



U.S. Department  
of Transportation  
Federal Aviation  
Administration

New England Region  
Air Traffic Division, ANE-520  
12 New England Executive Park  
Burlington, MA 01803-5299

SEP - 2 1998 **RECEIVED** SEP - 3 1998

IN REPLY REFER TO  
AERONAUTICAL STUDY  
NO. 98-ANE-0268-OE

### AERONAUTICAL STUDY OF PROPOSED CONSTRUCTION OR ALTERATION.

SPONSOR	Southwestern Bell Mobile Systems, Inc. dba Cellular One 100 Lowder Brook Drive Westwood, MA 02090  SEP 10 1998	CONSTRUCTION LOCATION	
		PLACE NAME Leicester, MA	
		LATITUDE 42°15'18.09"	LONGITUDE (NAD83) 071°54'24.57"
CONSTRUCTION PROPOSED	DESCRIPTION ANTENNA TOWER	HEIGHT (IN FEET)	
		ABOVE GROUND 150	ABOVE MSL 1217

A notice has been filed with the Federal Aviation Administration that the above described structure is proposed for construction. As proposed the structure would exceed the standards of Subpart C of Part 77 of the Code of Federal Regulations (CFR) and would be identified as an obstruction to air navigation. Accordingly, the FAA is conducting an aeronautical study of the proposal to determine its effect upon the safe and efficient use of the navigable airspace by aircraft and on the operation of air navigation facilities.

In the study, consideration will be given to all facts relevant to the effect of the proposal on existing and planned airspace use; air navigation facilities; airports; aircraft operations, procedures and minimum flight altitudes; and the air traffic control system. However, only those plans on file with the FAA, on the date the notice concerning the above described proposed construction was received, will be considered.

Interested persons are invited to participate in the aeronautical study by submitting comments to the FAA office issuing this notice. To be eligible for consideration, comments must be relevant to the effect the proposed construction would have on aviation, provide sufficient detail to permit a clear understanding, and be received on or before September 30, 1998. Please refer to the aeronautical study number printed in the upper right hand corner of this notice.

This notice may be reproduced and circulated by any interested person.

ATTACHMENT - See Reverse Page

☐ Proposal reviewed and comments stated in separate letter.

☐ Proposal reviewed and no comments submitted.

Signature and Title

Date

Representing

SIGNED:

Luis A. Ramirez

TITLE: Manager, Airspace Branch, ANE-520

ISSUED IN

New England Region, Burlington, MA. ON August 31, 1998

AIRPORT MANAGERS - PLEASE POST  
COMMENTS INVITED

## Aeronautical Study Number 98-ANE-0268-OE

The proposed structure will be located in the town of Leicester, MA, approximately 1.57 NM southwest of Worcester Municipal Airport (ORH) in Worcester, MA

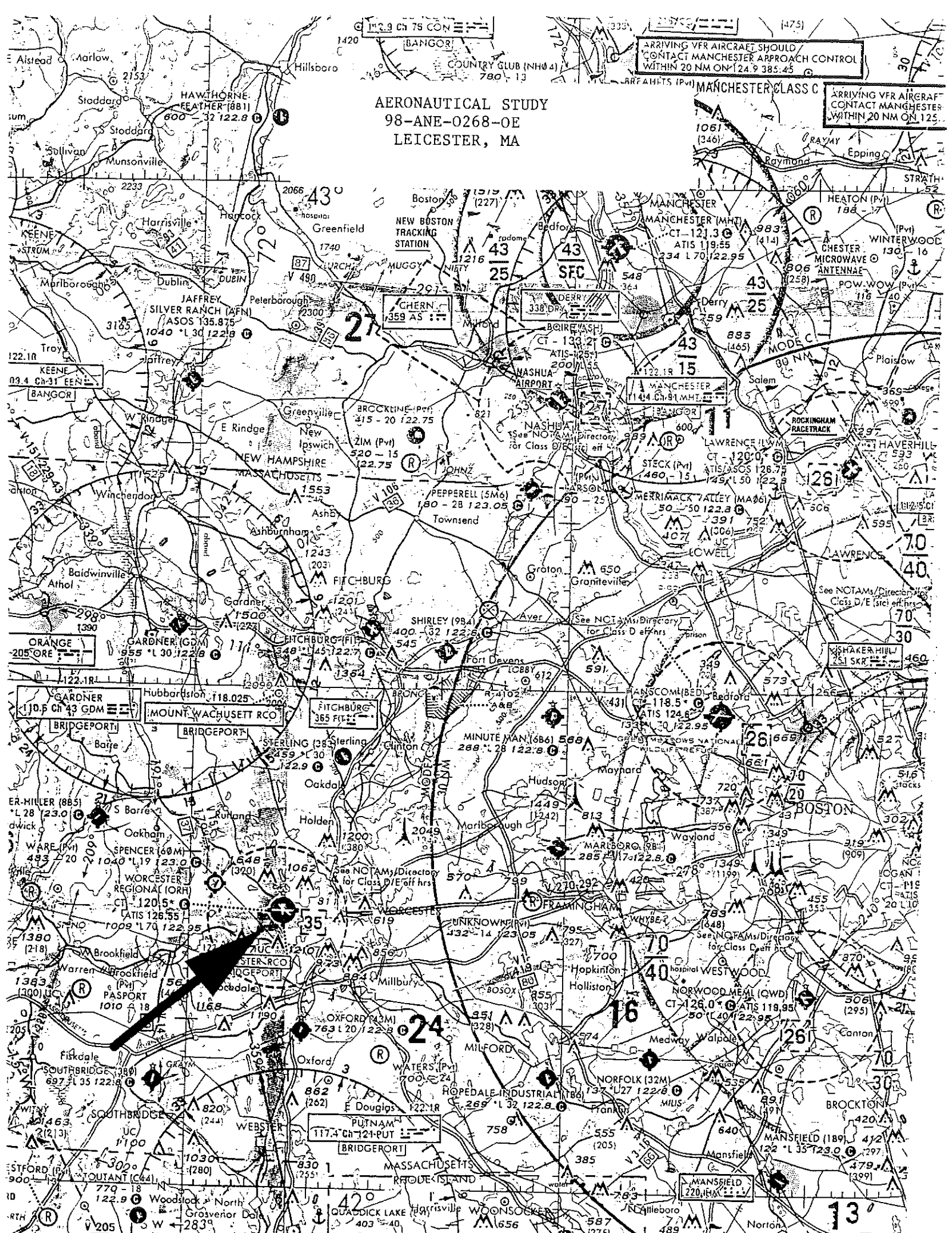
A preliminary aeronautical study indicates that the structure exceeds the Obstruction Standards of Title 14, Code of Federal Regulations, Part 77 as follows:

Section 77.25(a) by 58 feet, structures that exceed the horizontal surface--a horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of specified radii from the center of each end of the primary surface of the runway. The arcs are then connected by tangents and the radius of each arc is:

- (1) 5,000' for all runways designated as utility or visual;
- (2) 10,000' for all other runways

as pertains to ORH.

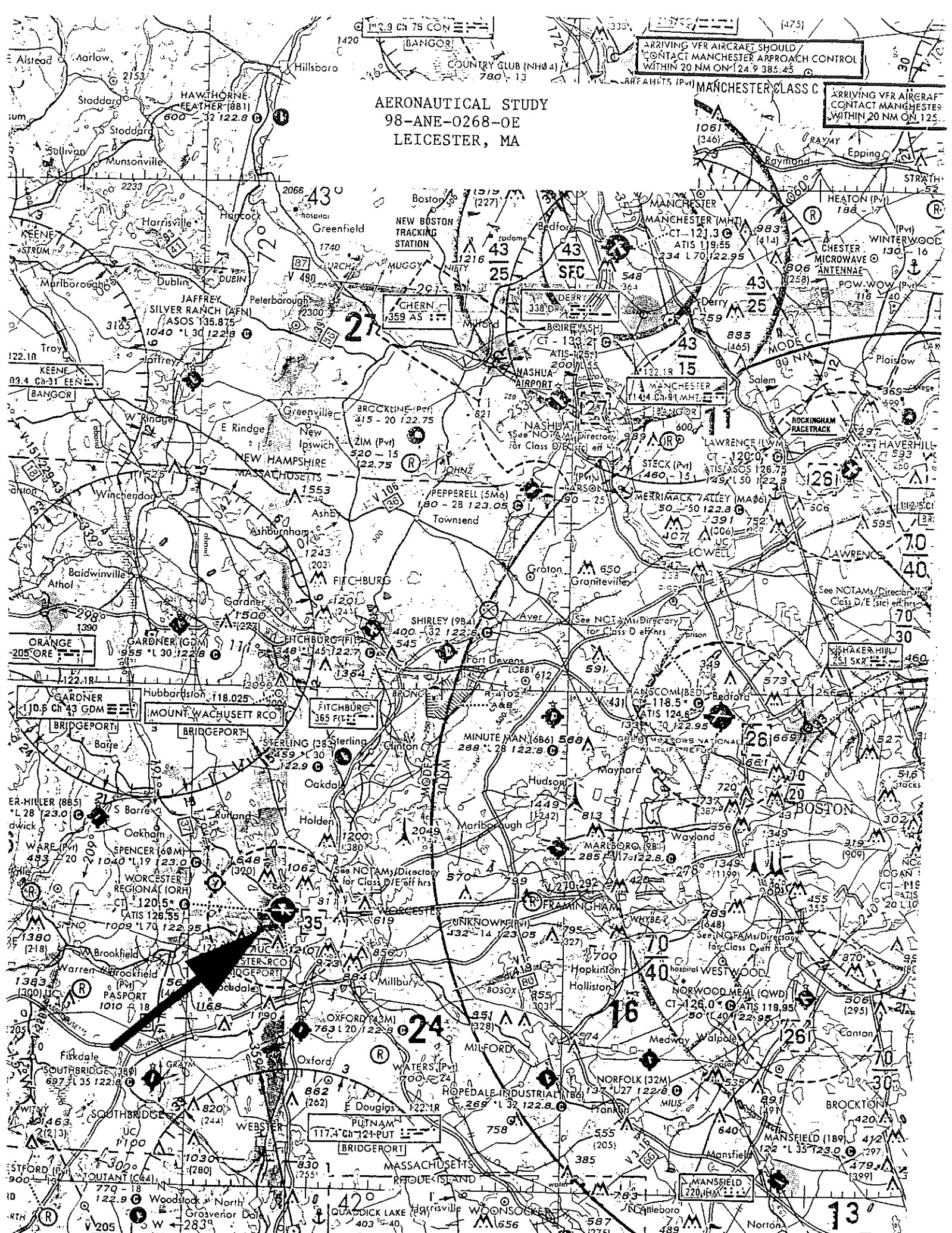
Please refer to Aeronautical Study Number 98-ANE- 0268-OE in any future correspondence concerning this structure.



AERONAUTICAL STUDY  
98-ANE-0268-OE  
LEICESTER, MA

ARRIVING VFR AIRCRAFT SHOULD  
CONTACT MANCHESTER APPROACH CONTROL  
WITHIN 20 NM ON 124.9 385.45

ARRIVING VFR AIRCRAFT  
CONTACT MANCHESTER  
WITHIN 20 NM ON 125.



D'AGOSTINE, LEVINE & GORDON, P.C.

ATTORNEYS AT LAW

268 MAIN STREET

POST OFFICE BOX 2223

ACTON, MASSACHUSETTS 01720-2223

978-263-7777

FAX 978-264-4868

JULIAN J. D'AGOSTINE

LOUIS N. LEVINE

STANLEY L. GORDON

F. ALEX PARRA

September 8, 1998

Zoning Board of Appeals  
Town of Leicester  
Town Hall  
3 Washburn Square  
Leicester, MA 01524

RE: Special Permit Application  
Petitioner: Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One  
Site Locus: 180 Paxton Street a/k/a Route 56, Leicester, MA  
Assessors' Reference: Map #15, Lot #A-19.2

Dear Members of the Board:

This letter is in response to the Attorney James P. McKenna's letter to you, on behalf of Joseph Hyland, dated September 4, 1998.

Contrary to Attorney McKenna's assertion, the Leicester Water Supply District is authorized to allow the use of its land for a cellular telephone tower. Massachusetts General Laws, Chapter 40, Section 3, specifically provides:

A . . . district authorized to furnish water for domestic purposes . . .  
*may from time to time lease any property not then so needed . . .*

Also contrary to Attorney McKenna's assertion, Article 49 of Part Two of the Articles of Amendment to the Massachusetts Constitution, as amended by Article 97 of Part Two (commonly known as Article 97), has no application to the subject parcel. An Article 97 two-thirds vote of the state legislature is only necessary to change the use or authorize the disposal of land acquired for conservation purposes. The deed of Locus to the Leicester Water Supply District, a copy of which is attached hereto as Exhibit A, contains no conservation purposes or restrictions and, therefore, Article 97 is simply inapplicable.

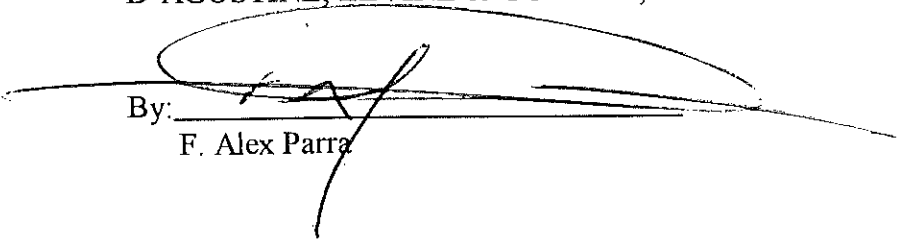
Attached hereto as Exhibit B is a copy of the Middlesex Superior Court's *Memorandum of Decision and Order on Defendants' Motions to Dismiss and Motion for Partial Summary Judgment*

Zoning Board of Appeals  
Town of Leicester  
September 8, 1998

*and Plaintiffs' Motions to Strike, Motion to Amend the Complaint and Motion for Emergency Stay* in the case of *Roberts v. Southwestern Bell Mobile Systems, Inc.*, Middlesex Superior Court Civil Action No. 97-3577. The Board's attention is respectfully drawn to pages 12 (last paragraph) through 16 thereof, which addresses and dismisses the same issues as those raised by Attorney McKenna.

If we can provide any further information, please do not hesitate to contact me.

Respectfully submitted,  
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.  
The Petitioner  
By its Attorneys  
D'AGOSTINE, LEVINE & GORDON, P.C.

By:   
F. Alex Parra

cc: James P. McKenna, Esquire  
Southwestern Bell Mobile Systems, Inc.

BOOK 5875 PAGE 395

I, WILLIAM HYLAND

of Leicester, Worcester County, Massachusetts

being ~~un~~married, for consideration paid, and in full consideration of \$12,000.00

grants to LEICESTER WATER SUPPLY DISTRICT, a corporation created by law in said Massachusetts,

of Leicester, in said county at P. O. Box 86 with quitclaim covenants

~~and~~ The land in Leicester on the easterly side of Paxton Street being more particularly bounded and described as follows:  
(Description of land to be conveyed, if any)

Parcel 1

BEGINNING: at a Worcester County Highway bound on the Easterly line of Paxton Street (1932 co-nty layout) opposite baseline station 107+91.97;

THENCE: N. 17° 09' 55" E. 114.50 feet by the Easterly line of said Paxton Street to a corner at land of William Hyland;

THENCE: S. 89° 04' 45" E. 481.06 feet by land of William Hyland to a corner at land of Leicester Water Supply District;

THENCE: S. 0° 55' 15" W. 411.00 feet by land of Leicester Water Supply District to a corner;

THENCE: N. 78° 49' 45" W. 554.90 feet by land of Leicester Water Supply District to a corner in the Easterly line of Paxton Street;

THENCE: N. 10° 10' 15" E. 205.00 feet by said Easterly line of Paxton Street to the point of beginning.

Said parcel contains 4.3331 acres, and is shown as

Parcel 1 on a plan titled "PLAN OF LAND IN LEICESTER, MASS., PARCEL 1 and 3 OWNED BY WILLIAM HYLAND" prepared by Moore Survey & Mapping Corp. and dated 8 October 1975, and recorded herewith Plan Book Plan

Parcel 2

BEGINNING: at the Northwesterly corner of the parcel to be conveyed, said corner being S. 89° 04' 45" E. 569.77 feet from the Northwesterly corner of the previously described Parcel 1;

THENCE: S. 89° 04' 45" E. 100.00 feet by land of William Hyland to a corner;

THENCE: S. 9° 12' 57" W. 454.26 feet by land of William Hyland to a corner;

THENCE: N. 78° 50' 50" W. 100.00 feet by land formerly of Hyland Farms to a corner at land of Leicester Water Supply District;

THENCE: N. 9° 20' 45" E. 436.46 feet by land of Leicester Water Supply District, ..., to the point of beginning.

Said parcel contains 1.0167 acres and is shown as Parcel 3 on a plan titled "PLAN OF LAND IN LEICESTER, MASS., PARCEL 1 and 3 OWNED BY WILLIAM HYLAND" prepared by Moore Survey & Mapping Corp. and dated 8 October 1975, recorded herewith Plan Book 421 Plan 15.

Said premises are conveyed subject to taxes for 1976.

JAN 14 1976

WORCESTER

058830

COMMONWEALTH OF MASSACHUSETTS  
RECORDS & EXCISE

JAN 14 '76



2736

JAN 14 1976

Witness my hand and seal this 14th day of January 1976

*William Hyland*

The Commonwealth of Massachusetts

14 January

Worcester,

ss.

1976

Then personally appeared the above named William Hyland

and acknowledged the foregoing instrument to be his free act and deed, before me

Amos E. Wasgatt, Jr.,

Notary Public — Justice of the Peace

My Commission Expires April 21, 1978

Recorded JAN 16 1976 at 4:15 m. P.M.



23

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 97-3577

DAVID ROBERTS and another<sup>1</sup>

vs.

SOUTHWESTERN BELL MOBILE SYSTEMS, INC. et al.<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'  
MOTIONS TO DISMISS AND MOTION FOR PARTIAL SUMMARY JUDGMENT  
AND PLAINTIFFS' MOTIONS TO STRIKE, MOTION TO AMEND  
THE COMPLAINT AND MOTION FOR AN EMERGENCY STAY

I. INTRODUCTION

This action stems from defendant Southwestern Bell Mobile System's ("Southwestern Bell") desire to place a wireless telecommunications tower and facility ("cellular tower") in the town of Littleton (the "town"). Southwestern Bell was granted a special permit and site plan approval for a particular location in the town. Plaintiffs are abutters to the proposed location of the cellular tower and bring this action as a zoning appeal pursuant to Chapter 40A.

This Court heard oral argument on all motions except for the Planning Board's motion for partial summary judgment and for the following reasons allows Southwestern Bell's motions for summary

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<sup>1</sup>Jean H. Lawlis.

<sup>2</sup>Mark Montanari, Janet LaVigne, William Oakland, Maren Toohill and David Campbell in their capacity as members of the Planning Board of the Town of Littleton.

judgment and its motions to dismiss certain counts. The Court **denies** plaintiffs' motions to strike, **denies** plaintiffs' motion for an emergency stay and takes no action on plaintiffs' motion to amend the complaint.

Additionally, see "Memorandum of Decision and Order on Defendant's Motion for Summary Judgment" issued the same date as this order.

## II. BACKGROUND

Southwestern Bell provides its customers, among other products and services, personal wireless services. In order to provide these services, cellular towers must be constructed in multiple locations to carry the signals. In stressing the importance of wireless communications, the federal government passed President Clinton's Telecommunications Act of 1996 (the "Act"), P.L. 104-104, codified as amendments to 47 U.S.C. § 332(c). The Act gives providers of these services certain rights over local zoning boards (see discussion infra).

In late 1996, Southwestern Bell initiated actions to construct a cellular tower in Littleton. It applied to the Town of Littleton Planning Board ("Planning Board") for a special permit and site plan approval to construct a 190 foot cellular tower on Foster Street, an industrial zoned district. In February, 1997, the town passed a new bylaw, Article XXI, Wireless Telecommunications Towers and Facilities, sections 173-128 through 173-133 (the "bylaw"). The new bylaw allows cellular towers up to a maximum of 100 feet in height and provides for where the towers can be located as well as

other specific requirements. After the town passed the bylaw, Southwestern Bell determined that it needed a 100 foot tower in the town to act as a microwave switching relay to a proposed regional switching facility in the town. Southwestern Bell then determined that the proposed site on Newtown Hill was the only location that would meet all their needs. Southwestern Bell applied to the Planning Board for a special permit and site plan approval for the Newtown Hill site sometime in March or early April, 1997.<sup>3</sup> Newtown Hill is municipally owned property and is located in a residential zoned district. The town's bylaw allows cellular towers in a residence district by special permit and site plan approval by the Planning Board. The Special Permit Application was not filed with the Town Clerk as required by the town's bylaw, § 173-7(B). The Special Permit plan called for a 100 foot cellular tower with microwave dishes and antennae attached to the tower, a 10 foot concrete shelter for electronic equipment, an emergency generator powered by propane including an above ground propane storage tank and a six foot chain link fence surrounding the facility. The cellular tower will not require a staff to operate but will require maintenance once or twice a month. The nearest residence to the site is 800 feet. The cellular tower itself will be built behind an existing 55 foot water tank.

In May, 1997, the town voted by two-thirds majority to pass several Articles authorizing leases of municipal properties to

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<sup>3</sup>The lines on the special permit application for dates are blank.

cellular providers. See Plaintiffs' Ex. 16, 19. On May 16, 1997, the town entered into an agreement to lease to Southwestern Bell a 4,000 square foot portion of Newtown Hill for ten years. See Plaintiffs' Ex. 17.

Access to Newtown Hill is made by travel on an unpaved road, not open to the general public for motor vehicle travel, although the general public does walk on the property. Newtown Hill is 31,240 square feet and is located on property acquired by the town in 1972 through eminent domain for water department purposes. See Plaintiffs' Ex. 21. An easement to use the road was also obtained by the town when it acquired the property.

The easement gave the town the

right to use said strip for all purposes for which town ways are customarily used in the town and including particularly the right to construct, lay, maintain, repair and from time to time replace water mains and utility lines in, over and through said easement . . . .

See Plaintiffs' Ex. 21. In 1978, the town acquired, as conservation land, approximately 98 acres adjacent to the Water Department property "subject to and with the benefit of the 20 foot wide easement . . . ." See Plaintiffs' Ex. 23. The Water Department easement cuts across the conservation land. The proposed cellular tower site on Newtown Hill is a 4,000 square foot portion of the hill.

From April, 1997 through June, 1997, five public hearings were held concerning the cellular tower proposal. See A.R., Ex. 31. Notice was made to the public for the meetings, see A.R., Ex. 4, of which plaintiffs attended some. See A.R., Ex. 31. Southwestern

Bell conducted a balloon test at the site by floating a balloon 100 feet in the air where the tower would be located. The Site Plan was approved by the Planning Board on June 19, 1997, and was filed with the town clerk June 20, 1997. See A.R., Ex. 30. The special permit includes several conditions required by the Water Department.

Plaintiffs raise several arguments against the proposed cellular tower. They allege that there were procedural defects in the public meetings, that the bylaw itself is unconstitutional, that the lease of the Newtown Hill property to Southwestern Bell was not lawful, that Southwestern Bell failed to timely file the application for a special permit with the town clerk, that the Planning Board failed to make a detailed record of its findings and failed to cite any reasons for its decision, that the grant of the special permit amounts to spot zoning, and that the location of the site required meeting the requirements of Article 97 of the Massachusetts Constitution.

### III. DISCUSSION

#### A. Plaintiffs' Motions

##### 1. Motion for an Emergency Stay

Plaintiffs request this Court grant an emergency stay which would deny the Planning Board from proceeding on or granting any application for a special permit to construct or operate a cellular tower on property located on Newtown Hill controlled by the Littleton Water Department. Plaintiffs make this request because

another company has submitted an application for a cellular tower on the same site. Public meetings have already been initiated concerning the other company's application and the Planning Board is required by law to hold public hearings and issue its decision within statutorily defined periods of time. See G.L. c. 40A.

Plaintiffs are not aggrieved parties as far as the new company's permit application is concerned, and thus do not have standing, until a final decision has been rendered by the Board. See Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Additionally, without a final decision by the Board with respect to the application, this Court has nothing to review. See Planning Bd. of Falmouth v. Board of Appeals of Falmouth, 5 Mass. App. Ct. 324, 328 (1977). Accordingly, plaintiffs motion for an emergency stay is denied.

**2. Motion to Strike Defendants' Joint Opposition to Plaintiffs' Motion to Amend the Complaint**

Plaintiffs move to strike: (1) the defendant Planning Board from the defendants' joint opposition to Plaintiffs' Motion to Amend the Complaint because the Planning Board did not respond within the 10 day period; (2) several specific sentences and paragraphs from the joint opposition because unsupported by affidavit or other documentation; and (3) the proposed order attached to the joint opposition.

The motion to amend the complaint to add an additional plaintiff was allowed November 18, 1997, rendering this motion to strike moot.

### 3. Motion to Strike the Administrative Record

Plaintiffs move to strike the administrative record arguing that it contains no reasons or findings of fact and no reference to anything said, done or filed in the course of the evidentiary hearings. Plaintiffs further argue that the permit contains nothing to connect any record evidence to the special permit grant nor does it incorporate by reference any actual procedural or substantive detail of the proceedings.

The Special Permits section of the Zoning Statute requires that a copy of the reason for the Board's decision be filed with the town clerk. G.L. c. 40A, § 9.<sup>4</sup> Southwestern Bell argues that it was not obliged to produce any evidence before the Board to obtain the permit because the Telecommunication Act shifts the burden of proof to the government agency that denied the permit.

As discussed in the "Memorandum of Decision and Order on Defendant's Motion for Summary Judgment," this Court looks at the record to determine if substantial evidence exists to support the

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<sup>4</sup>"The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be deemed a public record . . . ." G.L. c. 40A, § 9. See also Board of Appeals of Westwood v. Lambergs, 42 Mass. App. Ct. 411, 415 (1997) ("by specifying that the board must provide a detailed record of its proceedings as well as each member's vote on each question, the Legislature required the board to be thorough as well as prompt. As the court held in Capone [v. Zoning Bd. of Appeals of Fitchburg], 389 Mass. 617, 623 (1983)], the board's failure to perform 'all' of the actions required by the statute will result in constructive relief").

Planning Board's decision.<sup>5</sup> The Special Permit grant itself does not include any findings of fact or reasons for the Board's decision; however, it does contain conditions for the grant. See A.R., Ex. 29. A fair reading of the minutes of the public hearings held to discuss the permit, though, plus the checklist used by the Planning Board to determine if the bylaw's standards were met provides an understanding of the Board's reasoning.

Accordingly, plaintiffs' motion to strike the administrative record is denied.

#### **4. Motion to Amend Complaint and to Extend Tracking Order Deadlines**

The original plaintiff filed this action in July, 1997, as a zoning appeal of a special permit and site plan approval allowing the construction of a cellular tower. The complaint was amended in November, 1997, to add a new plaintiff as well as additional counts concerning the use of the property. The Court takes no action on this motion as the Court's Order "Memorandum of Decision and Order on Defendant's Motion for Summary Judgment" issued the same date as this order makes this issue moot.

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<sup>5</sup>As discussed below, the Telecommunications Act states that "[a]ny decision by a State or local government or instrumentality thereof 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).



## B. Defendants' Motions For Partial Summary Judgment

### 1. Summary Judgment Standard

Summary judgment must be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989).

A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the non-moving party's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); accord, Kourouvacilis v. General Motors Corp. 410 Mass. 706, 716 (1991).

"If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." Pederson, supra at 17. The non-moving party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

**2. Southwestern Bell's Motion for Partial Summary Judgment,  
Count 3.**

Southwestern Bell moves for summary judgment as to Count 3 of the complaint where plaintiffs argue that Southwestern Bell's failure to file a list of abutters warrants an annulment of the special permit. This motion is allowed by agreement of the parties.

**3. Planning Board's Motion For Partial Summary Judgment,  
Count 6.**

The Planning Board agreed at the hearing not to argue this motion. In any event, the motion is moot given the allowance of the motion for summary judgment. See "Memorandum of Decision and Order on Defendant's Motion for Summary Judgment" issued the same date as this order.

**C. Southwestern Bell's Motions to Dismiss**

**1. Motion to Dismiss Standard**

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must take the allegations of the complaint, as well as any inference which can be drawn from those allegations in the plaintiff's favor, as true. Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429 (1991), and cases cited. The "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." Nader v. Citron, 372 Mass. 96, 98 (1977) (quoting Conley

v. Gibson, 355 U.S. 41, 45-46 (1957)). A complaint is not subject to dismissal if it could support relief under any theory of law. Whitinsville Plaza, supra at 89.

Although the Court allows summary judgment in favor of the defendants rendering the motions to dismiss moot, a discussion of these motions is included for completeness.

As an initial matter, Southwestern Bell argues, in response to several of the plaintiffs' counts, that necessary parties have not been added as defendants. To that end, plaintiffs filed their motion to amend (see Section III.A.4) adding two defendants as well as several counts. This Court, taking no action on the motion to amend, for now ignores the fact that other parties are necessary for specific actions and therefore does not consider it a defect.

## **2. Motion to Dismiss Count 1, Violation of G.L. c. 40A, § 9.**

Plaintiffs argue that the Planning Board's decision cannot stand because Southwestern Bell failed to timely file the special permit application with the town clerk. Thus, plaintiffs argue, the Planning Board did not have jurisdiction to grant the special permit. Southwestern Bell argues that this is not a jurisdictional defect depriving the Planning Board of jurisdiction to grant the requested special permit.

The language of the statute is mandatory:

Each application for a special permit shall be filed by the petitioner with the city or town clerk and a copy of said application certified by the town clerk, shall be filed forthwith by the petitioner with the special permit granting authority.

G.L. c. 40A, § 9. There has been no statement of any prejudice to the plaintiffs due to the untimely filing. Moreover, not every failure to precisely follow the procedural requirements of Chapter 40A is a jurisdictional defect. See Richardson v. Zoning Board of Appeals of Framingham, 351 Mass. 375, 376-377 (1966); Schulte v. Director of Employment Security, 369 Mass 74, 79-80 (1975).

Case law discussing the importance of following the procedural requirements of Chapter 40A, § 9, mostly concerns the constructive grant of an application when no action is taken after 90 days of the close of public hearings. See, e.g., Racette v. Zoning Board of Appeals of Gardner, 27 Mass. App. Ct. 617, 619-620 (1989) ("The filing and constructive grant provisions of [G.L. c. 40A,] § 15 are explicit. The process of seeking a variance must begin with the filing of a petition with a city or town clerk. The filing requirements serve important purposes of allowing ready public access to the petition and of fixing in an official record the date from which the constructive grant period is to run.") Racette dealt with which event, the filing of a petition with a city clerk or the delivery to a building inspector, triggered the time requirements for a constructive grant of a special permit. Racette, supra at 619. Here, there is no such problem as the Planning Board acted within the allotted time.

Accordingly, dismissal is warranted for Count 1.

**3. Motion to Dismiss Count 5, Lack of Jurisdiction to Change the Use of Water Department Property, & Count 6, Violation of Article 97 of the Massachusetts Constitution**

In Count 5 of their complaint, plaintiffs contend that the

Planning Board does not have jurisdiction to change the property from public use to private commercial use because the proposed cellular tower site is Water Department property and is governed by state law. Plaintiffs contend in Count 6 of their complaint that the Water Department access easement across conservation land is subject to Article 97 of the Massachusetts Constitution.<sup>6</sup> Plaintiffs also maintain that the access easement is void ab initio to the extent that the purported purpose of it exceeds the authorized purpose, a public water supply. Plaintiffs argue that use of the easement for any other purpose is unlawful.

The proposed site of the cellular tower is on Water Department property. It was acquired by eminent domain. The access easement for the site cuts across conservation land. On May 13, 1997, the town, by a two-thirds majority, voted to authorize the Board of

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<sup>6</sup>"The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court."

Mass. Const., Amend. Art. 97

Selectmen to lease to Southwestern Bell a portion of the Water Department property on Newtown Hill. The Water Department property consists of 31,240 square feet. Acting on behalf of the Water Department, the Board of Selectmen leased 4000 square feet of the property to Southwestern Bell.

A town's power to hold, lease and convey property is derived from statutory authority:

A town may hold real estate for the public use of the inhabitants and may convey the same by a deed of its selectmen thereto duly authorized . . . [and] may by its selectmen let or lease for not more than ten years, on such terms as the selectmen determine, a public building or part thereof. . . . All real estate or personal property of the town, not by law or by vote of the town placed in the charge of any particular board, officer or department, shall be under the control of the selectmen, except as is otherwise provided in this section or section nine.

G.L. c. 40, § 3. The statute specific to Water Departments states:

A town, city, or district authorized to furnish water for domestic purposes, may, with the advice and approval of the state department of environmental protection, sell at public or private sale, or may exchange any real property, or any easements, whether taken by eminent domain or otherwise, no longer needed for public water supply works under its charge, or may from time to time lease any property not then so needed, or may permit the use thereof by the public for recreational purposes; and may in its discretion, by lease, license or other agreement, permit the construction or maintenance on any land under its control of towers, poles, wires, and other structures for the purpose of transmitting electric power of lands and water held for water supply purposes; provided, that such lease, license or agreement will not, in the opinion of said department, affect or interfere with the water supply; and provided, further, that said city, town or district may, with the approval of said department, revoke said lease, license or agreement for cause to be determined by it.

G.L. c. 40, § 15B.

Municipalities have long held the right to lease property.

"Even without explicit statutory authority, municipalities have the

undoubted right to lease real estate, land or buildings, held for public purposes and not presently needed for such purposes." Ballantine v. Falmouth, 363 Mass. 760, 763 (1973). "Under G.L. c. 40, § 3, '[a] town . . . may make such orders as it may deem necessary or expedient for the disposal or use of its corporate property.' Section 4 of G.L. c. 40 permits a town to 'make contracts for the exercise of its corporate powers.'" Ballantine, 363 Mass. at 766 (quoting G.L. c. 40, §§ 3, 4). "[A] lease is embraced within the language of §§ 3 and 4 of G.L. c. 40. A lease involves the 'disposal or use of corporate property.'" Ballantine, 363 Mass. at 767.

The property concerned here was taken by eminent domain for use by the Water Department and thus must remain in that use. The property is still being used for that purpose; however, the entire parcel is apparently not needed by the Water Department. The Water Department specified certain conditions it deemed necessary for approval of the special permit and such conditions were included in the grant of the special permit.

The fact that the easement cuts across conservation land does not make the use of the access easement subject to Amend. Art. 97 of the Mass. Constitution. The access easement to the Water Department property was in existence when the town acquired the conservation land. The deed containing the easement gave the town "the right to use said strip for all purposes for which town ways are customarily used in the town . . . ." The town has other cellular towers which are accessed by town ways, therefore this use

falls within the language of the easement.

Once construction is complete, the only change in the use of the easement will be an additional vehicle once or twice per month for the benefit of Southwestern Bell. This de minimus increase and change in use of the easement does not in any way impact the conservation land.

The town was acting within its authority when it leased the property. Additionally, Amend. Art. 97 of the Mass. Const is not implicated by the easement. Accordingly, dismissal of counts 5 and 6 is warranted.

#### **4. Motion to Dismiss Count 7, Spot Zoning**

Plaintiffs assert that the Planning Board's approval of the special permit does not comport with the policy of uniformity and compatibility of permissible land use within a zoning district as required by G.L. c. 40A, §§ 4, 7 and therefore amounts to spot zoning. The Supreme Judicial Court appears to have agreed with the prevailing view that the granting of a special permit cannot constitute spot zoning:

There appears to be no judicial precedent in this Commonwealth on the question whether the granting of a special permit constitutes spot zoning. The prevailing view elsewhere appears to be that it does not. "A special permit is granted pursuant to the literal language of the zoning regulations. It does not, in any sense, effect an amendment of the zoning ordinance. . . . [A board of appeals] is an administrative body which may be authorized to exercise quasi-judicial powers. It employs such powers when it receives and processes variance applications, and when it hears and grants or denies applications for special permits. It is a body without legislative authority. . . . As a special permit is not an amendment, it cannot constitute spot zoning."



Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 156-157 (1976), quoting 3 R. Anderson, American Law of Zoning § 15.04 (1968).

##### 5. Motion to Dismiss Count 8, Due Process Violation

Plaintiffs maintain that the Planning Board's decision was unfairly tainted by bias and prejudice, that the process was fundamentally unfair, and therefore there was a violation of their due process rights under the United States and Massachusetts Constitutions.

Plaintiffs allege that the approval of the special permit and site plan was pre-ordained before the public meetings were even held. They also allege that a private meeting attended by the Water Department General Manager, the Town Administrator, the Planning Board Chairman and a Southwestern Bell representative was held to discuss the lease of the property and/or the permit. This meeting was held after the town passed the new cellular tower bylaw but before the special permit application and before the May town meeting which authorized the lease of the property to Southwestern Bell.

The Planning Board had an obligation to "act fairly and reasonably on the evidence presented to it." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638-639 (1970). There is substantial evidence in the record that the Planning Board held public meetings and acted "fairly and reasonably on the evidence presented to it." See "Memorandum of Decision and Order on

Defendant's Motion for Summary Judgment" issued the same date as this order. Although there was a private meeting concerning what Southwestern Bell's options were after the new town bylaw was passed (Southwestern Bell initially intended to construct a 190 foot tower, then the town passed the new bylaw limiting cellular towers to 100 feet in height), any taint due to discussions of an idea to use the current proposed site was overcome by the subsequent public meetings.

The reasoning of the Open Meeting Law, G.L. c. 39, § 23B, is very applicable. That statute states, in part:

All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section. No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section. . . .

G.L. c. 39, § 23B. See Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence, 403 Mass. 531, 557-558 (1988).

Although plaintiffs do not claim a violation of the Open Meeting Law, the purpose of the statute can be applied here. The Open Meeting Law provides the public "broad access to the decisions made by its elected officials and to the way in which decisions are reached." Foudy v. Amherst-Pelham Regional School Comm., 402 Mass. 179, 184 (1988). The purpose of the statute "is to provide such access by 'eliminat[ing] much of the secrecy surrounding the deliberations and decisions on which public policy is based.'" Benevolent & Protective Order of Elks, Lodge No. 65, supra at 558, quoting Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72

(1978).

Here, the private meeting did not constitute a quorum of the Planning Board. Moreover, as stated earlier, any taint from the private meeting was cured by the later public meetings. See Benevolent & Protective Order of Elks, Lodge No. 65, supra at 558. The private meeting was a discussion of Southwestern Bell's options after the change in the town's bylaw for the maximum height of a cellular tower.

Plaintiffs also state that their due process rights were violated because the Planning Board failed to make the necessary findings of fact as required in the zoning statute.

The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be deemed a public record  
. . . . .

G.L. c. 40A, § 9. "[A]s is the case where the granting of a variance is involved, the board, when granting a special permit, must set forth 'clearly the reason or reasons for its decisions' that the applicable statutory and by-law standards have been met." Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972), quoting G.L. c. 40A, § 18 (changed to 40A, §§ 12, 15).

Here, the record reflects that the Planning Board reviewed the bylaw requirements. See A.R., Ex. 32. The Planning Board did not, however, in the special permit itself, cite reasons for its decision. Under the substantial evidence standard, a fair reading of the entire record, especially the minutes from the public

hearings, yields an understanding of why the Planning Board approved the special permit.

**6. Motion to Dismiss Complaint For Lack of Subject Matter Jurisdiction**

Southwestern Bell moves to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. It contends that neither plaintiff is a "person aggrieved" within the meaning of G.L. c. 40A, § 17, and that therefore, the appeal must be dismissed for lack of jurisdiction.<sup>7</sup>

"Any person aggrieved by a decision of the board of appeals or any special permit granting authority . . . may appeal to . . . the superior court." G.L. c. 40A, § 17. Plaintiffs need only "put forth credible evidence to substantiate [their] allegations" and "standing becomes, then, essentially a question of fact for the trial judge." Marashlian v. Zoning Board of Appeals, 421 Mass. 719, 721 (1996) ("a plaintiff is a 'person aggrieved' if he suffers some infringement of his legal rights"); Mark Bobrowski, The Zoning Act's "Person Aggrieved" Standard: From Barvenik to Marashlian, 18 W. N. Eng. L. Rev. 385, 401-402 (1996).

Here, one plaintiff's property is adjacent to the proposed site and the other plaintiff's property is adjacent to the access easement. Plaintiffs' status as abutters gives them a presumption

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<sup>7</sup>Additionally, Southwestern Bell moves for dismissal of the complaint arguing that G.L. c. 40A, § 17 does not provide a right of appeal from site plan approval. The town's bylaw specifically appoints the Planning Board as a special permit granting authority and empowers it to make onsite demonstrations. This is not a purely ministerial act. See G.L. c. 40A, § 17.

of standing unless rebutted. Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass. 106, 107 (1995). Since Southwestern Bell challenges standing, plaintiffs have lost that presumption. Plaintiffs have adduced evidence that construction and or maintenance of the cellular tower may adversely affect their property. Plaintiffs, who live very close to the proposed site of the tower, will be able to see the tower from their property, as well as hear any additional traffic. Plaintiffs have shown at least a perceptible harm to their legal rights and therefore have standing to bring this appeal. Marashlian, 421 Mass. at 724.

#### IV. CONCLUSION

The plaintiffs have brought a myriad of claims in trying to prevent the construction of the cellular tower in the proposed location. This action, initially set for hearing in January, 1998, has been delayed several times. There is no reason to further delay the construction of the cellular tower.

V. ORDER

For the foregoing reasons, it is hereby ORDERED that plaintiffs' motion for an emergency stay is DENIED; plaintiffs' motion to strike the administrative record is DENIED; plaintiffs' motion to strike the joint opposition to plaintiff's motion to amend the complaint is DENIED; no action is taken on plaintiffs' motion to amend; Southwestern Bell's motion for partial summary judgment as to Count 3 is ALLOWED; Southwestern Bell's motions to dismiss counts 1, 5, 6, 7 and 8 are ALLOWED; and no action is taken on defendant Planning Board's motion for partial summary judgment as to Count 6. It is hereby further ORDERED that partial summary judgment and dismissal of specific counts in favor of the Planning Board are ALLOWED to the same extent as to Southwestern Bell.



R. Malcolm Graham  
Justice of the Superior Court

DATED: May 21, 1998

**FULLER, ROSENBERG, PALMER & BELIVEAU, LLP**

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PAUL S. RAINVILLE**

**September 4, 1998**

James T. Buckley, Chairman  
Town of Leicester  
Zoning Board of Appeals  
Town Hall  
3 Washburn Square  
Leicester, MA 01524

RE: Proposed Cellular Phone Tower

Dear Chairman Buckley:

It was a pleasure meeting you at the Zoning Board of Appeals hearing on August 18, 1998 relative to the Special Permit that would allow a cellular phone tower to be built on Leicester Water Supply District land. I represent Joseph Hyland's interests in this regard.

As you know, at that hearing, a great number of concerns were raised as to the advisability of that tower — concerns ranging from whether barbed wire should be installed so close to a school and playground, to whether a 150-foot lattice tower would constitute an attractive nuisance, to whether it is wise to emit that level of radiation next to a school, to whether a 150-foot red and white tower, with flashing lights, could have a minimal visual impact at that site, to whether the real estate values of the surrounding properties would be diminished by such an eyesore. (With respect to the future use of the tower, the representatives of the petitioner told the Board that no additional antennas could be added to the tower without the approval of the Board. They did not make clear, however, that the Board would not be able to deny future permits for additional antennas, which met the applicable state and federal standards, on the grounds that they may endanger the health of the children in the school. In fact, should the tower be built, this Board could not stop such antennas from being installed in the future, even if the Board had legitimate questions about their effect on the school children).

James T. Buckley, Chairman  
Town of Leicester  
Zoning Board of Appeals  
September 4, 1998  
Page Two

I am writing today with regard to another reason why the Special Permit should be denied: the Leicester Water Supply District cannot legally allow its land to be used for a cellular phone tower.

St. 1888, Chapter 171, created "... the Leicester Water Supply District, for the purpose of supplying themselves with water for the extinguishment of fires and for domestic, manufacturing and other purposes, with power to establish fountains and hydrants, relocate and discontinue the same." With respect to real property, that statute specifically provided that the water district had the power "to take and hold property by purchase or otherwise, for the purposes mentioned in this act." (I have enclosed a copy of that statute for your convenience). Since the proposed cellular phone tower has nothing to do with the water district's legitimate business (supplying water and establishing fountains and hydrants), the district lacks authority to allow its land to be used for that purpose.

In addition, Article 49 of Part Two the Articles of Amendment to the Massachusetts Constitution, as amended by Article 97 of Part Two (hereinafter Article 49), provides that "[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment; and the protection of the people and their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose." Moreover, that Article also provides that "[l]ands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court." Not only would the proposed tower unconstitutionally interfere with the Hylands' right to enjoy the natural, scenic, historic and esthetic qualities of their environment, but, since there has been no legislative approval of the tower, the use of the water district's land for a cellular phone tower would be in direct violation of Article 49.

Thus, not only would the construction of the tower constitute a violation of the Hylands' constitutional rights as guaranteed by Article 49, but such action would be beyond the authority of the water district, and would contravene the specific procedural requirements of Article 49.

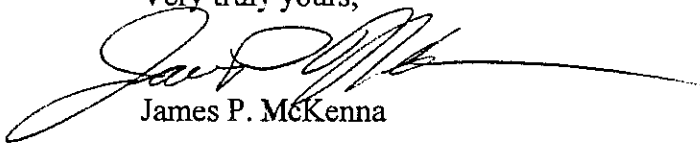
Should the Board issue the Special Permit, a permanent injunction against construction would undoubtedly be sought on the foregoing grounds. Remarkably, should the Special Permit issue and the injunction be obtained, the petitioner may well seek civil damages against the water district for the costs they have incurred. Hence, the interests of the residents of the Leicester Water Supply District would be best served by a denial of the Special Permit.



James T. Buckley, Chairman  
Town of Leicester  
Zoning Board of Appeals  
September 4, 1998  
Page Three

Therefore, for all of the foregoing reasons, on behalf of my client, I respectfully urge you to deny the Permit.

Very truly yours,

A handwritten signature in dark ink, appearing to read "James P. McKenna", with a long horizontal flourish extending to the right.

James P. McKenna

JPM:klc  
Enclosure

cc: Board of Selectmen  
Frank Lyons, Leicester Water Supply District  
F. Alex Parra, Esquire, Counsel for CellularOne

Corporate Office  
100 Lowder Brook Drive  
Westwood, MA 02090  
(617)462-4000

August 21, 1998

From @ Southwestern Bell

Leicester School Committee  
c/o Lawrence Spaulding, Chairman  
Office of the Superintendent  
1078 Main Street  
Leicester, MA 01524

Re: Proposed radio broadcasting and relay station antenna array and tower  
(wireless communication facility)  
180 Paxton Street, Leicester, MA

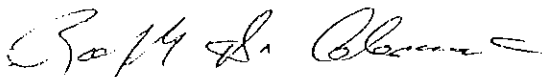
Dear Mr. Spaulding:

This letter is pursuant to our telephone discussion, of earlier today, regarding the above referenced issue, relative to the School Committee's scheduled meeting on Monday, August 24, 1998.

On behalf of Cellular One, I am offering to the committee the services of two representatives, who can provide any needed technical expertise that may become necessary. These consultants will be in attendance at the meeting should your board be inclined to utilize their services. The consultants are Eric Campbell (Real Estate), and David Maxson (Radio Engineer). Furthermore, should the committee require any additional documentation, etc., Cellular One will happily assist in any way possible.

Hopefully, you and your board will approve our plans as submitted to the Board of Appeals. Please do not hesitate to contact me if you have any questions, and thank you for your time and consideration regarding this matter..

Sincerely,



Ralph A. Colorusso  
Real Estate Consultant

cc. Leicester Board of Appeals  
Frank W. Lyon, Superintendent, Leicester Water Supply District

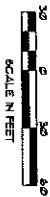
BOSTON • 33 Union Street • MA 02108 • (617) 367-2871/ • One International Place • MA 02110 • (617) 462-7080

BRIGHTON • 1686 Commonwealth Avenue MA 02135 • (617) 566-1100 • FRANKLIN • 25 Franklin Village Drive • MA 02038 • (508) 498-4360

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WALTHAM • 221 Bear Hill Road • MA 02154 • (781) 890-9366 • WILMINGTON • 310 Lowell Street • MA 01887 • (978) 657-4100


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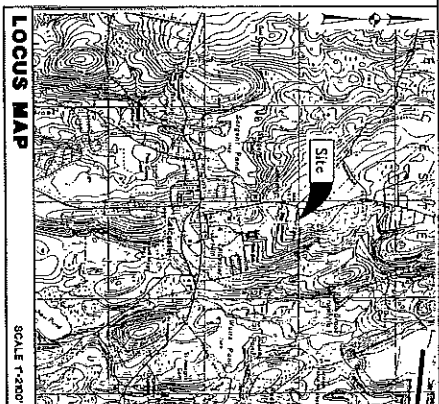


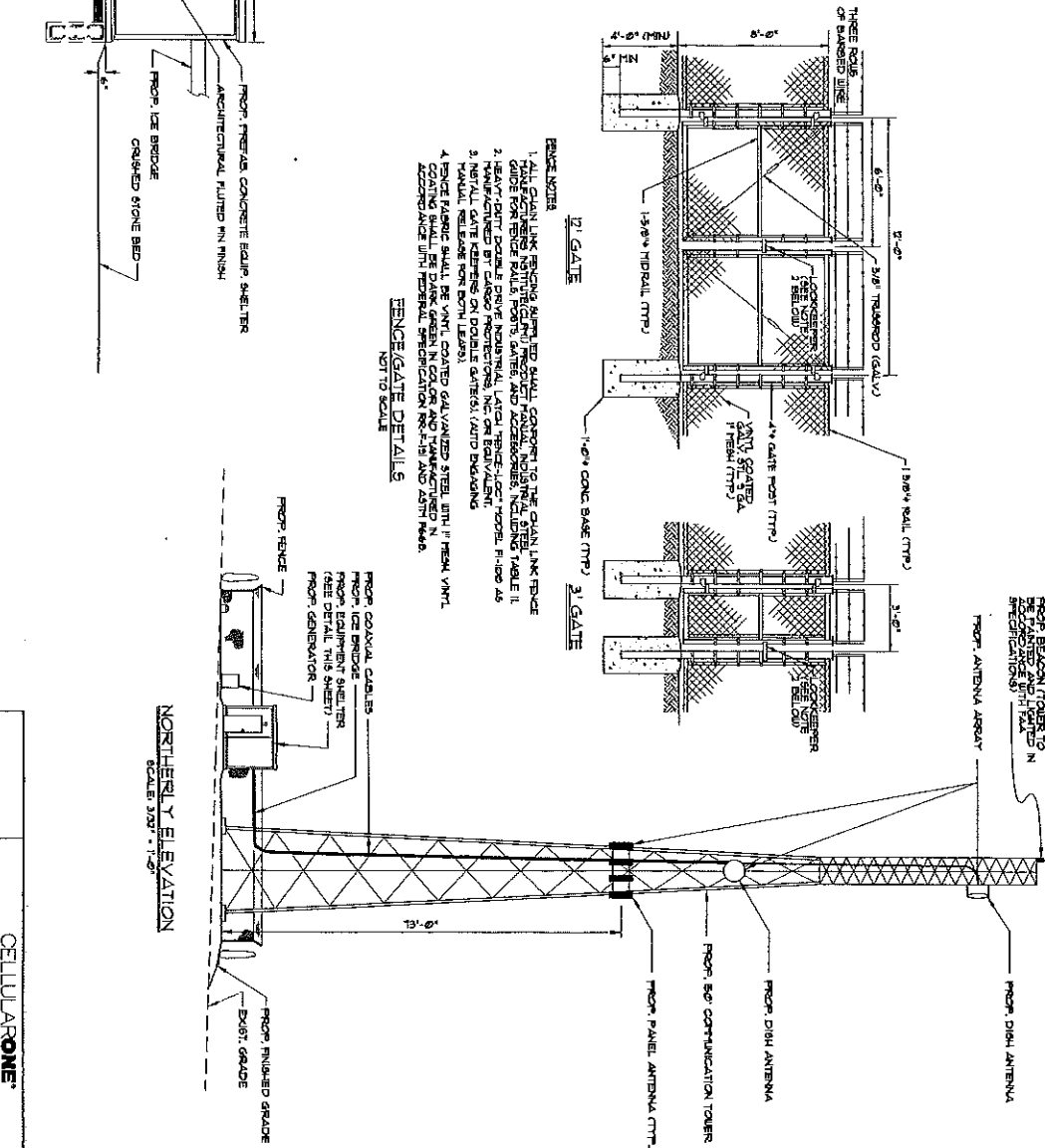
**CELLULARONE**  
COMMUNICATION FACILITY

180 MARTIN STREET  
LOCUSTON, MA

PROPOSED SITE PLAN

  
TOWN OF LOCUSTON



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