Public Facilities Committee Report

City of Newton
In City Council

Wednesday, November 9, 2016

Present: Councilors Crossley (Chair), Albright, Lappin, Gentile, Danberg, Lennon, Brousal-Glaser; also present; Councilors Fuller, Leary; absent; Councilor Laredo.

City Staff Present: Assistant City Solicitor Marie Lawlor, Director of Operations for Public Works Shane Mark, Commissioner of Public Works Jim McGonagle, Recycling/Environmental Manager Waneta Trabert, City Solicitor Donnalyn Lynch-Kahn, Associate City Solicitor Alan Mandl,

School Department Staff: School Committee Member Diana Fisher-Gomberg, Assistant Superintendent/Chief Financial Officer Liam Herlihy, Chief of Operations Mike Cronin

Waneta Trabert, our new Recycling/Environmental Manager provided an update on the status of waste and recycling programs and effectiveness across the city, improvements that are in the works and future plans. A full report to be issued at years end.

#12-16 **Discussion with the DPW regarding the City's recycling and solid waste programs**
COUNCILOR LEARY, NORTON, KALIS, HESS-MAHAN, ALBRIGHT, AND CROSSLEY requesting an update from and discussion with the Department of Public Works and the Solid Waste Commission on the current status of Newton's solid waste management and recycling program operations and performance objectives, future goals and objectives, staffing, program challenges, and survey data due to be submitted to the Department of Environmental Protection. [12/28/15 @ 8:44 AM]
Action: Public Facilities Held 7-0.

Note: The Council passed a resolution in Spring 2016 to develop a long term solid waste and recycling plan for the City. Recycling/Environmental Manager Waneta Trabert was hired with the City shortly afterward. Ms. Trabert presented her outline for a report (attached) in progress that will identify her findings throughout the system, including ongoing issues and proposed solutions and strategies to implement. The intent of this high level overview was to introduce key topics and get feedback from Committee members prior to releasing a final draft at the end of December. Ms. Trabert noted that it is her intent to focus the City's efforts on materials management and provide education on alternative and appropriate waste disposal methods. Ms. Trabert hopes to help educate residents by utilizing Recollect; a software application that assists with identification of appropriate disposal facilities in addition to providing residents with trash and recycling updates in the event there are delays. The software company has created a logo intending to help brand Newton's recycling program.

Councilors requested that Ms. Trabert identify some specifics of what will be expanded on in the report. Ms. Trabert noted that there is room for improvement at the Rumford Avenue Recovery Center and as well as how the rebate for recycled materials is calculated. Councilors also expressed interest in discussion and coordination with the Parks and Recreation Department on waste management efforts.

Ms. Trabert has taken steps to implement existing City policy starting in October 2016 to increase curbside compliance. While the Recycling/Environmental Manager position was vacant, curbside compliance was not uniformly enforced. The department has identified common areas of noncompliance and issues stickers to alert the homeowner of the particular violation that must be corrected before the barrel will be picked up. Ms. Trabert then contacts residents to provide further information. She estimates she sends 50 letters weekly.

Ms. Trabert confirmed that the Solid Waste Commission is meeting again. A Councilor that while there are 6 people currently serving, there remain many vacancies which must be filled by the Mayor.

Commissioner of Public Works Jim McGonagle noted that the Department that the report be a living document that can evolve with ongoing input from the Council. It was suggested that Committee members provide feedback now and once receiving the final draft in December, particularly as suggestions may be relevant to and can be incorporated into budget discussions.

Chair's note: *An update from the subcommittee on Wireless Attachments to inform the committee of governing regulations ahead of resuming several petitions at our December meeting.*

Note: The Public Facilities Committee created a subcommittee to review the Council's authority when considering grants of location for wireless telecommunication attachments on poles in public ways. Attorney Mandl drafted documents to guide the Council in reviewing these petitions (attached). The Chair summarized that the Council, under state law, has authority to control a number of variables including aesthetics and positioning. After a location is approved however, that pole is considered a "base station" and the Council's authority is much further limited by Federal (FCC) rules. While the Council can influence the utilities with design standards, they cannot effectively prohibit service. A recent tolling agreement with Verizon Wireless, allows the Committee until the end of the calendar year to take action on two petitions for grants of location.

Attorney Mandl noted that the Council's ability to impose limitations as governed by state law remains impacted by federal law. While state law might allow denial based on aesthetics, interference with the public way (snowplowing, ADA requirements, traffic obstacles, height); case law suggests that the denial will not necessarily stand against federal laws (no effective prohibition of

service, no unreasonable discrimination). If a pole becomes a "base station", a carrier would not normally be required to seek additional approval from the Council, as long as FCC rules are met.

Attorney Mandl emphasized the need to standardize design guidelines in order to provide carriers with the information in an objective manner. He noted that it would be helpful to carriers to have guidelines when considering locations for attachments. He added that the values selected for the guidelines should be based on the recommendation by a subject matter expert. The subcommittee intends to craft recommendations and a draft ordinance, but not in time to impact the pending petitions. Attorney Mandl added that the Committee may not deny a petition because there is no current set of guidelines. He noted that Verizon Wireless might be amenable to conditions including; no updates/replacement of equipment without additional Council review or no locating of equipment on a pole that is directly in front of a residence. Attorney Mandl stated that he would consult with Verizon Wireless' counsel prior to the Committee's discussion on December 7, 2016 to determine if they would voluntarily agree to those conditions or another postponement. Councilors deliberated whether the carrier has proven the need for service and noted that some of the equipment is to meet the demands of surrounding communities by taking the demand off of macro sites. Committee members acknowledged that the creation of the smaller wireless equipment is to address municipalities' reluctance to approve larger macro sites.

Also mentioned was the City's relationship with Verizon Wireless outside of the grant of location process. The City's current contract for wireless service is with Verizon Wireless. In addition, the City has been working with Verizon Wireless to identify areas where service needs improving; including around Lasell. With Attorney Mandl's commitment to reach out to Verizon Wireless regarding conditioning pending grants, the Committee agreed to meet to further discuss the petitions on December 7, 2016.

Referred to Public Safety & Transportation, Public Facilities and Finance Committees

#335-16 **Request for Ordinance amendments to require removal of snow from sidewalks**
COUNCILOR DANBERG requesting that §26-8 through §26-9 and §20-21 of the City of Newton Rev. Ords., 2012, be amended to establish criteria and provisions for requiring removal of snow in all districts by property owners, occupants, and property managers from sidewalks abutting their property and to review and amend enforcement provisions including structure of fines for snow removal violations. [09/27/16 @ 11:36 AM]
Action: Public Facilities Approved 4-0-1 (Councilors Lennon, Lappin not voting, Councilor Gentile abstaining)

Note: At the previous meeting, enforcement of the snow ordinance pertaining to residential areas remained unclear, and the Committee voted to approve the extension of the snow trial at the meeting on October 19, 2016. Associate City Solicitor Marie Lawlor presented amendments to section 26-8 of the snow ordinance, specific to commercial properties only. The proposed

amendments would hold commercial, business, mixed use and manufacturing districts to commercial standards and reduce the amount of time that these properties have to clear sidewalks from 24 to 12 hours. Additionally, the amendments define properties containing 4 or more residential units as subject to commercial clearing standards. It was noted that larger corporations generally take longer to clear. Committee members deliberated whether 12 hours is enough time for commercial properties to clear, but were supportive of holding residential dwellings with 4 or more units to commercial standards.

Additional amendments were to modernize language specifically to change the word "handicapped" to "accessible" where applicable. Councilor Danberg motioned to approve the item which carried 5-0-1 with an abstention from Councilor Gentile to consider the reduction in clearing time.

Referred to Public Facilities and Finance Committees

#386-16 MWRA loan financing for homeowners to replace lead service lines

COUNCILORS CROSSLEY AND GENTILE proposing to establish policies and procedures for the use of approved Massachusetts Water Resource Authority (MWRA) no interest loan financing to encourage homeowners to participate in the lead service line replacement program. [10/26/16 @ 3:12 PM]

Action: Public Facilities Held 7-0.

Note: The Council has authorized the Department of Public Works to apply for a 4 million dollar, 10 year, no interest loan offered by the MWRA to implement a program to replace lead service lines. However the bonding authority will not approve release of funds until the program is clearly defined, including how the City plans to use the funds.

Commissioner McGonagle reviewed that there are currently 587 homes likely to have lead services lines and these homeowners have been notified. A DPW engineer is mapping out the work, will have cost estimates by the end of November and would like to put it out to bid in January. Public Works is requesting guidance from the Council about how the funding should be used to implement the program. As the MWRA disperses funds every three months, they hope to have a decision in order to accept the grant monies in February so that work may take place from April – December 2017.

Commissioner McGonagle noted that the average cost of replacement from the main in the street the house is $4,000. Public Works estimates that the total cost of the project will be $2.4 million dollars. This will include backfill, seeding and loaming but will not include the cost of any custom landscaping. Councilors discussed whether the homeowner should be responsible for any part of the cost of the replacement. The City's lead and copper program requires the replacement of lead mains if they are discovered when the City has already excavated a line for some other reason. Commissioner McGonagle noted that 38 properties have had lead mains replaced at the City's expense due to this policy. While some Councilors felt that the City should cover the total expense, others felt that it would be unfair to those who have previously paid to replace lead service lines. Committee members agreed that it would ultimately be more consistent for the City to pay from the

main to the property line and the homeowner to pay from the property line to the house. Committee members suggested that the work can be paid as a betterment to the property. There was general consensus that the ten year no interest terms of the MWRA loan be extended to residents to help finance their portion of the work. Commissioner McGonagle confirmed that Public Works would draft a specific proposal with the administration and return to the Public Facilities Committee and Finance Committee with additional details. Committee members were in support of the program as a whole.

Referred to Public Facilities and Finance Committees

#385-16 Discussion about the Community Solar Share Program

PUBLIC FACILITIES COMMITTEE requesting discussion with the Administration and Public Buildings Department about the Community Solar Share Program, which intends to provide credits resulting from solar power generated at 70 Elliot Street to qualifying low income residents. [10/26/16 @ 4:20 PM]

Action: Public Facilities Held 7-0.

Note: The Chair presented the request for additional information from Public Buildings and the administration about whether the Mayor may unilaterally make the decision to allocate approximately $50,000 worth of solar credits to low income families. The Chairs of Public Facilities and Finance have requested a formal opinion from the Law Department and the Department of Revenue.

Comptroller Dave Wilkinson emailed his summary of a conference call with the Law Department and the Department of Revenue. The DoR stated their opinion that the state finance laws do not apply because solar credits are not cash receipts. Because the credits would be received by low income residents, a public purpose is satisfied. DoR did suggest that state legislative approval might be necessary. The Law Department will provide a formal opinion at a subsequent meeting.

Committee members noted that when Phase II solar projects were approved by the Council, the administration had presented that the solar credits would go toward reducing the City's electrical expenses. However, with that understanding, it was not made a condition of approval. Committee members noted that while the cause may be good; the Council should have review of the implementation of a program that results in the transfer of municipal assets of resources.

Councilors had concerns about the fairness of the program for residents and the impact that this decision may have on the approval of future solar projects. Committee members also questioned how a reduction in projected savings would impact the program. It was noted that the solar carports at the Elliot Street yard are not installed yet. Committee members agreed that more information and input from the administration is necessary. Councilor Gentile moved to hold, which carried 7-0.

Update 11/18/2016: The Law Department Opinion has been received and is attached.

Referred to Public Facilities and Finance Committees

#384-16 Appropriate $71,000 to build an observation deck on the greenway

HIS HONOR THE MAYOR requesting authorization to appropriate and expend seventy-one thousand dollars ($71,000) from Free Cash for the purpose of construction an observation on the greenway walking corridor. [10/31/16 @ 2:05 PM]

Action: Public Facilities Held 7-0.

Note: Commissioner McGonagle presented the request for $71,000 to fund the construction of an observation deck on the greenway. The request is in response to community support for the project to move forward. Commissioner McGonagle noted that the project cost is higher than anticipated due to the railroad ties remaining on the old bridge that are hazardous waste which need to be removed and the engineering required to secure the deck to the bridge and meet structural and safety codes.

The Chair noted that the structure was initially supposed to be built by a previous contractor at no cost, in return for the value of the steel rails along the greenway. However, the original (partially constructed) design did not meet the required codes, so the project was put on hold, and the City fenced off and padlocked access to the deck. At this time, Needham is unwilling to reconstruct their half of the bridge for pedestrian use. They would like the greenway to be utilized for transportation purposes to help build their commercial. The Chair noted that while there is community support, there is ample space to accommodate different desires and it might be appropriate to collaborate with Needham to create a meaningful solution. As the documents detailing the bridge reconstruction (attached) were only received at the time of the meeting, The Committee voted unanimously in favor of Councilor Albright's motion to hold the item.

Referred to Programs & Services, Public Facilities and Finance Committees

#387-16 Appropriate $250,000 for renovation of 1st Floor of the Ed Center

HIS HONOR THE MAYOR requesting authorization to appropriate and expend two hundred fifty thousand dollars ($250,000) from the Override Capital Stabilization Fund for the purpose of renovating the space on the 1st floor of the Ed Center which has been vacated by the relocation of the Pre-K Program to the Aquinas site to house the Central High School Program, additional professional development meeting space, and general office space. [10/31/16 @ 2:05 PM]

Action: Public Facilities Held 7-0.

Note: The Chair introduced the request to appropriate $250,000 from the override capital stabilization fund for the purpose of renovating the ground floor of the Ed Center to include classrooms, bathrooms and a cafeteria to serve relocation of the growing Central High Program currently housed in the annex behind the Ed Center. Also additional professional development meeting and general office space is indicated. The Chair noted that concept (floor) plans and an

outline budget were provided to the Committee only the day before and the item was not expected to come before the Committee prior to last week.

Assistant Superintendent/Chief Financial Officer Liam Herlihy presented the plans. He noted that the ground level is now vacant subsequent to relocating the preschool. He stated that the space in the basement is in poor condition but could be renovated to provide valuable professional development and meeting space for up to 60 staff members in addition to the classroom space needed for the growing Central High School program, which the annex building is inadequate to serve. Mr. Herlihy noted that currently, large staff groups must travel to other nearby schools for professional development.

The school department intends to locate the Middle School Stabilization program (MSP) in one annex building and the Connections program in the second annex building. Mr. Herlihy noted that the annex buildings are in good condition with recent updates. The MSP assists in stabilizing fragile students. The Connections program helps in transitioning 18-22 year old students who have not yet graduated. As part of the plans, the cafeteria space will be used to provide vocational training and life skills to students in these programs. Mr. Herlihy noted that students from other programs would be also be able to use the cafeteria space.

After reading an excerpt from Mr. Herlihy's School Department Operational Update about the projected year end deficit of 1.2 million dollars, a Committee member questioned whether additional professional development and meeting space is necessary or appropriate at this time, given many competing needs. Mr. Herlihy stated that solving for the projected deficit is a top priority, but the school department wishes to develop this space to meet existing needs; including additional professional development space. Committee members remained concerned that this project, not on the 2017 CIP, might replace other necessary projects.

Committee members were also concerned that the budget seemed low for the apparent project scope, and that no written scope was included. Newton Public Schools Chief of Operations Mike Cronin, who would be managing the project, stated that the School Department has worked closely with Art Cabral from Public Buildings to develop the budget. Councilors voiced concerns about the budget, management of the project, prioritization of the project and the school budget deficit. With additional information necessary and input from Public Buildings requested, Councilor Lappin motioned to hold the item. The Committee voted to hold the item 7-0.

Referred to Public Facilities and Finance Committees

#334-16 **Request to connect Walsingham Street to City sewer system**

COUNCILORS GENTILE, SANGIOLO, AND HARNEY, on behalf of the residents of Walshingham Street, requesting the necessary approvals to connect Walsingham Street to the City sewer system. [09/22/16 @ 11:15 AM]

Action: Public Facilities Voted No Action Necessary 7-0.

Note: This item was originally docketed for four abutting homeowners to cover the cost of a sewer extension, requiring Council approval. Three of the homeowners no longer want to cover the cost of the extension, but the remaining homeowner has offered to pay the expense, making it a connection to the property and no longer requiring Council approval. Councilor Gentile motioned No Action necessary on the item which carried unanimously.

The Committee adjourned at 10:53 pm.

Respectfully submitted,
Deborah J. Crossley, Chair

Moving Beyond Solid Waste to Sustainable Materials Management

Progress Summary for Public Facilities Committee

November 9, 2016

What's in it?

- 5 sections
  - Introduction & Background
  - Current Practices & Policies
  - Proposed Solutions for Improvement
  - Education & Outreach
  - Looking Forward

What is it?

- Resolution passed in May 2016 requesting the development of a long term solid waste and recycling plan
- Framework report is information gathering to develop a long term plan
- Purpose is to describe current practices, provide proposed solutions for improvement and propose long term goals

Introduction

- Define sustainable materials management
- Explain the waste management hierarchy
- Summary of MA Solid Waste Master Plan
- Brief history of Newton's practices
- Zero waste definition
- Vision and goal setting

Current Practices & Policies

- Residential materials management
  - Curbside services
  - Resource Recovery Center
- City generated materials management
  - Municipal buildings
  - City operations
  - Public spaces
- Best practices comparison

Education & Outreach

- Methods
  - Print materials
  - Social media
  - Local media (NewTV, local radio, Newton Tab)
  - Community engagement
  - Technology services

Proposed Solutions for Improvement

- Waste Sources
  - Residential: curbside, multi-family, recovery center
  - Municipal: buildings, operations, public spaces
- Solution categories
  - Waste reduction
  - Cost reduction
  - Increase recovery

Looking Forward

- Improvements in technology
- Newton Leads 2040 Initiative

Proposed Next Steps

- Framework report will be released late Dec
- Seek feedback from stakeholders
  - City Council
  - Solid Waste Commission
  - Local organizations
- Present framework to Public Facilities Committee in February
- Begin long term plan development Spring 2017

Newton Environmental Affairs Division

Thank you

Questions?

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Newton Environmental Affairs Division

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To: Public Facilities Committee
From: Alan Mandl
Date: November 4, 2016
Re: Wireless Communications Facilities in Public Ways

Attached are 3 documents that address your questions about municipal authority over the placement of wireless communications facilities in Public Ways:

1. An Executive Summary of municipal grant of location authority
2. A more detailed memo on municipal grant of location authority
3. A summary of law that applies when a party submits a request to attach covered by the federal "eligible facilities request" statute and FCC regulations

A significant amount of work has been done to draft grant of location and eligible facilities request standards, application instructions and application forms. These documents will need to be reviewed with other departments as well as you.

Attachments

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To: Public Facilities Committee
From: Alan Mandl
Date: November 1, 2016
Re: Executive Summary of City Council authority to regulate (1) wireless attachments to utility poles located in public ways and (2) construction of new poles dedicated to the provision of wireless communications services

The Public Facilities Committee requested clarification of City Council authority to regulate (1) wireless attachments to utility poles located in public ways and (2) construction of new poles dedicated to the provision of wireless communications services. This Executive Summary addresses these questions. A more detailed "Summary of Grant of Location Requirements for Wireless Communications Facilities" is attached.

- Under state law, municipalities are limited in how they may regulate the use of public ways by providers of wireless communications services. A municipality may regulate the location and height and impose use conditions in order to avoid undue interference with the public use of public ways.

- The exercise of municipal authority is limited by federal laws. There can be (1) no unreasonable discrimination between functionally equivalent services; (2) no effective prohibition of the provision of wireless service; and (3) no regulation based on RF emissions that exceed compliance with FCC standards.

- If a utility pole has a pre-existing wireless attachment, it is considered a "base station" under federal law. In this instance, a municipality is limited to reviewing whether proposed wireless attachments constitute the collocation of "transmission equipment" which does not "substantially change" the base station under FCC regulations. If the application does not qualify, it can be resubmitted and considered under the above state and federal standards.

City Council Authority Under State Law G.L.c.166, §§21, 22

Standard	Examples
Location of the attachments	-avoid placement directly in front of a residence; compliance with ADA requirements regarding use of sidewalks; -address safety concerns regarding the use of public ways by a motorist or pedestrian
Height of the attachments	visual concerns; -compliance with industry safety standards; set standards for residential vs commercial areas; -compatibility with existing poles
Clearance above ground	-safety; set out of reach of the public; -coordination with tree pruning minimums; -compliance with ADA requirements regarding use of sidewalks; -address safety concerns such as endangering the use of public ways by a motorist or pedestrian -assure emergency vehicle access
Aesthetics	-regulate location on scenic roads or near historic sites; -regulate a village entry point; -require compatibility with city master plans regarding design standards, public use of streets, color, shape, dimensions of facilities; -number of attachments on a single pole; -new pole compatibility with existing pole height and spacing; limiting new poles if existing poles are available
Radio frequency emissions	-require continuing compliance with FCC standards
Noise and vibration	-apply noise and vibration standards and require suppression capability
Lighting	-no lighting annoying to abutters, pedestrians or motorists
Existing City Code	-e.g., pole height, indemnification, performance bond
Scenic roads	-relates to location, height, number of attachments, appearance
Historical areas	-relates to location, height, number of attachments, appearance

Federal Limitations 47 U.S.C. §§332(c)(7), 1455

Even if a City acts properly under state law, its action would violate federal law if it is:

A. Unreasonable discrimination among functionally equivalent services
B. Effective prohibition on the provision of personal wireless services
C. Regulation of radio frequency emissions that comply with FCC standards
D. Failure to base a decision on substantial evidence; formal decision requirements not met
E. Unreasonable delay in acting on the application (longer than 90 days[1] is presumed to be unreasonable, but if sued, the city can try to rebut the presumption in federal court; city and applicant can enter into a written tolling agreement to allow more time for a decision)
F. Once a utility pole has a wireless attachment, it becomes a "base station"

1. State law standards do not apply; need for separate application form and instructions
2. The city may only review the application to determine whether the proposed modifications (a) involve a collocation of new transmission equipment, removal of transmission equipment or replacement of transmission equipment ; and (b) do not substantially change the physical dimensions of the "base station"[2]
3. A decision must be issued within 60 days after the filing of the application; unless a tolling agreement, a delay results in the application being deemed permitted by operation of law
4. If application is properly denied, the applicant may file a new grant of location petition, which would be subject to review under G.L.c.166, §22.

City-owned Property

As a landlord or licensor, the City may require conditions for attachments to city-owned poles or streetlights in the public ways.

[1] The applicability of the 90 vs 150 day "shot clock" interval is discussed in the attached "Summary of Grant of Location Requirements for Wireless Communications Facilities."

[2] These terms are defined by 47 U.S.C. §1455 or FCC orders and regulations. The definitions are provided in the attached "Summary of Grant of Location Requirements for Wireless Communications Facilities."

ATTACHMENT 1

SUMMARY OF GRANT OF LOCATION REQUIREMENTS FOR WIRELESS COMMUNICATIONS FACILITIES

ELIGIBLE FACILITIES REQUESTS TO MODIFY AN EXISTING WIRELESS BASE STATION

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. 47 U.S.C. §1455.

The FCC has adopted regulations to govern state and local review of a subset of wireless facilities that meet the definition of "eligible facilities requests" under this federal statute, the federal Spectrum Act of 2012 *These federal laws apply to utility poles that have a pre-existing wireless attachment (a "base station").*

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.

Transmission equipment includes antennas and other equipment associated with and necessary to their operation, including radio transceivers, antennas, coaxial or fiber-optic cable, and regular and back-up power supply. The term includes wireless equipment associated with wireless communications, 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. 47 CFR§1.40001(b)(8).

Base station includes structures other than towers that support or house an antenna, transceiver, or other associated equipment that constitutes part of a "base station" at the time the relevant application is filed with state or local authorities, even if the structure was not built for the sole or primary purpose of providing such support, <u>but does not include structures that do not at that time support or house base station components.</u> 47 CFR§1.40001(b)(1)

The modifications must involve "collocation" of new "transmission equipment," removal of "transmission equipment," or replacement of "transmission equipment" "Collocation" means 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. " 47 CFR §1.40001(b)(2).

Substantial change- A modification "substantially changes" the physical dimensions of a base station (as measured from the dimensions inclusive of any modifications approved prior to the passage of the Spectrum Act) if it meets any of the following criteria:

a. for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
b. for all base stations, it protrudes from the edge of the structure more than 6 feet;
c. It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed 4 cabinets;
d. It entails any excavation or deployment outside the current site of the base station;
e. It would defeat the existing concealment elements of the base station; or
f. It does not comply with conditions associated with the prior approval of the base station unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds. 47 CFR§1.40001(b)(7)

Limited City Review

Scope limited-The City must determine whether an application is an "eligible facilities request"… "for a modification of an existing wireless… base station" and whether the proposed modification would "substantially change the physical dimensions of such … base station." This is the only substantive review that the City is allowed to conduct. If the application does not qualify, it can be treated in accordance with the grant of location standards and 47 U.S.C. §332(c)(7) limitations on local permitting authority. *The City will need to decide how to address a rejected "eligible facilities request"* (e.g., requiring a separate, new application in accordance with grant of location guidelines)

Application requirements limited- A state or local government may require applicants to provide documentation or information "only to the extent reasonably related to determining whether the request meets the requirements of this section." 47 CFR§1.40001(c)(1). 2014 FCC *Report and Order,* ¶¶ 211-221.

Codes of general applicability apply- States and localities may continue to enforce and condition approval upon compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety. *Report and Order,* ¶¶ 211-221.

Deadline for a decision Within 60 days from the date of filing, accounting for tolling, a state or local government shall approve an application covered by Section 6409(a) unless it determines that the application is not covered by Section 6409(a). 47 CFR§1.40001(c)(2). *There is no rebuttable presumption on a time frame for a decision -this is a firm deadline.* However, the running of the 60 day period may be tolled by mutual agreement or upon notice from the City that an application is incomplete, such notice provided in accordance with the same deadlines

and requirements applicable under Section 332(c)(7), but not by a moratorium on the review of applications. In addition, a second or subsequent notice of incompletion may not specific missing documents or information that were not delineated in the original notice of incompleteness. 47 CFR§1.40001(c)(3).

Failure to act results in approval by operation of law- An application filed under Section 6409(a) is deemed granted if a state or local government fails to act on it within the requisite time period. "The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted." 47 CFR§1.40001(c)(4).

Disputes- Parties may bring disputes-including disputes related to application denials and deemed grants- in any court of competent jurisdiction (but not at the FCC). 47 CFR§1.40001(c)(5). *Report and Order* at ¶¶226-236. The FCC will handle complaints based upon a locality denying a permit based upon radio frequency emissions.

Section 6409(a) applies only to state and local governments acting in their role as land use regulators and does not apply to these governments acting in their proprietary capacities

The FCC ruled that …"Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities." It further found, "Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property…" and determined that Section 6409(a) does not apply in these circumstances.

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To: Public Facilities Committee
From: Alan Mandl
Date: November 1, 2016
Re: Summary of Grant of Location Procedures and Scope of City Council Authority Regarding the Placement of Wireless Communications Facilities in Public Ways

This memo covers (1) grant of location procedures under state and federal law; and (2) the scope of municipal authority to regulate the deployment of wireless communications facilities in public ways under state and federal law.[1]

[1] *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720-721 (9th Cir. 2009) described the competing demands for high capacity, ubiquitous wireless service and protection of the public ways by reference to Camillo Sitte, City Planning According to Artistic Principles, 110 (Rudolph Wittkower ed., Random House 1965 (1889):

> The tension between technological advancement and community aesthetics is nothing new. In an 1889 book that would become a classic in city planning literature, Vienna's Camillo Sitte lamented:
>
> > [T]here still remains the question as to whether it is really necessary to purchase these [technological] advantages at a tremendous price of abandoning all artistic beauty in the layout of cities. The innate conflict between the picturesque and the practical cannot be eliminated merely by talking about it; it will always be present as something intrinsic to the very nature

GRANT OF LOCATION PROCEDURES[2]

Who may petition: "A company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise…may, under this chapter, construct lines for such transmission upon, along, under and across the public ways…; but such company shall not incommode the public use of public ways…." General Laws Chapter 166, Section 21.
Wireless service providers are authorized under General Laws Chapter 166, Section 25A (the pole attachment statute) to attach to utility poles. Such rights are also recognized under federal pole attachment law. Wireless service providers also have been recognized as "public service corporations" entitled to seek exemptions from zoning by-laws under General Laws Chapter 40A, Section 3. *Dispatch Communications of New England d/b/a Nextel Communications, Inc.*, D.P.U./D.T.E. 95-59B/95-80/95-112/96-13 (Jan. 8, 1998). It is highly probable that wireless service providers are authorized to file petitions under Chapter 166, Section 21.
Distributed antenna systems and small cell facilities (including those of a neutral host) that are or will be used for the provision of personal wireless facilities, are likely authorized to file grant of location petitions.

Pre-petition guidelines: Under federal law, **t**he City must have a code provision, ordinance, application instruction or otherwise publicly-stated procedures that require the information to be submitted as part of the application. There must be objective standards in place for the review of the petition and the reasons for any decision must be based on these standards. The current City Code's grant of location section has very few specifics on required information and review standards.

Written petition: A written petition for a grant of location is required under General Laws Chapter 166, Section 22. After facilities are constructed, a company may petition for an "…increase in the number of wires or cables, and direct an alteration in the location of the poles…or in the height of the wires or cables." This latter petition is not required to go through a public notice and hearing process, although the City Council may elect to conduct a public hearing after notice. *It is recommended that the City adopt an application form and guidelines for the submission and review of WCF grant of location filings.*

Filing the petition: The City Code provides how grant of location petitions are handled. The Commissioner of Public Works reviews the petition and the plans of the applicant before they are submitted to the City Council. Any comments by the Commissioner must be provided within

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of things.

[2] **Eligible facilities requests:** A subset of collocation is covered by a separate fast track procedure under federal law. 47 U.S.C. §1455 and related FCC regulations. Since the substantive and procedural standards for eligible facilities requests differ from those that apply to first time wireless attachments to utility poles, they are addressed separately in Attachment 1 to this memo. These applications may be reviewed only to the extent necessary to determine whether the eligible facilities would "substantially change" the existing structure (utility pole), as defined by the FCC.

30 days and included in the application submitted to the City Council. The contents of the petition and the requirements for a plan should be reviewed with the Commissioner of Public Works. The current City Code does not address wireless attachments to utility poles (nor does Chapter 166, Section 22). It also suggests that no plan is required if wires are to be attached to a pole that already has wires lawfully attached to it.

Federal Procedural Requirements-Establishment of the filing date and prompt review of the filing for completeness are critical in light of the following federal requirements:

> **Federal "shot clock" for wireless service facilities applications-90 days to issue a decision unless a longer time frame is agreed to by the applicant or the City can demonstrate that a period longer than 90 days is not unreasonable** A local government must "…act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government…, taking into account the nature and scope of such request." 47 U.S.C. §332(c)(7)(B)(ii). The FCC has created rebuttable presumptions of unreasonable delay of 90 days for "collocation" and 150 days for other requests. A failure to act within the applicable interval enables the applicant to file a complaint in federal court. A municipality is afforded an opportunity to rebut the presumption of unreasonable delay. The municipality must produce evidence of the reasonableness of its delay under the circumstances of the particular application.
>
> **DAS or Small Cell Facilities Applications are Covered by the FCC's Shot Clock Requirements-** The FCC has clarified that applications for DAS or small cell facilities, including third party facilities such as neutral host deployments, that are or will be used for the provision of personal wireless services, are subject to the shot clock standards and the presumptively reasonable timeframes established by the FCC. 2014 *Report and Order* at ¶248.
>
> **Collocation defined:** For shot clock purposes, an application is a request for collocation if it seeks authorization to place an antenna on an existing structure and does not involve a "substantial increase in…size," as that phrase is defined in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("NPA"). 2014 *Report and Order* at ¶273. The NPA was amended on August 3, 2016 and defines "collocation:" as " …the mounting or installation of an antenna[3] on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure."
>
> The amended NPA sets forth detailed guidelines for the collocation of small wireless antennas and associated equipment on non-tower structures outside of and within historic districts. Outside of historic districts, there are volume limits on each individual antenna of 3 cubic feet and for all antennas, 6 cubic feet overall. Collocations of 21 cubic feet for all other wireless equipment on a utility pole that can support fewer

[3] "Antenna" covers cabling, power sources, equipment and cabinets under the NPA definition.

than 3 providers. 28 cubic feet for pole collocations that can support at least 3 providers. Separate standards apply to the collocation of small or minimally visible wireless antennas and associated equipment in historic districts. These guidelines were adopted for purposes of determining when Section 106 historic review is required under federal law.

It is arguable that if an application involves wireless pole attachments that exceed the dimensions specified in the NPA that the application should be subject to the 150 day shot clock and not the 90 day collocation shot clock. Dimensional information would need to be requested and verified.

Shot clock starts when application is filed: The shot clock begins to run from the filing date of the application

Review of application for completeness within 30 days: The running of the interval may be tolled upon timely and specific notice by the City to the applicant that its application is incomplete; notice must be given within 30 days of the application filing date and must specifically identify: all missing information; the code provision, ordinance, application instruction or otherwise publicly-stated procedures that require the information to be submitted. *The City cannot raise an application incompleteness issue that was not brought to the attention of the applicant within 30 days after the filing of its application.*

Continued incompleteness: The City may reach a subsequent determination of incompleteness of the application "based solely upon the applicant's failure to supply specific information that was requested within the first 30 days" after the filing of the application.

Resumption of shot clock: the shot clock begins to run again when the applicant makes its first supplemental filing; however, the shot clock may be tolled again if the City notifies the applicant within 10 days of the supplemental filing, specifically identifying the information that the applicant failed to provide in response to the initial request to supplement.

Moratorium: A local moratorium does not toll the shot clock

Shot clock tolling agreements: The applicant and the City may negotiate a formal agreement to extend the applicable shot clock presumption ("tolling agreement").

Public hearing process: Notice of a public hearing on the petition must be posted and mailed to abutters at least 7 days prior to the public hearing per MA General Laws Chapter 166, Section 22.

Formal public hearing record required: A formal record of the public hearing should be developed (the application, hearing transcript or tape, all documents submitted during the public hearing). MA General Laws Chapter 166, Section 22; 47 U.S.C. §332(c)(7)(B)(iii)(as to personal wireless service facilities). Grant of location hearings have been characterized as adjudicatory

hearings. *Boston Edison Co. v. Bd. of Selectmen of Concord*, 355 Mass. 79, 83-84 (1968).

Written decision and statement of reasons: A written decision should be issued, accompanied by a written statement of reasons for the basis of the decision and supported by substantial evidence. 47 U.S.C. §332(c)(7)(B)(iii). (as to personal wireless service facilities). *Boston Edison Co. v. Bd. of Selectmen of Concord*, 355 Mass. 79, 91-93 (1968). 47 U.S.C. §332(c)(7)(B)(iii).

Burdens on Applicant: The burden is on the petitioner to demonstrate that its proposed facilities would not incommode the public use of the public ways. City Council action cannot be arbitrary and unreasonable *Boston Edison Co. v. Bd. of Selectmen of Concord*, 355 Mass. 79, 91-92 (1968) (also, City Council action is subject to limitations under federal law). *Applicants may present evidence to support an appeal on the ground that a denial violates one or more limitations on municipal authority.*[4]

SCOPE OF GRANT OF LOCATION AUTHORITY

Scope of authority under state law

Action by the City Council must come within the scope of its authority under Massachusetts law and the City Code. *Boston Edison Co .v. Town of Sudbury*, 356 Mass. 406, 423 (1969) and cases cited.

By statute: Under Chapter 166, Section 22, a municipality may specify:

- Location of poles and wires
- The kinds of poles that may be used
- The number of wires and cables that may be attached to a pole
- The height of the cables and wires

These terms can be read to cover wireless antennas and related equipment. Pole owners have internal construction standards that apply to WCF attachments to their poles. Also, the current edition of the National Electrical Safety Code contains standards that apply to WCF

[4] More research is needed on the question whether the applicant can appeal from a denial on federal grounds without having presented evidence on unreasonable discrimination or on an effective prohibition of personal wireless services. The federal district court makes the determinations on these issues and may take new evidence not in the administrative record in doing so. Courts have ruled that the local authority should base its decision on local criteria. However, some courts have suggested that the local authority should take evidence and make findings on these federal standards. In some cases, communities have "safety valve" rules that allow it to grant exceptions to specific requirements if a failure to do some would have the effect of prohibiting the provision of personal wireless services. A safety valve provision would enable the applicant to request an exception and for the local authority to grant the request upon a proper showing.

attachments. The Eversource standards have been requested and it has been recommended that the City purchase the 2017 NESC, released in August 2016.

Case law: In *Boston Edison Co. v. Bd. of Selectmen of Concord*, 355 Mass. 79, 90-91 (1968), the Supreme Judicial Court found that a local board could deny a grant of location for facilities that would incommode the public use of a public way. It also concluded that even if the proposed facilities did not incommode the public use of the public way, a denial would be upheld as long as the denial were not arbitrary nor capricious. This decision suggests that a local board may consider factors that fall within its oversight of the use of public ways, but which do not incommode the public use of the public way. It appears to stand for the proposition that a local board can exercise its authority under Chapter 166, Section 22 without having to base its action upon the "incommode" standard.

Meaning of Incommode: "Incommode" involves more than a physical impediment to the travel of cars or pedestrians. *Boston Edison v. Bd. of Selectmen of Concord,* 355 Mass. 79, 89-91(1968). Aesthetic considerations are one factor that may be considered. *Boston Edison Co. v. Bd. of Selectmen of Concord*, 355 Mass. 79, 92-93 (1968). A "high level of annoyance" among residents, based on the public hearing record in that case, provided an adequate basis for the local board to conclude that the proposed facilities would incommode the public.

More recently, courts in other jurisdictions where the "incommode" standard applies also have concluded that it is within the authority of the community under state law to deny proposed wireless attachments to utility poles at a location in public ways based on aesthetic considerations. *See., e.g., Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates,* 583 F.3d 716, 725 (9th Cir. 2009) ("…[A] company can 'access' a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter.").

The *City of Palos Verdes Estates* decision contains helpful discussion. One example is its noting that "public use" of a public way is not limited to travel:

> "It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions." 583 F.3d at 723.

Compare, T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 994-995 ((9th Cir. 2009) (factors such as height of a tower, proximity to residential structures, nature of uses of nearby properties are legitimate concerns for a locality).

Determinations of this nature are fact-specific. For example, proposed wireless facilities may not raise any aesthetic concerns if they are located far from a residence or an entrance to a village. The height and dimensions of proposed facilities may have different impacts on the use of public ways based on their respective locations.

Illustrative Factors

The Public Facilities Committee has requested advice on what types of conditions and limitations might be placed upon the construction of wireless communications facilities in public ways. Specific conditions and limitations would (1) need to be authorized under G.L.c. 166, §22; (2) not violate any federal limitation of local permitting; (3) need to be fully supported by a hearing record; (4) need to be issued in writing based on a written hearing record; and (5) need to be ordered within a reasonable time. Specific limitations and requirements should have a reasonable relationship to (1) specific provisions in Chapter 166, Section 22 (location, number and height of attachments); and (2) the use and enjoyment of public ways, management of public ways, and public safety and public welfare considerations.

An illustrative list of conditions and limitations, drawn primarily from a review of the Village of Evergreen Park IL Ordinance No. 14-2016 I(April 2016) Regulations and Standards and similar ordinances, is provided for discussion. They are representative of a small sample of local ordinances. As of this writing, we have not verified whether the municipalities apply these types conditions and limitations under an "incommode" standard or under state laws similar to G.L.c.166, §22.

(1) Number limitation-unless authorized, not more than 1 personal wireless telecommunications service antenna or antenna may be located on a single utility pole

(2) Separation and setback requirements- attachments to a utility pole no closer than 100 feet to a residential building and no closer than 1000 feet from any other personal wireless services antenna; a lesser setback may be allowed if the applicant establishes that a lesser setback is necessary to close a significant gap in the applicant's personal telecommunications service and the proposed facility is the least intrusive means to do so

(3) Co-location- unless authorized based on good cause shown, only 1 personal wireless service antenna allowed on each pole for the use of a single wireless services operator

(4) Municipally owned infrastructure – no attachments to streetlights or traffic lights unless authorized by the mayor

(5) New monopole- not permitted except by special permit

(6) Attachments to utility poles-limitations-

-surface areas of antenna can't exceed 7 feet, no single dimension can exceed 7 feet, whip or omnidirectional antenna can't exceed 7 feet, not including any pole extension
-volume of all above ground wireless equipment can't exceed 15 cubic feet wireless equipment shall be located wherever possible at height no lower than 8 feet above grade
-Height- antenna shall not be more than 35 feet above ground level. The highest

point of the support structure and in combination with antenna extension shall not exceed 35 feet
-Color- should blend with the pole; wiring must be covered with an appropriate cover or cable shield
-Antenna panel covering- radome, cap or other antenna panel covering or shield blending with color of the pole
-Wiring and cabling- per then current electrical code; can't interfere with wiring or cabling of cable TV, other video, electric and telephone providers
-Grounding- per then current electrical code
-Guy wires- not to be used unless the existing support structure already has them
-Pole extensions- specifies materials capable of withstanding wind forces and ice loads in accordance with TIA/EIA Section 222-G standards
-Structural integrity- related to wind and ice per above standards without use of guy wire
-Signage- only those required by federal law or regulations
-Screening- when required
-Permission to use utility pole or alternative antenna structure-approval of pole owner must be submitted; approval must include a guarantee to cause removal of abandoned equipment
-Licenses and permits- all required approvals must be provided by applicant

Other provisions include variances, abandonment and removal requirements, application fees, insurance, performance bonds and indemnity.

Please note that we have not found case law that determines the propriety of these types of limitations and requirements in light of federal standards discussed below.

FEDERAL LIMITATIONS ON MUNICIPAL GRANT OF LOCATION AUTHORITY

Assuming that the City Council has acted within the scope of its authority under Massachusetts law, the City Council's regulations, requirements and decisions are subject to federal limitations. For example, in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates,* 583 F.3d 716,725 (9th Cir. 2009), the Court stated that a city that invokes aesthetics as a basis for a public way permit denial is required to produce substantial evidence to support its decision, and "even if it makes that showing, its decision is nevertheless invalid if it operates as a prohibition on the provision of wireless service in violation of 47 U.S.C. §332(c)(7)(B)(i)(II)." *See also, Industrial Tower and Wireless, LLC v. Haddad,* 109 F. Supp. 3d 284 (D. Mass. 2015) at 296-297. Municipal regulation of wireless use of public ways is subject to 47 U.S.C. §332(c)(7) even though not a zoning permit matter. *GTE Mobilenet of Cal. Ltd. Partnership v. City and County of San Francisco,* 440 F.Supp.2d 1097, 101-1102 (N.D. CA 2006).

- **No unreasonable discrimination among functionally equivalent services-**"The regulation of the placement, construction, and modification of personal wireless service facilities by any…local government…(I) shall not unreasonably discriminate among providers of functionally equivalent services; 47 U.S.C. §332(c)(7)(B)(i).

A municipality can *reasonably* discriminate as between functionally equivalent services that have different aesthetic or safety impacts or different structure, placement or cumulative impact. *Nextel Communications of Mid-Atlantic, Inc. v. City of Cambridge,* 246 F.Supp. 118, 125 (D. Mass. 2003). *Compare, Second Generation Props. L.P. v. Town of Pelham,* 313 F.3d 620, 634 (1st Cir. 2002).

- **No effective prohibition of the provision of personal wireless services-** and "The regulation of the placement, construction, and modification of personal wireless service facilities by any…local government… (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. §332(c)(7)(B)(i).

  The "effective prohibition" standard inquiry involves a 2 part analysis requiring (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations. *Industrial Tower and Wireless, LLC v. Haddad,* 109 F.3d 284 (D.Mass. 2015) at 296-297.

  "[S]ignificant gap" determinations are extremely fact- specific inquiries that defy any bright-line legal rule." *MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d 715, 733 (9th Cir. 2005). The relevant service gap must be truly significant-the TCA does not guarantee wireless service providers coverage free of small dead spots. *City of Palos Verdes Estates,* 583 F.3d at 726-727 (citing the *MetroPCS* decision and discussing context-specific factors considered in other court decisions). Resident comments on the general availability of the applicant's service and drive test results may illustrate that the applicant's existing network is " …at the very least, functional." *Id.* at 728.

  In deciding whether a coverage gap is "significant" a court may consider (1) the physical size of the gap; (2) the area in which there is a gap; (3) the number of users the gap affects; (4) whether all of the carrier's users in that area are similarly affected by the gaps. Percentages of unsuccessful calls or inadequate service during calls in the gap area may be considered. *Industrial Tower and Wireless, LLC v. Haddad,* 109 F.3d 284 (D.Mass. 2015) at 296-297,301-302. *Omnipoint Holdings, Inc. v. City of Cranston,* 586 F.3d 38,49 (1st Cir. 2009).

  The applicant has the burden of showing that its plan is the only feasible plan based on an investigation of the possibility of other viable alternatives. *Id. Green Mountain Realty Corp. v. Leonard,* 750 F.3d 30, 40 (1st Cir. 2014). If the applicant has produced this type of evidence, the municipality must be prepared to submit its own evidence of potential alternatives in order to support a denial. *Industrial Communications & Electronics, Inc. v. O'Rourke,* 582 F.Supp.2d 103(D. Mass. 2008)(court review of competing sites).

  The fact that one service provider covers an area does not support a denial of the application of another service provider that does have a significant coverage gap.

Whether or not an effective prohibition has occurred depends on each case's unique facts and circumstances and there can be no general rule classifying what is an effective prohibition. Whether local action constitutes an effective prohibition is decided by the federal district court, which may take additional evidence in making a determination. *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 38-40 (1st Cir. 2014). However, our recommendation is that the grant of location application and public hearing process allow (1) an applicant to claim that denial of the location, limits on the number of attachments and height of attachment limitations, for example, would be preempted by federal law based on unreasonable discrimination or an effective prohibition of the provision of personal wireless service and (2) the granting of exemptions from one or more requirements in order to avoid a violation of federal limitations.

Application of the "effective prohibition" standard to pole attachments- The tests for "effective prohibition" discussed above were developed in the context of cell towers, not pole attachments. Small cells might not address a "significant gap in wireless service coverage" as that term has evolved in court cases. Propagation studies, drive by tests and data on dropped calls are used to illustrate the presence of a coverage gap and whether it is significant.

Given heavy demand for wireless services, users may exhaust the capacity of a portion of a wireless service provider's network, leading to losses in speed and other service-affecting problems. In this latter situation, a wireless service provider may propose to build small cells to provide increased capacity in a small geographic area and free up capacity at a larger macro cell that is now capacity deficient.

To date, I have not discovered court decisions on the application of the "effective prohibition" standard to a situation involving capacity-relieving facilities. A coverage gap differs from a capacity deficiency, although wireless providers have stated that users would have the same experience in both instances.

- **No regulation based on radio frequency emissions that comply with FCC regulations-** "No…local government…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 Commission's [FCC's] regulations concerning such emissions." 47 U.S.C. §332 (c)(7)(B)(iv).

  It is not uncommon for local boards to require a showing that the proposed facilities comply with FCC rules and ongoing testing to establish continuing compliance. The City should determine how often compliance filings are made with the FCC and if they cover pole by pole facilities. Also, it should be determined whether the FCC reviews the combined impact of wireless pole attachments located in a small geographic area.

GUIDELINES FOR DECISION-MAKING

Decisions Supported by Substantial Evidence

There are dozens of federal court decisions that review municipal denials of wireless facilities permit applications. Most of them involve towers and not wireless facilities located in public ways. These cases are very fact-specific. For extensive discussion of the substantial evidence standard, *see* 72 ALR Fed. 67 (2013) (discussing denials based on a proposed facility's impact on community, neighbors or nearby landowners) and 73 ALR Fed. 49(2013) (discussing denials or restrictions relating to need for facility or facility design or location).

In order to be supported by substantial evidence, the reasons for a decision must be based on the objective criteria in existence-governing bodies cannot arbitrarily invent new criteria. Reasons for denying an application must be limited to reasons stated by voting members during the Board meeting, memorialized in meeting minutes (there should be a formal order with statement of reasons). Unscientific, anecdotal testimony from a small group of residents may not be sufficient to raise a genuine issue of fact as to the existence of a coverage gap (the applicant presented extensive scientific evidence in support of a significant coverage gap). *Industrial Tower and Wireless LLC v. Haddad,* 109 F.Supp.3d 284 (D. Mass.2015).

Retention of Consultant

In cases involving towers, it is not uncommon for the municipality to retain a consultant to evaluate the application and present evidence during public hearings. While it is not suggested that every grant of location application requires retention of a consultant, serious consideration should be given to doing so on a case by case basis. A consultant should be considered to advise on applications based on the need for additional capacity and applications for new poles (in excess of 40 feet).

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

TO: Deborah Crossley, City Councilor
Leonard Gentile, City Councilor

FROM: Donnalyn B. Lynch Kahn, City Solicitor DBLK
Alan D. Mandl, Assistant City Solicitor ADM

SUBJECT: Allocation of Net Metering Credits to Low Income Residents

DATE: November 18, 2016

Background

Recently, the Executive Office announced plans for a low income solar share program (the "solar share program"). Under the solar share program as presently planned, the City would work with ABCD, a non-profit corporation, to allocate to low income residents of Newton with Eversource electric accounts a portion of net metering credits produced by a 599kw solar canopy located at an Elliot Street DPW parking area. All of the residents eligible for the solar share program have been income–qualified by ABCD to receive service under the Eversource R- 2 rate. According to ABCD, up to 1200 Newton residents are eligible and would receive an allocation of net metering credits unless they opt out of the solar share program.[1]

Question Presented

Councilors Crosley and Gentile have asked "whether the Mayor may unilaterally redirect solar energy credits that would otherwise reduce municipal electricity costs, to low income Newton residents for purposes of reducing the electricity bills of individual Newton residents."

Answer and Discussion

Yes. Because a net metering credit is not "money" under municipal finance law, a City Council appropriation is not required in order for the City to allocate a portion of the Elliot Street

[1] The amount of net metering credits to be allocated under the solar share program is expected to be a small fraction of the net metering credits expected under the entire Phase 2 solar facilities, which involve multiple municipal locations. Because of the small size of the Elliot Street solar canopy, Eversource is required to provide net metering credits and does not have the option of making cash payments in lieu of net metering credits. G.L.c.164, §139(b)(1); Eversource Net Metering Tariff, M.D.P.U. 163C, Section 1.07(5).

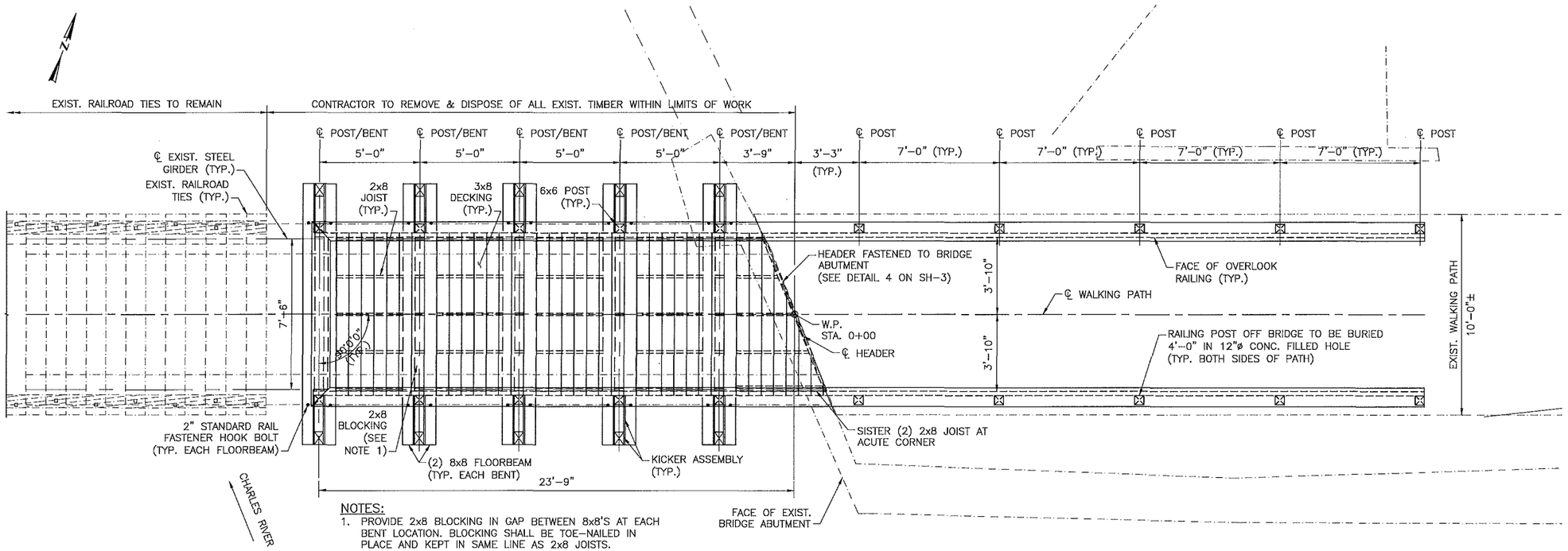
solar canopy net metering credits to low income residents of Newton through the solar share program. The allocation of net metering credits to low income residents is consistent with other City programs that benefit its low income residents. This analysis was confirmed through a telephone conversation between Kathleen Colleary, Bureau Chief of the Department of Revenue Bureau of Municipal Finance Law, and the City Solicitor, Deputy City Solicitor Ouida Young and Comptroller David Wilkinson.

The City Council has an opportunity to review the allocation of net metering credits among various department electric accounts and to low income residents as part of the budget process. Electricity expenses of the various departments are included in budgets submitted to the City Council for review and approval. During the budget review process, the City Council can determine which department electric accounts have allocated net metering credits to low income residents (e.g., DPW) and can exercise fiscal oversight of these practices through the budget process.

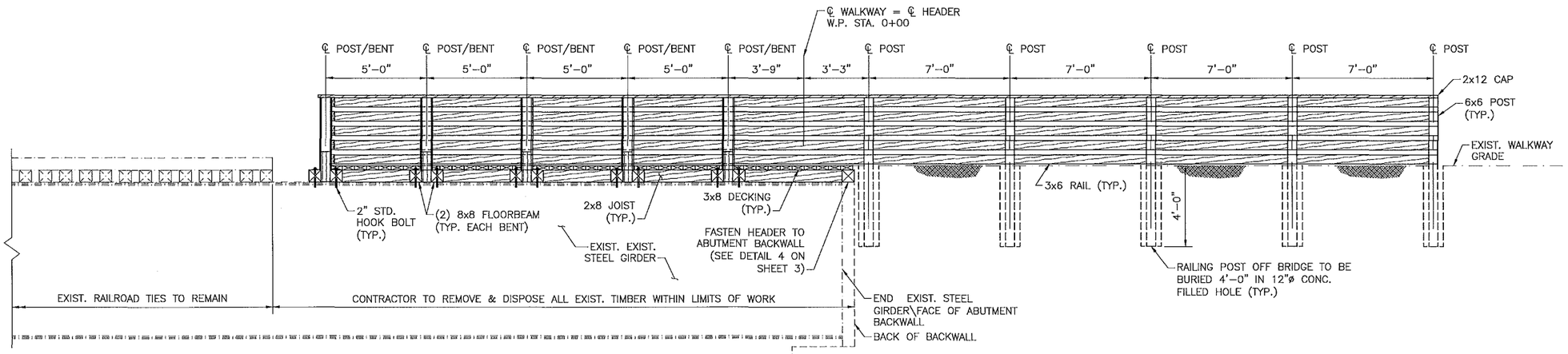
Our conclusion is based on a reading of state statutes that cover the municipal finance process. Under G.L.c.40, §5, "money" is appropriated. Similarly, the use and disposition of municipal funds, as described under state statutes, involves the receipt of moneys. G.L.c.44, §§53 (moneys received by departments paid into city treasury), 53E (department reports on change in cash balances submitted to Mayor, City Council and Director of Bureau of Accounts), 53E1/2 (revolving funds accounted for separately from "all other moneys"). "Moneys" received by a municipal department are paid on receipt by the department to the City treasury. G.L. c. 44, §53.

Net metering credits are not "money" as that term is commonly understood. For example, "Money" is defined in the Massachusetts Uniform Commercial Code, G.L.c.106, §1-201(24) as: "a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement of two or more countries." A net metering credit appears as a line item credit on the Eversource electric bill. It cannot be deposited in the City treasury, like "money" received by a City department.

At the request of City Councilor Crossley, the Law Department raised with Kathleen Colleary, Bureau Chief of the Department of Revenue Bureau of Municipal Finance Law, whether a special act is needed in order for the allocation of a portion of net metering credits to low income residents. Special acts have been used to direct money received by some municipalities from solar arrays to special purpose funds which otherwise would have gone into a general fund. These situations are distinguishable from the allocation of net metering credits, which does not involve the receipt of money from Eversource.



OBSERVATION DECK PLAN
SCALE: 3/8"=1'-0"



OBSERVATION DECK ELEVATION
SCALE: 3/8"=1'-0"

NUMBER	DATE	MADE BY	CHECKED BY	DESCRIPTION

REVISIONS

DRAWN BY: TMW
DESIGNED BY: TMW
CHECKED BY: CJ

PE STAMP:

PREPARED BY:
BETA
www.BETA-Inc.com

SCALE: AS SHOWN

UNLESS OTHERWISE NOTED OR CHANGED BY REPRODUCTION

City of Newton, Massachusetts
Greenway Walking Corridor Observation Deck
OBSERVATION DECK PLAN AND ELEVATION

BETA JOB No. 5369
PLOT DATE: 7/29/2016 10:35 AM
ISSUE DATE: 6/3/2016 11:58 AM
SHEET No. 1
File: Sheet1_NotesPlanElevSect.dwg

O:\5300\5369 - NEWTON - GREENWAY OBSERVATION DECK\DRAWING FILES\SHEET1_NOTESPLANELEVSECT.DWG

DESIGN DATA:

- 2009 AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS (AASHTO) LRFD GUIDE SPECIFICATION FOR THE DESIGN OF PEDESTRIAN BRIDGES, INCLUDING THE 2015 INTERIM REVISIONS
- 2009 INTERNATIONAL BUILDING CODE (IBC)
- MASSACHUSETTS AMENDMENTS TO THE 2009 INTERNATIONAL BUILDING CODE (8TH EDITION)
- 2012 NATIONAL DESIGN SPECIFICATIONS (NDS) FOR WOOD CONSTRUCTION

DESIGN LOADING:

90 PSF PEDESTRIAN LIVE LOAD.

RAIL AND POST LOADING CONSISTS OF 50 PLF OR 200 POUNDS, WHICHEVER GOVERNS, DISTRIBUTED IN ACCORDANCE W/ 2009 IBC 1607.7.1.

GENERAL NOTES:

1. ALL CONSTRUCTION INDICATED ON THESE PLANS SHALL BE IN ACCORDANCE WITH THE 1988 MASSDOT STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES W/ THE JULY 1, 2015 SUPPLEMENTAL SPECIFICATIONS.
2. DIMENSIONS AND ELEVATIONS ARE SHOWN TO THE NEAREST ONE–HUNDREDTH OF A FOOT OR ONE–EIGHTH OF AN INCH.
3. ANGLES ARE SHOWN TO THE NEAREST SECOND.
4. ALL WORKING POINTS ARE SHOWN AT THE CENTERLINE OF PATH UNLESS OTHERWISE NOTED.
5. NO INFORMATION WAS GIVEN FOR EXISTING UTILITIES. NO EXISTING UTILITIES ARE SHOWN ON THE PLANS. THE CONTRACTOR IS TO ASSUME THAT UTILITIES MAY BE PRESENT.
6. THE CONTRACTOR SHALL BE RESPONSIBLE FOR ALL COORDINATION WITH ALL UTILITY COMPANIES.
7. ANY DAMAGE TO EXISTING CITY OR PRIVATE PROPERTY CAUSED BY THE CONTRACTOR SHALL BE REPAIRED BY THE CONTRACTOR AT NO ADDITIONAL COST TO THE CITY.
8. THE CONTRACTOR SHALL PLACE ALL EQUIPMENT AND MATERIAL IN HIS FIELD YARD OR AT A SITE APPROVED BY THE CITY. THE EQUIPMENT AND MATERIAL SHALL BE PLACED IN A STORAGE AREA SO AS NOT TO CAUSE A SAFETY HAZARD.
9. IT WILL BE THE CONTRACTOR'S RESPONSIBILITY TO FIELD VERIFY ALL ELEVATIONS, DIMENSIONS, DETAILS, ANGLES, STRUCTURAL MEMBER SIZES, AND LAYOUTS AS SHOWN ON THESE PLANS. THIS PRIOR FIELD VERIFICATION IS ESPECIALLY PERTINENT FOR PRE–FABRICATED STRUCTURAL ITEMS AND WORK IN THE VICINITY OF UTILITIES (IF APPLICABLE).
10. FEDERAL LAW REQUIRES NOTIFICATION OF APPROPRIATE UTILITY COMPANIES BEFORE DIGGING, TRENCHING, BLASTING, DEMOLISHING, BORING, BACKFILLING, GRADING, LANDSCAPING, OR OTHER EARTH MOVING OPERATIONS. IT IS THE CONTRACTOR'S RESPONSIBILITY TO NOTIFY ALL UTILITY COMPANIES (INCLUDING THROUGH THE "DIG SAFE" PROGRAM) TO ENSURE THAT ALL UTILITIES, BOTH UNDERGROUND AND OVERHEAD, HAVE BEEN MARKED BEFORE COMMENCEMENT OF SUCH WORK. THE CONTRACTOR SHOULD UNDERSTAND THAT NOT ALL UTILITIES SUBSCRIBE TO THE "DIG SAFE" PROGRAM. ANY DAMAGE TO EXISTING UTILITIES MARKED IN THE FIELD, OR AS A RESULT OF FAILING TO CONTACT THE APPROPRIATE UTILITY COMPANIES, SHALL BE REPAIRED OR REPLACED (AS DEEMED APPROPRIATE BY THE IMPACTED UTILITY COMPANY) AT NO ADDITIONAL COST TO THE CITY.
11. FOR STRUCTURAL DETAILING, THE FOLLOWING MEMBER DIMENSIONS WERE ASSUMED:

MEMBER	ACTUAL DIMENSIONS
1x6 KICKER	$\frac{3}{4}$" x 5$\frac{1}{2}$"
2x12 TOP RAIL	1$\frac{1}{2}$" x 11$\frac{1}{4}$"
2x8 JOIST	1$\frac{1}{2}$" x 7$\frac{1}{4}$"
3x8 DECKING	2$\frac{1}{2}$" x 7$\frac{1}{4}$"
3x6 RAIL	2$\frac{1}{2}$" x 5$\frac{1}{2}$"
6x6 POST	5$\frac{1}{2}$" x 5$\frac{1}{2}$"
6X8 BLOCKING	5$\frac{1}{2}$" x 7$\frac{1}{4}$"
8x8 FLOORBEAM	7$\frac{1}{4}$" x 7$\frac{1}{4}$"

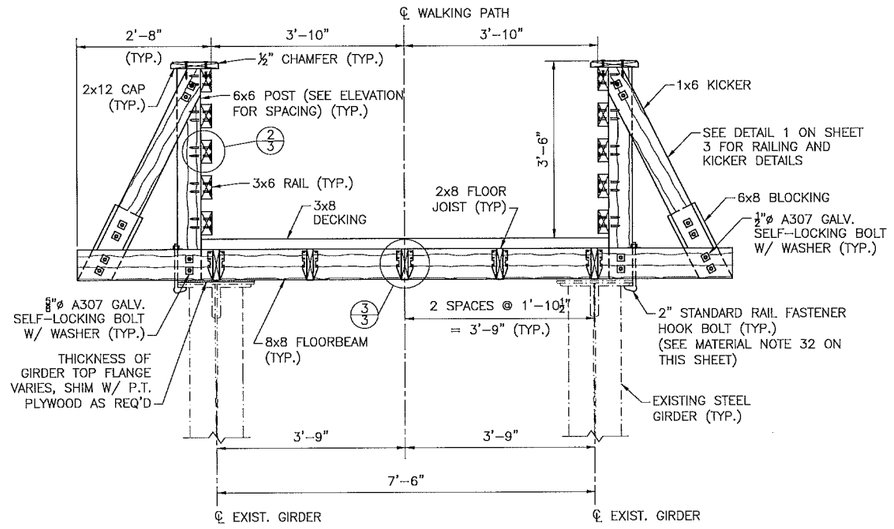
IF ACTUAL MEMBER DIMENSIONS VARY, ADJUST ACCORDINGLY.

TEMPORARY PROTECTIVE SHIELDING NOTES:

12. TEMPORARY PROTECTIVE SHIELDING SHALL BE PROVIDED DURING DEMOLITION OF THE EXISTING STRUCTURE AND DURING THE CONSTRUCTION OF THE NEW STRUCTURE. SHIELDING SHALL BE INSTALLED PRIOR TO COMMENCING ANY WORK.
13. THE CONTRACTOR IS RESPONSIBLE FOR PREVENTING ANY DEBRIS RESULTING FROM DEMOLITION, EXCAVATION, OR CONSTRUCTION FROM FALLING INTO THE RIVER BELOW. ANY DEBRIS THAT FALLS TO THE RIVER BELOW DUE TO THE CONTRACTORS ACTIVITIES SHALL BE IMMEDIATELY REMOVED BY THE CONTRACTOR AT HIS/HER EXPENSE.
14. THE TEMPORARY SHIELDING SHALL BE PLACED IN A MANNER AS TO PREVENT IT FROM BEING BLOWN OUT BY WIND. IF, IN THE OPINION OF THE CITY, THE SHIELDING IS NOT SECURE, THE CONTRACTOR SHALL REMOVE IT AND INSTALL IT TO THE SATISFACTION OF THE CITY AT NO ADDITIONAL COST.
15. SHIELDING SHALL BE DESIGNED TO SAFELY WITHSTAND ALL LOADS THAT IT MAY BE SUBJECTED TO; AND BE SEALED TIGHTLY AT ALL JOINTS.
16. ALL MATERIALS USED IN THE SHIELDING SYSTEM SHALL BECOME THE PROPERTY OF THE CONTRACTOR AND SHALL BE REMOVED FROM THE SITE AT THE COMPLETION OF THE PROJECT.
17. THE CONTRACTOR SHALL SUBMIT SHOP DRAWINGS OF ALL PROPOSED SHIELDING TO THE CITY OF NEWTON CONSERVATION COMMISSION FOR APPROVAL PRIOR TO INSTALLATION.

MATERIAL NOTES:

18. ALL TIMBER SHALL BE SAWN LUMBER, SURFACED FOUR SIDES (242) UNLESS OTHERWISE NOTED, AND SHALL COMPLY WITH THE REQUIREMENTS OF AASHTO M168.
19. ALL TIMBER SHALL BE PRESSURE TREATED WITH ACQ CONFORMING TO AWPA STANDARD P5. ALL MEMBERS SHALL BE FABRICATED BEFORE TREATMENT AND DRIED TO A MOISTURE CONTENT OF 19 PERCENT OR LESS AFTER TREATMENT.
20. ALL TIMBER SHALL BE PREDRILLED PRIOR TO TREATMENT.
21. FLOORBEAMS, JOISTS, DECKING, BLOCKING, KICKERS, POSTS, AND RAILS SHALL BE SOUTHERN PINE, GRADE NO. 1 OR GREATER.
22. ALL TIMBER SHALL BE PRECISION END TRIMMED TO LENGTH WITH ¼" UNDER LENGTH AND NO OVER LENGTH TOLERANCE PERMITTED.
23. ALL TREATED TIMBER THAT IS FIELD CUT, BORED THRU, DRILLED INTO OR DAMAGED SHALL BE TREATED AS OUTLINED IN AWPA STANDARD M4 WHICH REQUIRES THAT ALL CUTS, HOLES, OR INJURIES TO TREATED WOOD BE PROTECTED BY BRUSHING, SPRAYING, DIPPING, OR SOAKING IN AN APPROVED PRESERVATIVE.
24. ALL BOLTS SHALL CONFORM TO ASTM A307, UNLESS OTHERWISE NOTED. LAG SCREW SHALL COMPLY WITH THE REQUIREMENTS OF ANSI/ASME STANDARD B18.2.1, GRADE 2.
25. ALL HARDWARE SHALL BE GALVANIZED AS PER CURRENT STATE SPECIFICATIONS AND/OR AASHTO SPECIFICATION M232.
26. CONSTRUCTION REQUIREMENTS SHALL CONFORM TO STATE SPECIFICATIONS. ALL TIMBER SHALL BE CUT TO LENGTH AND DRESSED TO SIZE REQUIRED PRIOR TO TREATMENT.
27. TIMBER WHICH AT THE DISCRETION OF THE CITY IS SEVERELY WARPED, BOWED, SPLIT, OR SPLINTERED SHALL NOT BE INCORPORATED IN THE WORK.
28. TIMBER RAIL POST SHALL BE SET VERTICAL IN THE FIELD.
29. TIMBER RAILS SHALL BE ATTACHED PARALLEL TO THE ACTUAL SLOPE OF DECK.
30. RAILS SHALL BE CONTINUOUS OVER TWO POSTS SPACING (MINIMUM).
31. STEEL PLATES SHALL CONFORM TO ASTM A606.
32. 2" RAIL FASTENING HOOK BOLTS SHALL BE $\frac{3}{4}$"ø AND GALVANIZED BY LEWIS BOLT AND NUT COMPANY OR YANGTZE RAILROAD MATERIALS. ALTERNATE MANUFACTURERS MAY BE PERMITTED UPON APPROVAL FROM THE CITY.
33. EXPANSION ANCHORS SHALL BE HOT–DIPPED GALVANIZED IN ACCORDANCE WITH ASTM A 153. NUTS AND WASHERS SHALL BE IN ACCORDANCE WITH ASTM A 563, GRADE A, HEX AND ASTM F 844, RESPECTIVELY.



OBSERVATION DECK SECTION
SCALE: ¾"=1'–0"

NUMBER	DATE	MADE BY	CHECKED BY	DESCRIPTION

REVISIONS

DRAWN BY: TMW
DESIGNED BY: TMW
CHECKED BY: CJ

PE STAMP:

PREPARED BY: BETA www.BETA-Inc.com

SCALE: AS SHOWN

City of Newton, Massachusetts
Greenway Walking Corridor Observation Deck
NOTES AND OBSERVATION DECK SECTION

BETA JOB No. 5369
PLOT DATE: 7/29/2016 10:35 AM
ISSUE DATE 8/3/2016 11:58 AM
SHEET No. 2
File: Sheet2_Details.dwg

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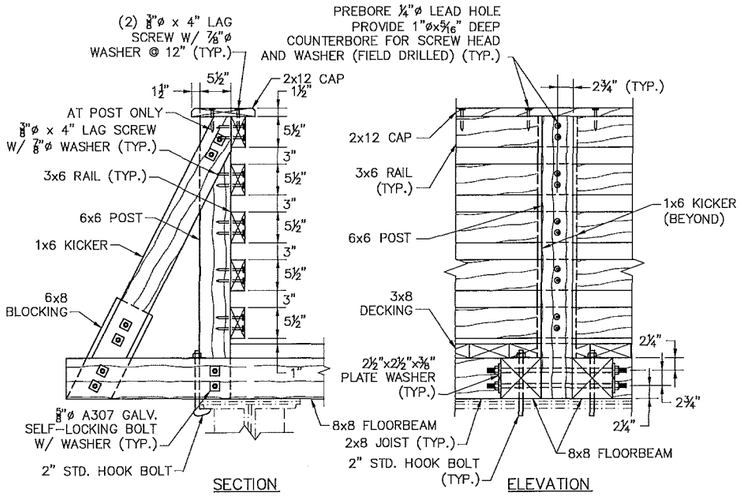
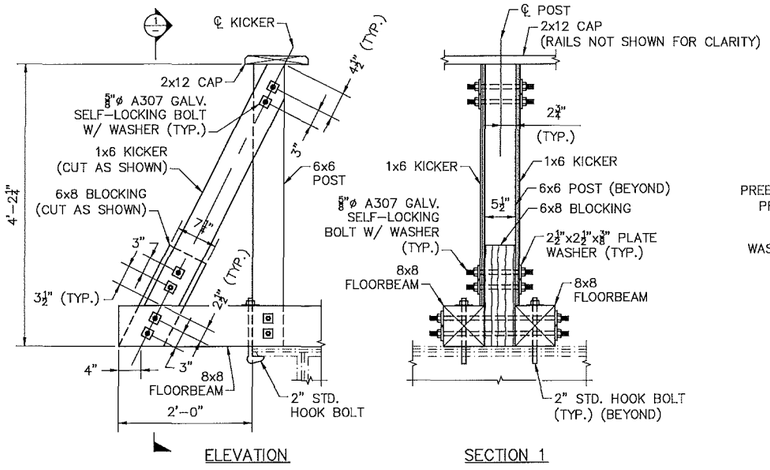


RAILING DETAIL
SCALE: 1" = 1'-0"



DETAIL 1/2
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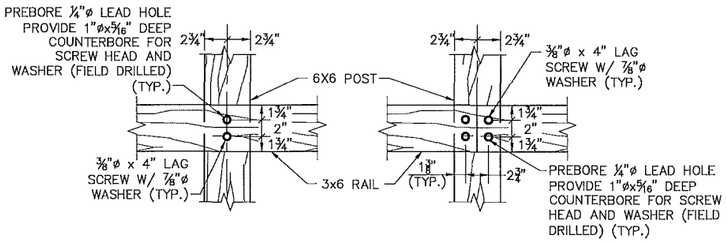
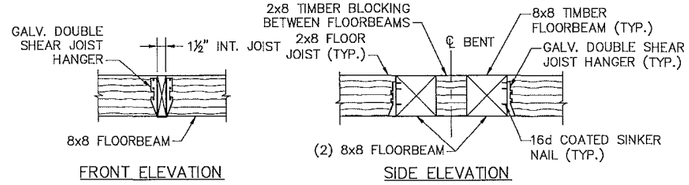


DETAIL 2/2
SCALE: 1½" = 1'-0"



DETAIL 3/2
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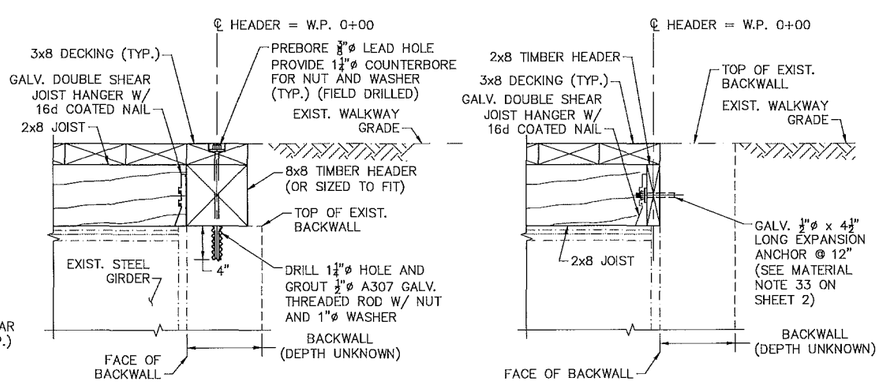
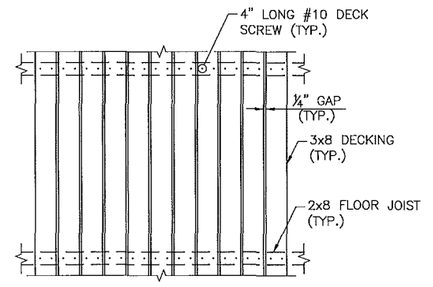


NOTE:
1. THIS DRAWING IS FOR CONCEPTUAL PURPOSES. ACTUAL BACKWALL CONFIGURATION IS UNKNOWN AND MAY VARY.
2. IF CONDITIONS DO VARY FROM WHAT IS SHOWN IN THIS DETAIL, HEADER SHALL BE FASTENED AS DIRECTED BY THE ENGINEER.

DETAIL 4/1
SCALE: 1½" = 1'-0"



DECK FASTENING DETAIL
SCALE: 1½"=1'-0"

NUMBER	DATE	MADE BY	CHECKED BY	DESCRIPTION

REVISIONS

DRAWN BY: TMW
DESIGNED BY: TMW
CHECKED BY: CJ

PE STAMP:

PREPARED BY: BETA www.BETA-Inc.com

SCALE: AS SHOWN

UNLESS OTHERWISE NOTED O/R CHANGED BY REPRODUCTION

City of Newton, Massachusetts
Greenway Walking Corridor Observation Deck
OBSERVATION DECK DETAILS

BETA JOB No. 5369
PLOT DATE: 7/29/2016 10:35 AM
ISSUE DATE 7/28/2016 3:24 PM
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File: Sheet3_Details.dwg

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