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MEMORANDUM

**TO: Chairman John Gunn and Members of the
City of Beacon Planning Board**

FROM: Keane & Beane, P.C.

RE: Eligible Facilities Requests

DATE: May 13, 2019

The Planning Board has recently reviewed amendments to the City of Beacon Zoning Code concerning small wireless telecommunications facilities (§223-26.4) and large wireless telecommunications facilities (§ 223-24.5). Within Section 223-26.4, the City addresses a third type of application that is neither a small wireless facility nor a large wireless facility, known as an eligible facilities request. The Federal Communications Commission has established specific regulations to guide state and local government review of such requests. This memorandum explains the federal regulations applicable to eligible facilities requests and the Planning Board's role in the review of such request.

BACKGROUND

Under Section 6409 of the Spectrum Act (Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. 1455), a 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.

The term “**eligible facilities request**” means any request for modification of an existing wireless tower or base station that involves—

- A. collocation of new transmission equipment;
- B. removal of transmission equipment; or
- C. replacement of transmission equipment.

Typically, the determination of whether an application is properly classified as an eligible facilities request turns on whether the proposal results in a “**substantial change**” to the physical dimensions of the existing support infrastructure.

To implement Section 6409 of the Spectrum Act, the Federal Communications Commission adopted 47 CFR § 1.40001 which sets forth clarifying definitions and review procedures applicable to eligible facilities requests, including a multi-pronged definition of “**substantial change**.” Attached as Appendix “**A**” is the list of terms and definitions set forth in 47 CFR § 1.4001.

REVIEW PROCEDURES

Documentation Requirements

An applicant must assert in writing that its request is an eligible facilities request. Under Section 223-26.4.C(2) of the City of Beacon Zoning Code, an application for an eligible facilities request is submitted to the Planning Board. The Planning Board must review the request to determine whether the application is appropriately characterized as an eligible facilities request. The Planning Board may require the applicant to provide documentation or information only to the extent reasonably related to its determination of whether the request meets the requirements of an eligible facilities request. The Planning Board may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for the wireless facilities or to justify the business decision to modify the wireless facilities.

Substantial Change

For each eligible facilities request application transmitted to the Planning Board, it is expected that the Building Inspector will review the application and provide his or her recommendation to the Planning Board as to whether it is an “eligible facilities request.” The memorandum will include a chart which compares each prong of the definition of “**substantial change**” against plans submitted by an applicant to determine whether the application is, in fact, an eligible facilities request.

Shot Clock Periods

The City must approve the application within sixty (60) days, unless it determines that the application is **not** an eligible facilities request. This timeframe is known as a shot clock period. The shot clock period begins to run when the application is first filed, and may only be tolled upon mutual agreement or where the City issues a determination that the application is incomplete. To toll the timeframe for incompleteness, the City must provide written notice to the applicant within thirty (30) days of receipt of the application, clearly and specifically delineating all missing documents or information. The timeframe for review begins running again when the applicant makes a supplemental submission in response City's notice of incompleteness.

Following a supplemental submission, the City will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

Failure to Act

In the event the City fails to approve or deny an eligible facilities request within the sixty (60) day shot clock period, the request must be deemed granted. The applicant is required to notify the Planning Board in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

APPENDIX A

The following terms are defined in 47 CFR § 1.40001(b):

Base station.

A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

- (i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
- (ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).
- (iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i) through (ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.
- (iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)-(ii) of this section.

Collocation.

The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

Eligible facilities request.

Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

- (i) Collocation of new transmission equipment;
- (ii) Removal of transmission equipment; or
- (iii) Replacement of transmission equipment.

Eligible support structure.

Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

Existing.

A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

Site.

For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

Substantial change.

A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

- (i) For towers other than towers in the public rights-of-way, 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 twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;
 - (A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.
- (ii) For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

- (iii) For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;
- (iv) It entails any excavation or deployment outside the current site;
- (v) It would defeat the concealment elements of the eligible support structure; or
- (vi) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i) through (iv).

Transmission equipment.

Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

Tower.

Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.