, as follows: "Any such board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto." (emphasis added). The Town should ensure that Section 9-3 (B) is applied consistent with G.L. c. 40A, § 11, and consult with Town Counsel with any questions on this issue.

In addition, Section 9-3 (C) requires the Planning Board to file its decision "within 150 days" for a new facility and within "60 days for any co-locations requiring a special permit." Certain regulations including FCC 09-99 and FC14-153 address time periods for acting on special permit applications for a co-location. To the extent that the time limits set forth in FCC 09-99 and FCC 14-153 differ from those set forth in G.L. c. 40A, § 9, the Town should consult

with Town Counsel regarding the proper application of Section 9-3 (C) to ensure compliance with G.L. c. 40A, § 9.

2. Section 9-7 - Tower and Antenna Design, Site and Location Requirements and Abandoned Facilities

Section 9-7 (I)(3) requires the applicant to provide a surety bond to cover the costs of removal of the wireless communications facility and remediation of the landscape, should the facility be deemed abandoned. General Laws Chapter 44, Section 53, requires that performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund (and subject to future appropriation), unless the Legislature has expressly made other provisions that are applicable to such receipt. General Law c. 44, Section 53G ½ does allow the deposit of surety proceeds into a special account under certain circumstances, as follows:

> Notwithstanding section 53, in a...town that provides by by-law...rule, regulation or contract for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization, the monies or other security received may be deposited in a special account. Such by-law...rule or regulation shall specify: (1) the type of financial guarantees required; (2) the treatment of investment earnings, if any; (3) the performance required and standards for determining satisfactory completion or default; (4) the procedures the applicant must follow to obtain a return of the monies or other security; (5) the use of monies in the account upon default; and (6) any other conditions or rules as the...town determines are reasonable to ensure compliance with the obligations. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. Monies in the special account may be expended by the authorized board, commission, department or officer, without further appropriation, to complete the work or perform the obligations, as provided in the by-law...rule or regulation. This section shall not apply to deposits or other financial surety received under section 81U of chapter 41 or other general or special law.

For the Town to deposit surety proceeds into a special account, the Town must comply with the requirements of G.L. c. 44, § 53G ½. Otherwise, surety proceeds must be deposited into the Town's general fund, pursuant to G.L. c. 44, § 53. The Town should consult with Town Counsel with any questions regarding the proper application of Section 9-7 (I)(3).

I have posted copies in each precinct; namely, at the Post Office in Templeton, the Post Office in E. Templeton, the Post Office in Baldwinville and at the Town Office Building at 160 Patriots Road in E. Templeton and on the Town's website @ www.templetonma.gov Pursuant to G.L. c. 40, sec. 32.

Sincerely,

Carol A. Harris, Templeton Town Clerk