



TOWN OF WAYLAND

41 COCHITUATE ROAD
WAYLAND, MASSACHUSETTS 01778

MEMORANDUM

To: Board of Selectmen
From: Louise Miller, Town Administrator
Date: July 29, 2019
Re: Questions Regarding Wayland's Right of First Refusal for Approximately .5 Acres on Wayland Rod and Gun Club, Inc. Property

On or about June 28, 2019, the Wayland Rod and Gun Club, Inc. (the Club) sent a letter to the Town restating its intent to convert or transfer a part of its land, currently classified as recreational under Massachusetts General Laws Chapter 61B, to a different use which does not qualify for tax benefit status under Chapter 61B. The use would support the Club's role as a firearms safety training facility and would also allow for a cellular communications tower pursuant to an agreement between the Club and Cellco Partnership d.b.a. Verizon Wireless (VerizonW). Under Chapter 61B, the Town has a right of first refusal for land that is being converted to a non-tax-benefited use, even if ownership of the property does not change.

At its last meeting, the Board of Selectmen asked that I research and consult with Town Counsel regarding a number of questions that it had surrounding the right of first refusal and the placement of the cellular communications tower on Club property. I have compiled the questions and combined them to the extent that they overlapped. The answers provided may require further information depending upon the direction that the Board decides to pursue.

1. Is the notice to convert provided by the Club proper under Chapter 61B?

Yes. The notice of the Club's intent to convert part of its land was in accordance with Chapter 61B. As required under Chapter 61B, the Club's notice of intent to convert to another use included a statement of proposed use of the land, the location and acreage of land as shown on a map drawn at the scale of the assessors' map, the name, address and telephone number of the landowner and the landowner's attorney. The notice was sent by certified mail to the Board of Selectmen.

At the last meeting of the Board, a member of the public stated that the Club must provide the Town with a Purchase and Sale Agreement specifying the purchase price. That would be true if the Club had a buyer for the land that it wishes to convert and were selling it. That is not the case. The Club stated its intent to convert the use of the land without a conveyance to a third party.

2. What is the timetable for the Board's decision?

Chapter 61B provides for a 120-day period to exercise the Town's right of first refusal. Because the property is not being sold, an appraisal would be required to determine its value. Chapter 61B provides the statutory scheme for the appraisal of the property. The 120-day period begins to run after the completion

of the statutory appraisals. The statute also requires a public hearing prior to any exercise of the right of first refusal.

Under Chapter 61B, where the intended conversion of land does not involve sale of the land, “the municipality shall have an option to purchase the land at full and fair market value to be determined by an impartial appraisal performed by a certified appraiser hired at the expense of the municipality.” The statute further provides that the appraisal is to be completed and delivered “within 30 days after the notice of conversion to the municipality.” If the notice was mailed on June 28, 30 days after the notice would be Sunday July 28. The Town has asked the Club for an extension to perform the required appraisal given the meeting schedule of the Board of Selectmen.

In the event that the Club is dissatisfied with the Town’s appraisal, the Club may contract for a second appraisal at its expense, which is “to be completed within 60 days after the delivery of the notice to convert.” If, after completion of the second appraisal, the Town and the Club cannot agree on a value, the statute provides that “the parties will contract with a mutually acceptable appraiser for a third appraisal whose cost will be borne equally by both parties. The third appraisal shall be delivered to both parties within 90 days after the notice of conversion to the municipality and shall be the final determination of consideration.”

Upon agreement of a consideration, the Town will then have 120 days to exercise its option. During the appraisal process, the landowner may revoke the intent to convert at any time and with no recourse to either party.

3. What does it cost to go through the appraisal process?

The cost of the appraisal is anticipated to be less than \$2,000. The exact amount will be determined by the turnaround time for the appraisal.

4. A member of the public suggested that Chapter 61B land with a change of use might be limited or intended for recreation only.

That is not correct. A conversion of use under Chapter 61B from recreational use to other use is not limited to other recreational use. Chapter 61B states: “Land taxed under this chapter shall not be sold for, or converted to, residential, industrial or commercial use while so taxed or within 1 year after that time unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to, that other use.” The uses to which Chapter 61B land may be converted are not limited. Nor does the statute provide that the Town must maintain any property for which it exercises its right of first refusal as recreational. The statute does state that a Town may “at the public hearing or a further public hearing, ... assign its option to a nonprofit conservation organization or to the commonwealth or any of its political subdivisions under the terms and conditions that the ... board of selectmen may consider appropriate.” The language which provides for the Town to assign its option to purchase to a third-party for conservation is permissive only.

5. Is there any legal exposure to the Town if the Board does not exercise its option to purchase the Club property?

To the extent that the Town follows the Chapter 61B process, there does not seem to be any legal exposure to a decision not to exercise its option to purchase the Club property.

6. Does the current cell tower zoning by-law, creating a cell tower district, play any role in the discussion the purchase the land?

The Board does not have the right to prevent a cell tower's installation at the Club should the Board choose not to exercise its right of first refusal. Wayland's current cell tower zoning by-law plays no role in the discussion. The ZBA filed its decision on VerizonW's application for a use variance on the Club property with the Town Clerk on Tuesday July 23, 2019. The ZBA decision states that "The Petitioner [VerizonW] has identified the need to add a new facility to its existing network of sites to improve coverage and capacity with regard to a gap in service that now exists in Wayland. This will support reliable communication and meet growing demand in the targeted areas listed in the submissions." Once VerizonW identified and proved a gap in service, the Town's cell tower zoning by-law played no further role.

7. To what extent does the Board have the right to prevent a cell tower's installation at the Club? What happens if the Town decides to purchase land and leave it as open space? Does KP Law have any examples of other Towns' experiences regarding cell towers?

Should the Board choose to exercise its right of first refusal, the purchase of the land would require a Town Meeting appropriation. Both the Board's recommendation to exercise the Town's right of first refusal and Town Meeting would discuss the Town's use of the property which would become the basis for the decision to purchase the land. The Board should be aware that any proposed lease between VerizonW and the Club cannot be effective until the Club's proposed change in use has occurred. At the time of any agreement between VerizonW and the Club, VerizonW was aware that the Club land was receiving favorable tax treatment under Chapter 61B and that the Town would have a right of first refusal, giving rise to the possibility that the Town may decline having a cell tower on the property purchase.

However, if the Town were to purchase the land and leave it as open space, it will risk a lawsuit by VerizonW on at least two separate grounds: intentional interference with advantageous relations and effective ban on cellular towers in violation of federal law. The ZBA's decision to permit a variance from the table of permitted uses on the Club property included findings of fact regarding the availability of viable alternate sites for the tower that VerizonW proposed. The ZBA found: "After identifying the area with a gap in coverage, the Petitioner [VerizonW] searched for viable sites on existing buildings, towers, and other structures of sufficient height. Having found no other viable opportunities, including several discussions with Town officials to further explore the availability of town-owned land within the vicinity of Wayland High School, the Petitioner commenced and proceeded with its application for the telecommunications facility at Wayland Rod & Gun Club." The exploration for alternate sites occurred at two different times:

prior to the filing of the application for a cell tower at the Club and during the hearing phase on the application. In neither instance did the Town find a suitable alternative site on Town-owned land.

Given that the Town was aware of the agreement between the VerizonW and the Club that resulted in VerizonW's application, the Town could be at risk of being sued by VerizonW for tortious interference with advantageous relations should the Town choose to purchase the property solely to prevent the cell tower's installation. How a court would rule on such a claim is uncertain. Case law exists where a town is ordered to issue a permit where the zoning authority does not grant a permit for a cellular antenna or a cellular tower, although no case law exists where the Town exercises its right of first refusal, thereby changing the owner of the property. Case law also exists allowing for tortious interference with advantageous relations where a Town's exercises its right of first refusal and interferes with a purchase and sale agreement, although not in the context of a cell tower.

Here, the ZBA has issued a permit to VerizonW to build a cell tower on the Club's property. VerizonW investigated potential alternative Town-owned sites with the Town, leaving VerizonW with only the Club property as a suitable location according to the ZBA. If the Town exercises its right of first refusal solely to prevent VerizonW from installing the cell tower, the Town's action may be found to be an effective prohibition of cell towers, which is not permitted under federal law.

KP Law had many examples of other Towns' experiences regarding cell towers and stated that Towns have a difficult time when trying to prevent cellular towers from being permitted. KP Law suggested two cases in particular: Wayland and Peabody.

In 2002, the Wayland ZBA was ordered to issue permits to Nextel to construct antennas on a Boston Electric Company (BECO) tower. In that case, the Court found that Wayland had demonstrated hostility toward Nextel's application for a permit. The factual findings centered around the Town's multiple changes to its zoning by-laws during the course of the hearings on Nextel's permit and the Town's issuance of a Request for Proposals after denial of Nextel's permit and Nextel's filing of its lawsuit. The Court found that there was no basis to believe that the Town's Request for Proposals process would result in a successful alternative for Nextel.

Recently, VerizonW also won a Land Court case against the Peabody City Council. In the Peabody case, the City Council denied VerizonW a permit for a cell tower in a residential neighborhood. After VerizonW sued the city, city issued an RFP for lease of a cell tower on city property near its water treatment facility, which the Council approved initially and then rejected. (There were numerous changes to the permit and the permutations of the cell tower with options for numerous smaller towers). The Land Court ordered the City Council to issue the permit to VerizonW on its initial application for a cell tower in a residential neighborhood. There, the Court stated that VerizonW had established that it had made efforts to find a suitable alternative location and that further reasonable efforts to find a suitable alternative location would be fruitless.

8. The Board understands that VerizonW may not be interested in working with the federal government in finding an alternative location because of the complexity of dealing with the federal government on this type of issue. Is the issue the same with the MWRA? Are there any examples of cell towers on MWRA land?

There are examples of towers on MWRA land. However, they are towers that MWRA uses for its own communication, which it then leases or licenses to other entities, including municipalities and cellular carriers. There is no way of knowing the complexity of dealing with the MWRA regarding the proposed cell tower.

9. Is it worth communicating with Framingham to see if land in their town is available to meet VerizonW's need?

While the Town can certainly communicate with Framingham, the Town has not determined whether the gap in coverage that VerizonW is trying to fill can be met with Framingham city property. The Board should also keep in mind that any discussion with Framingham would need to occur within the Chapter 61B time frame if the Town would like to provide a site in Framingham as an alternative.

10. What happens if the Town purchases the land and then negotiates with VerizonW for a cell tower? Pros and cons?

What happens with the VerizonW cell tower lease in the event that the Town purchases the Club's land depends upon the terms of the lease between VerizonW and the Club. The Town has asked the Club for a copy of the lease agreement, which may include an assignment of the lease to subsequent purchasers of the property.

Otherwise, the Town would generally have the same options that it would on any town-owned parcel. The Town could issue a Request for Proposals either for lease of the land for a cellular communication carrier to build a tower. The Town could issue an invitation for bids to build its own communication tower for police and fire communication, and then issue a Request for Proposals for the lease of space to cellular providers on the Town's communication tower.

VerizonW could bid on the Request for Proposals, as could others. Both VerizonW and the Club could potentially bring an intentional interference with advantageous relations claims against the Town.

Potential revenue generated from the cell tower would be a benefit to the Town. The neighbors, however, would be in the same position and make the same arguments against the cell tower whether on Club property or Town property.

Another issue the Board should consider is the lack of access to this particular portion of the Club's property. The Town would need to negotiate with the Club for access. The Club would also not be able to build the firearms safety facility that it proposes, leaving it with the option of offering another parcel for the Town to determine whether to purchase or the option to designate another portion of its property for change in use, triggering the right of first refusal anew.

11. Can we get some specific language from Public Safety on the safety issue of poor cell reception in Town?

The former and current fire chiefs have stated that poor cell reception creates a safety issue. Residents are opting out of maintaining traditional phone lines in favor of cell phones. Without reliable reception and transmission, poor cell reception creates a safety issue for residents. The Town has received correspondence from residents related to poor reception in the area that VerizonW is proposing covering.

12. Will the introduction of 5G mean that cell towers will be phased out?

No. 5G still requires cell towers. More towers are needed to cover the same amount of space but they are much smaller. They also require a direct line of sight to operate best. They can be placed on existing poles and building structures or they can be stand alone structures. Some communities require that they be camouflaged to stand out less.



13. Do we need, as a town, to re-examine the cell tower issue overall, possibly involving the ZBA?

The Board could decide to undertake and review of the cell tower issues in consultation with other boards and committees. It is unlikely that such a review could occur prior to the expiration of the right of refusal time frames set forth in Chapter 61B.

14. Is there any recent legitimate research on health and safety related to cell towers?

Federal law prohibits local agencies from considering the environmental effects related to cell towers, including on health.