

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT DEPT.
NO. 1972CV 130

Dennis Scannel, Diane Scannel,)
Peter Michaelson and Laraine)
Michaelson, as trustees of the)
Michaelson Trust, Michael)
Ronhock, Teresa Ronhock,)
Robert Rebello, Dawn Rebello,)
Robert Nelson, Debra Nelson,)
Margo Cutter, Dana Robert,)
Lauren Robert, Christopher)
McDonald and Jennifer McDonald)

Plaintiffs)

v.)

Jonathan Furbush, William)
Blaisdell, Ronald Bonvie)
Scott Goldstein, Sharon)
Sangeleer, Brad Pittsley)
And Norman J. Gould as They)
Are Members of And Are)
Collectively the Mashpee)
Zoning Board or Appeals,)
Blue Sky Towers, LLC, and)
the Town of Mashpee)

Defendants)

MASHPEE TOWN CLERK

MAR 19 2019

RECEIVED BY *dl*

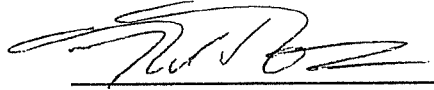
NOTICE OF COMPLAINT

To the Clerk of the Town of Mashpee:

Take notice that a complaint (copy attached) has been filed challenging the decision of the Town of Mashpee Zoning Board of Appeals to issue a variance to Blue Sky Towers

II, LLC.

Respectfully submitted,

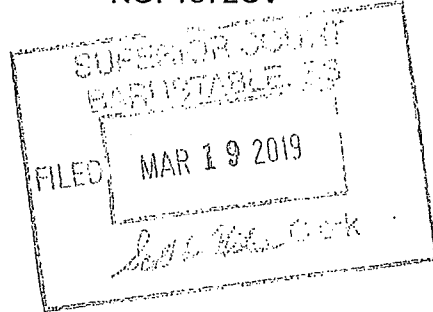
A handwritten signature in black ink, appearing to be "Paul Revere, III", written over a horizontal line.

Paul Revere, III
(BBO #636200)
Trevor Tavano
(BBO #703999)
Law Offices of Paul Revere, III
226 River View Lane
Centerville, Massachusetts 02601
(508) 237-1620
revereiii@aol.com

COMMONWEALTH OF MASSACHUSETTS

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Collectively the Mashpee)
Zoning Board or Appeals,)
Blue Sky Towers, LLC, and)
the Town of Mashpee)

Defendants)

COMPLAINT

Introduction

1. This action involves an appeal by the Plaintiffs of a decision of the Town of Mashpee Zoning Board of Appeals ("ZBA") to issue a variance for a cellular tower to Blue Sky Towers, LLC, on land owned by the Town of Mashpee at 101 Red Brook Road, Mashpee.

JURISDICTION

2. This court has jurisdiction pursuant to M.G.L. ch. 40A.

PARTIES

3. Plaintiffs are individuals and own property in the immediate vicinity of and/or abutting 101 Red Brook Road, Mashpee, Massachusetts (the "Subject Property")

4. The plaintiffs' names and addresses are as follows:

- a. Dennis and Diane Scannell, 108 Degrass Road, Mashpee, MA 02649
- b. Peter and Laraine Michaelson as trustees of the Michaelson Trust, 120 Degrass Road, Mashpee, MA 02649
- c. Michael and Teresa Ronhock, 104 Degrass Road, Mashpee, MA 02649
- d. Robert and Dawn Rebello, 95 Degrass Road, Mashpee, MA 02649
- e. Robert and Debra Nelson, 113 Degrass Road, Mashpee, MA 02649
- f. Margo Cutter, 121 Degrass Road, Mashpee, MA 02649
- g. Dana and Lauren Robert, 75 Degrass Road, Mashpee, MA 02649
- h. Christopher and Jennifer McDonald, 103 Degrass Road, Mashpee, MA 02649

5. The Defendants Jonathan Furbush, William Blaisdell, Ronald Bonvie, Scott Goldstein, Sharon Sangeleer, Brad Pittsley and Norman J. Gould are individuals and are the members of the ZBA with an address of 16 Great Neck Road South, Mashpee, Massachusetts 02649 and also have the following individual addresses:

- a. Jonathan Furbush, 57 Greensward Road, Mashpee, MA 02649.
- b. William Blaisdell, 144 Greensward Road, Mashpee, MA 02649
- c. Ronald Bonvie, 82 Meadowbrook Road, Mashpee, MA 02649
- d. Scott Goldstein, 37 Amos Landing Road, Mashpee, MA 02649
- e. Sharon Sangeleer, 10 Shorewood Drive, Mashpee, MA 02649
- f. Norman Gould, 155 Leisure Green Drive, Mashpee, MA 02649
- g. Brad Pittsley, 11 Florence Avenue, Mashpee, MA 02649

6. The Defendant Blue Sky Towers II, LLC, is a Delaware corporation authorized to do business in the commonwealth of Massachusetts with an address of 352 Park Street, Suite 106, North Reading, Massachusetts 01864.

7. The Town of Mashpee ("Town") is a body politic and corporate with an address of 16 Great Neck Road South, Mashpee, Massachusetts 02649.

FACTS

8. In 2017 or 2018, the Town of Mashpee ("Mashpee") issued a request for proposals ("RFP") to locate a cellular communications tower at 101 Red Brook Road, Mashpee, Massachusetts (the "Subject Property").

9. The request for proposals was based upon Mashpee owning the Subject Property and a desire to create revenue for the Town.

10. Blue Sky obtained authorization to attempt to build a cellular tower on the Subject

Property based upon a proposal submitted in response to the RFP.

11. The location of the proposed cellular tower was based upon the RFP and not pursuant to an examination of coverage areas and coverage gaps within Mashpee.

12. A petition was filed with the ZBA on January 10, 2019, by Blue Sky Towers II, LLC ("Blue Sky") requesting a dimensional variance for the construction of a tower which is at least 116 feet higher than that which is allowed under the Mashpee Zoning bylaw.

13. On or about February 13, 2019, the ZBA held a hearing on the petition of Blue Sky.

14. At the close of the hearing, the ZBA voted unanimously to grant the variance to Blue Sky.

15. A copy of that decision is attached as Exhibit One.

16. GL ch. 40A, Sec. 10 provides that a variance may be granted when "such circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise."

17. The evidence submitted to the ZBA and the findings do not demonstrate the

presence of circumstances relating to the soil conditions, shape or topography of the Subject Property which support the issuance of a variance by the ZBA.

18. The evidence submitted to the ZBA and the findings do not demonstrate the presence of circumstances affecting the Subject Property, but not affecting generally the zoning district.

19. The evidence submitted to the ZBA and the findings do not demonstrate the presence of hardship of any kind.

20. The Telecommunications Act of 1996 does not provide any additional authorities to the ZBA as the ZBA is created by state law and its powers are those vested in it by the commonwealth of Massachusetts.

COUNT I

21. Plaintiffs repeat the allegations in paragraphs 1 through 20 set forth above and, further, allege as follows.

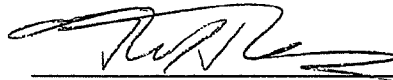
22. The ZBA's decision was not supported by the facts or law.

23. The ZBA's decision was arbitrary and capricious, constituted an error of law, constituted an abuse of discretion, exceeded the authority of the ZBA, was against the weight of evidence presented at the public hearing, and was otherwise unlawful.

WHEREFORE, Plaintiffs request that this court enter judgment as follows:

- a. That the decision of the ZBA was:
 - i. in excess of the ZBA's authority or jurisdiction,
 - ii. based upon error of law,
 - iii. made upon unlawful procedure, and/or
 - iv. unsupported by factual evidence.
- b. Issue an Order:
 - i. reversing the decision,
 - ii. ordering that the variance was unlawfully issued, and
- c. Provide such other relief, as this court deems meet and just under the circumstances.

Respectfully submitted,



Paul Revere, III
(BBO #636200)
Trevor Tavano
(BBO #703999)
Law Offices of Paul Revere, III
226 River View Lane
Centerville, Massachusetts 02601
(508) 237-1620
revererii@aol.com

EXHIBIT ONE



Town of Mashpee

16 Great Neck Road North
Mashpee, Massachusetts 02649

MASHPEE ZONING BOARD OF APPEALS DECISION FOR A VARIANCE

V-2019-10

Blue Sky Towers II, LLC
101 Red Brook Road
(Map 104 Parcel 2)
Mashpee, MA 02649

Bk.: #1467
Page: 760

A Petition was filed on January 10, 2019 by Blue Sky Towers II, LLC requesting a Variance under all provisions of §174-45.3 (E) (1) and §174-45.3 (E) (2), of the Zoning Bylaws, and M.G.L. 40A §10 to allow for a Personal Wireless Service Facility on property located in an R-3 Zoning District, Map 104 Parcel 2, Mashpee, MA.

Notice was duly given to abutters in accordance with Massachusetts General Laws Chapter 40A. Notice was given by publication in The Mashpee Enterprise, a newspaper of general circulation in the Town of Mashpee, on January 18, 2019 and January 25, 2019 a copy of which is attached hereto and made a part hereof.

The Mashpee Zoning Board of Appeals issues this Decision pursuant to the provisions of Massachusetts General Laws Chapter 40A §10 and the Town of Mashpee Zoning By-laws.

Public Hearings were held on the Petition at the Mashpee Town Hall on Wednesday, February 13, 2019 at which time the following members of the Board of Appeals were present; Chairman, Jonathan Furbush, Vice Chairman, William Blaisdell, Board Members, Scott Goldstein, Norman J. Gould, and Associate Members, Brad Pittsley and Sharon Sangeleer. Also present was Building Commissioner, Michael Mendoza.

Attorney, Elizabeth Thompson represented the applicant for the proposed cell tower. The application is for a 150 ft. Variance for a monopole type wireless tower at 101 Red Brook Road, which is located at the Mashpee Fire Station #2. Also present was Jesse Moreno, Project Engineer with ProTerra Design Group, Dan Brown, the Radio Frequency Engineer for Verizon Wireless, and Rick Karinki, the Radio Frequency Engineer for T-Mobile. The Team present was a result of the past four proposals that were issued in May 2017 by the Town of Mashpee for a personal wireless service at this location. Blue Sky Towers was the successful bidder of the "Request for Proposal" (RFP). The reason she pointed out the RFP is because it's indicative that the Town presumably recognizes that there was a significant gap in wireless coverage in south Mashpee that necessitated a new tower to remedy that gap. Blue Sky Towers has a letter of intent by two wireless service providers, Verizon Wireless and T-Mobile who both have evidence of this significant gap, and needs this height to remedy the gap. In addition to the gap, there is significant capacity problems of both which radio frequency engineers discussed.

MASHPEE ZONING BOARD OF APPEALS
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Blue Sky Towers II, LLC
101 Red Brook Road (Map 104 Parcel 2)
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Ms. Thompson said the process began with the Planning Board when the applicant filed for a Special Permit, and immediately the proceedings were suspended because this is a development of regional impact referred by the Cape Cod Commission. Those proceedings began in September of 2018. On October 18, 2018. After four hearings of the sub-committee, and the Cape Cod Commission, the facility was approved at this location at 150 ft. above ground level. In that decision, which is in the application packages, the Commission retained a wireless expert David Maxson, principal with Isotrope, LLC who for over 20 years has been advising municipalities and regional authorities on wireless facilities. He reviewed all of the radio frequency data that was presented in the package, and made additional requests which were met. He reviewed this with the professional staff of the Commission, and presented this to the sub-committee and full Commission, and based upon that data this height was approved at the minimal height necessary to close the gaps and coverage.

Mr. Jesse Moreno, with ProTerra Design Group was retained by Blue Sky Towers to help design the site plans for the 150 ft. monopole tower. He presented the site plans as given to the Board depicting the location of the tower and how it will be accessed. The parcel is triangular shaped and is located on the right hand side of Great Neck Road South, Red Brook Road, and along the north of Blue Castle Drive. The tower will be placed in the center of the lot 175 ft. away from the Mashpee Fire Station building. The existing paved driveway will be utilized and will extend 150 ft. to the corner of the parking lot with a gravel driveway toward the woods. There will be a 70' x 70' compound with a six foot chain link fenced within the 100' x 100' leased area with 3/4" stone at the base. There are no buildings within 300 ft. of the site except for the fire station itself. Inside the compound will be 150 ft. tower inside the leased space.

There are two carriers, Verizon Wireless and T-Mobile. Mr. Moreno pointed out the compound plan and elevation of what the tower will look like. It's a tapered steel structure, 150 ft. in height with a lightning rod on the top. Approximately every 10 ft. down the tower has a potential location for a wireless carrier. In this case, it's Verizon and T-Mobile at the top. The surrounding trees are approximately 50 to 60 ft. tall, as measured on site, and is necessary for the tower to be above the tree line for Radio Frequency (RF) propagation. Inside the compound area is about 200 sq. ft. where each individual carrier will have their equipment. A typical wireless site consists of antennas and radio equipment with a series of cables that go down through the structure to the bottom. There is refrigerator sized equipment that house some of the power and communication equipment.

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These particular carriers are proposing backup powered by generators that run on propane. As Mr. Moreno stated earlier, the site location was identified in the RFP by using the existing infrastructure of the fire station, and will reduce the amount of clearing, and the effort to reduce impact to the area expressed by the Cape Cod Commission. The total disturbance area is a little over 18,000 sq. ft. There were no wetlands identified for the project within 200 ft. of the site. The site is not located in a habitat, it is not in any type of flood plain and does not require additional landscaping. It is an unmanned facility, and will not generate any trash, and there are no water or sewer requirements. There is a proposal for utilities that will be from the street pole, and will run along the fire station to the facility, for both telecommunication, and power. At the Plan Review hearing on February 5, 2019, it was suggested to have underground power lines. The applicant has agreed to place the utilities underground rather than using the utility poles.

Attorney Thompson said that a study was performed on April 14, 2018, that consisted of a balloon test at the site, and was publicly noticed. Both the Cape Cod Commission and the Town of Mashpee gave the applicant a number of locations that were photographed of specific addresses and historical features around the site where the pole was either visible or not visible. Every photograph taken was provided to the Attorney and a photo simulation was rendered. During the Cape Cod Commission process, certain requests were made on the design. One request was that a rendering of a mono pine or big tree be seen esthetically at the location. A second request depicted a rendering of the pole as light blue or as light grey. The applicant would accept the preference made by the Town of Mashpee. The Cape Cod Commission wanted tests taken at 150 ft. and 125 ft. to see if this had any impact on the visibility of the tower. They concluded there was no impact on the visibility of the tower.

Mr. Dan Brown, the RF Engineer on behalf of Verizon Wireless, and Rick Karinki, the RF Engineer on behalf of T-Mobile both presented site plots depicting the current situation of the gap areas in south Mashpee without the cell tower, and the significant improvement in the coverage areas when the cell tower is up and running. The Verizon plots depicted the installed equipment at 146 ft., and showed what the coverage would look like at 121 ft. which represents a 25 ft. reduction in coverage. T-Mobile provided plots depicting increased coverage of the equipment on the tower at 135 ft.

Chairman Furbush commented that one or two plots had a significant coverage gap close to the area along the water in Popponeset. The engineers said that these gap areas have hills specifically located along Rock Landing Road. There were other road tests performed in the south Mashpee area depicting issues with the topography.

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101 Red Brook Road (Map 104 Parcel 2)
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Mr. Furbush recited the M.G.L. 40A Sec. 10. "applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, 1) a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant." Mr. Furbush believes that it's important to determine which Variance is required, and he believes it is topography. He said there's hills in the way, there's a lower area. He thinks this is the basis of the topography issue.

Mr. Furbush asked the Board to read in the resident letters, and Town Department comments into the record.

Sharon read the Conservation Department comment dated February 8, 2019 into the record.

Sharon read the Board of Health comments dated February 12, 2019 into the record.

Sharon read a resident at (2 Bowsprit Point) letter dated February 7, 2019 into the record who is in favor of the proposed tower.

Mr. Furbush read the Inspection Department comments dated February 4, 2019, and February 6, 2019 into the record.

Sharon read a memorandum dated February 5, 2019 from Scott Carline, Chief of Police into the record.

Mr. Furbush read a memorandum dated February 11, 2019 from Evan Lehrer, Town Planner into the record.

Scott Goldstein read a memorandum dated January 30, 2019 from Thomas C. Rullo, Fire Chief into the record.

Sharon read a resident at (41 Triton Way) letter dated January 18 2019 into the record who is in favor of the proposed tower.

Mr. Furbush opened the meeting to the audience.

MASHPEE ZONING BOARD OF APPEALS
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Attorney Paul Revere, from Centerville, MA represented two residents who oppose the cell tower. He handed the Board his written comments, and recited the M.G.L. Ch. 40A Sec. 10 bylaw stating that there was no evidence of a hardship for this proposal. He said that he never heard a word from the applicants regarding the hardship relating to soil, shape or topography or anything of the site that says it's different than the rest of the zoning district. The impact is on the people of New Seabury's homes, they're the ones getting this service, and they ought to have the impact, not his clients. This is about coverage, not about the property.

There were several abutters that spoke in opposition of the cell tower;

- Michael Ronhock
- Teresa Ronhock
- Brian Hyde
- Sharon, on Scituate Road
- Carl Lubekzyk
- Linda Lubekzyk
- Dan Kupperman
- Sharon Muller

Attorney Thompson concluded under the Massachusetts Zoning Act, G.L. c. 40A §10 certainly would submit that topography makes it challenging to necessitate the height as one of the many reasons. In addition with the configuration of a cell site, it has to be particularly located at a height in a particular area, and based upon the topography in this area it necessitates 150 ft. in order to accomplish the goal of filling that coverage gap. Therefore, the unusual topography at this site is a hardship and meets the burden of proof for a variance from the Bylaw requirements with respect to height.

The issue here is a topographical hardship due to the valleys and hills which require the necessary height in order that the tower can be usable, thus effective. The Board reviewed the detailed presentations from both the Verizon Wireless and T-Mobile Representatives, and determined that due to the shape and topography of the south Mashpee area, the height of a 150 ft. cell tower would provide the coverage necessary to fulfill the service gap. The Board also based their determination from the Board of Health comments that were read into the record as stated; "The plans have been reviewed along with Dr. Haes report on the RF signal strength and exposure probabilities. The FCC, CDC and American Cancer Society website reports on cell towers have been reviewed. The above information indicates that the cell towers offer very little chance of exposure to ground level occupants.

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The ZBA is reviewing the height variance for the tower. The higher the tower, the less chance of exposure. BOH recommends approval as presented.”

In view of the foregoing, the Board determined the Petitioner met the criteria for a Variance. Upon motion duly made and seconded at the Public Hearings on Wednesday, February 13, 2019, the Zoning Board of Appeals voted unanimously to issue a Variance for 101 Red Brook Road, Petitioners, Blue Sky Towers II, LLC request for a Variance under all provisions of §174-45.3 (E) (1) and §174-45.3 (E) (2), of the Zoning Bylaws, and M.G.L. 40A §10 to allow for a Personal Wireless Service Facility on property located in an R-3 Zoning District, Map 104 Parcel 2, Mashpee, MA based on the following conditions:

The Board has determined that the applicant meets all the conditions of a Variance for the height of 150 feet under Mass General Law 40A Section 10 based on the following:

Hardship:

- The issue here is a topographical hardship due to the valleys and hills which require the necessary height in order that the tower can be usable, thus effective.
- The reason for the height requested is that the tower has to be usable. It has to be taller than the surrounding tree line canopy which is part of the topography issue, therefore the request of 150 feet.
- The literal enforcement of the bylaw would prevent addressing a known condition of a gap in cellphone coverage in the southern part of the Town of Mashpee. There are court decisions which state that preventing the closing of significant gaps in the availability of wireless service violates the Federal Telecommunications Act regarding the construction and placement of wireless towers.
- The applicant has demonstrated that the proposed height of the cell tower will significantly close this gap.
- The question to be asked and has been asked and answered is “Will the proposed variance be a substantial deterrent to the public good?” Letters from our first responders (the police and fire departments) have clearly demonstrated a need for this coverage. This is not a deterrent but, in fact, a positive effect on the public because of its ability to assist the first responder’s ability to serve and protect our public in a time of need.

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- We also have letters from our local residents which show the medical need for this tower and, therefore, it has been clearly demonstrated that advancements in medical technology need a cell tower to deliver an internet connection, in which it provides the lifesaving monitoring that only a cell tower can provide. It should also be noted that radio waves cannot be the basis for a denial for a variance.
- It has been established that there is a substantial gap in the coverage in the southern part of the Town of Mashpee.
- That the location of the proposed tower will significantly close this gap.
- That the proposed height is not excessive but is high enough to address the topographical impediments to provide the necessary coverage.
- That the letters from our first responders and local residents have demonstrated that there is a need for this tower to provide for the safety for our citizens.
- It has been stated that medical technology has evolved to use the internet to monitor their patients and this cannot happen without a cell tower.

The ruling is also based on the following conditions:

1. **Plans:** Blue Sky Towers II, LLC, Site Name: Mashpee Fire Station #2, Site Number: MA-5112, Address: 101 Red Brook Road, Mashpee, MA 02649. Prepared by: ProTerra Design Group, LLC, 4 Bay Road, Building A: Suite 200, Hadley, MA 01035. Title Sheet: T-1, Date: 09/27/17, Drawn: BLM/STZ, Check: JMM/TEJ, Scale: See Plan, Job No.: 17-063, Abutters Plan: C-1, Existing Conditions: C-2, Aerial & USGS Maps, A-1, Compiled Plot Plan: A-2, Overall Site Plan: A-3, Compound Plan & Elevation: A-4, Siting Elevations: SE-1, Siting Elevation: SE-2, Details: D-1, Tenant Details: CA-1, Tenant Details: CA-2, Tenant Details: CA-3, Tenant Details: CA-4, Erosion Control Plan & Details: EC-1.
2. The electrical power from the street is to be underground.
3. All Town Department comments previously read into the record.
4. The Variance relief required is 116 ft. to build a 150 ft. cell tower.

MASHPEE ZONING BOARD OF APPEALS
DECISION FOR A VARIANCE

Name: Blue Sky Towers II, LLC
Address: 101 Red Brook Road, Map 104 Parcel 2, Mashpee, MA 02649
Case: V-2019-10

Legal Notices

MASHPEE ZONING BOARD OF APPEALS

PUBLIC HEARINGS NOTICE
FEBRUARY 13, 2019

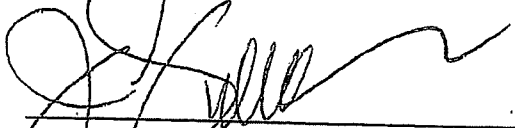
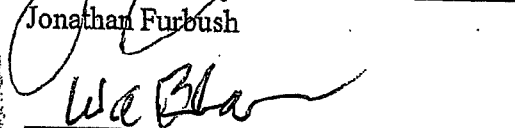
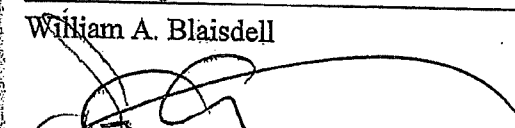
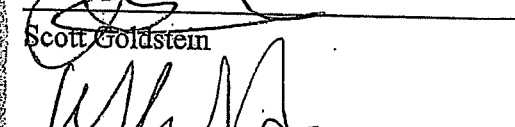
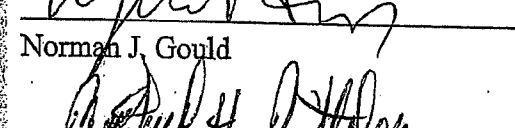
The Mashpee Zoning Board of Appeals will hold Public Hearings on Wednesday, February 13, 2019 at 6:00 p.m. in the Village Meeting Room at the Mashpee Town Hall, 16 Great Neck Road North on the following:

NEW HEARINGS

101 Red Brook Road, Fall River, Blue Sky Towers II, LLC request a Variance under all provisions of §17-245 (5)(1) and §17-245(5)(2) of the Zoning Bylaws, and M.G.L. 40A §10 to allow for a Personal Wireless Service Facility on property located in an R-3 Zoning District, Map 104 Parcel 2, Mashpee, MA.


Plans may be viewed prior to the hearings in the ZBA office and the Town Clerk's office.

Per Order of:
Jonathan D. Furbush, Chairman
Mashpee Zoning Board of Appeals
January 13, 2019

	IN FAVOR	TO DENY
 Jonathan Furbush	<input checked="" type="checkbox"/>	<input type="checkbox"/>
 William A. Blaisdell	<input checked="" type="checkbox"/>	<input type="checkbox"/>
 Scott Goldstein	<input checked="" type="checkbox"/>	<input type="checkbox"/>
 Norman J. Gould	<input checked="" type="checkbox"/>	<input type="checkbox"/>
 Bradford H. Pittsley	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sharon Sangeleer	<input type="checkbox"/>	<input type="checkbox"/>

This Decision has been duly filed on February 27, 2019 with the Town Clerk of Mashpee. Any Appeals shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A within Twenty days after the date of said filing.

This Decision is effective when a Certified Copy is filed at the Barnstable County Registry of Deeds. A Certified Copy may be obtained from the Town Clerk the next business day after the expiration of the 20-day Appeal phase, which lasts through March 19, 2019. Special Permits shall lapse three years after date of grant. Written Findings shall lapse two years after date of grant. Appeals shall lapse one year after date of grant. If the rights authorized by a Variance are not exercised within one year of date of grant of such Variance, such rights shall lapse unless: (1) substantial use or construction has commenced, or (2) a Petition for a six-month extension has been filed prior to the expiration date, or (3) the property that is the subject of the Variance has been conveyed in reliance on said Variance prior to the expiration date of such one year period.

MASHPEE TOWN CLERK
FEB 27 2019
RECEIVED BY: 



Bid Solicitation: BD-16-1455-TH001-TH001-15760

Header Information

Bid Number: BD-16-1455-TH001-TH001-15760	Description: RFP for Lease of Municipal Property for Installation of Cellular/Wireless Equipment	Bid Opening Date: 06/09/2017 02:00:00 PM
Purchaser: Catherine Laurent	Organization: Town of Mashpee	
Department: TH001 - Town Hall	Location: TH001 - Town Hall	
Fiscal Year: 16	Type Code:	Allow Electronic Quote: No
Alternate Id:	Required Date:	Available Date : 05/10/2017 09:30:00 AM
Info Contact:	Bid Type: OPEN	Informal Bid Flag: No
Purchase Method: Open Market		

Pre Bid Conference:

Bulletin Desc: The Town is seeking proposals for the lease of land to install cellular/wireless telephone equipment on property located at 101 Red Brook Road, Mashpee, MA 02649.

Ship-to Address:	Thomas Mayo 16 Great Neck Road North Mashpee, MA 02649 US Email: tmayo@mashpeema.gov Phone: (508)539-1401	Bill-to Address:	Thomas Mayo 16 Great Neck Road North Mashpee, MA 02649 US Email: tmayo@mashpeema.gov Phone: (508)539-1401	Print Format:	Bid Print
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Item Information

Item # 1: (80-13 - 15) The Town is seeking proposals for the lease of land to install cellular/wireless telephone equipment on property located at 101 Red Brook Road, Mashpee, MA 02649.

UNSPSC Code: 80-13-15
Lease and rental of property or building

Qty	Unit Cost	UOM	Total Discount Amt.	Tax Rate	Tax Amount	Total Cost
1.0		EA - Each				

4/19/2019

COMMBUYS - Bid Solicitation

Manufacturer:

Brand:

Model:

Make:

Packaging:

Exit

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MA-PAS1

Rodney C. Collins

From: Patrick Costello <pcostello@lccplaw.com>
Sent: Thursday, November 29, 2018 6:15 PM
To: Rodney C. Collins
Subject: RE: RESPONSE TO CONCERN (CONFIDENTIAL AND LAWYER/CLIENT PRIVILEGE- NOT A PUBLIC RECORD)

Rod:

Just FYI, a brief summary of the relevant caselaw applicable to such situations follows. We can discuss further, as needed, in consideration of the relevant circumstances.

To the extent a permit applicant alleges violations of open meeting laws, it should first be noted that the “[p]ower of court] to set aside public action because of violations of [G.L. c. 39,] § 23B is discretionary in nature.” *Robinson v. Planning Bd. of Hingham*, 6 Mass. App. Ct. 835 , 836 (1978). A party alleging impropriety on the part of the board or any of its officials has the burden of proof. *Bonan v. City of Boston*, 398 Mass. 315 , 321 (1986); *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802 , 811 (1981). Even if ex parte communications occur, a decision of a local board will be overturned only if “substantial justice” was not achieved in light of the communications. See *Fandel v. Bd. of Zoning Adjustments of Boston*, 280 Mass. 195 (1932) (upholding zoning decision where plaintiff failed to show that zoning authority relied on communications provided after the close of the public hearing); see also *Valley Properties, Inc. v. Pinnacle Partners, Inc.*, 14 LCR 52 , 64 (2006).

[Therefore, if the vote of an offending board member is the deciding factor on whether the application for a permit or approval fails, it may well be determined that “substantial justice” was not served, and the board’s decision may be overturned. However, if the Board vote is unanimous, or otherwise adequate despite the improper vote, then the tainted vote will not have mattered.]

It is axiomatic that a board reviewing a special permit application “must act fairly and reasonably on the evidence presented to it.” *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638-39, 255 N.E.2d 347 (1970); *Vazza Properties, Inc. v. City Council of Woburn*, 1 Mass. App. Ct. 308, 312, 296 N.E.2d 220 (1973). The Massachusetts Appeals Court held in *Arrigo v. Planning Bd. of Franklin*:

“Here we assume, without deciding, that the board's approval of the subdivision plan would have to be annulled if it were shown that the approval was actuated by improper motives of the members of the board, such as a motive to do favors for friends, heedless of the consequences to the public. But if a proper motive is essential to the regularity of the official act, it follows from the presumption of regularity that the motive must be assumed to be proper until the contrary is shown. See *Foster from Gloucester, Inc. v. City Council of Gloucester*, 10 Mass. App. Ct. 284, 293-294 (1980). “It cannot be presumed that the [approval] was [given] solely in the interest of a single owner without regard to the broad public interests involved in the whole subject.” *Ayer v. Commissioners on Height of Bldgs.*, 242 Mass. 30, 35 (1922). The evidence in this case contained not a hint or suggestion of impropriety. If the chairman's testimony concerning the board's reason is disbelieved despite its surfcial plausibility, there is no other evidence from which the board's motives can be ascertained. To whatever extent subjective motivation may be relevant, the burden would be on the plaintiff to show the impropriety. *Wheatley v. Planning Bd. of Hingham* 7 Mass. App. Ct. at 448.

Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802 (1981)

"An executive officer or an administrative board upon whom alone the power of removal has been conferred is not prevented by reason of bias or prejudice from removing anyone whose conduct has merited his severance from the public service...The general rule is that a member of an administrative board who is biased or prejudiced against one

on trial before the board is not required to withdraw from the hearing if no other board can hear and determine the matter, especially if his withdrawal would deprive the board of the number of members required to take a valid affirmative vote." *Moran v. School Comm. of Littleton*, 317 Mass. 591 (1945). Here, the Planning Board is the designated special permit granting authority for the application, no other board can hear the matter.

In a case dealing with the Telecommunications Act, the applicant and some town officials had a meeting prior to the public hearing to discuss other sites for the proposed tower. The abutters/plaintiffs claimed that the planning board's special permit decision was therefore tainted by bias and prejudice. However, the lower court judge held, as a matter of law, that that "any taint due to discussions of an idea to use the current proposed site was overcome by the subsequent public meetings." *Roberts v. Southwestern Bell Mobile Sys.*, 429 Mass. 478 (1999). The Massachusetts courts have not squarely addressed the issue, but they have suggested that any perceived bias can be overcome by disclosures of such discussions at a subsequent public meeting. In fact, in 1993, the Middlesex Superior Court cited a case from Oregon which stated:

"If an ex parte communication does take place, it must be placed on the public record to enable interested parties to rebut the substance of the communication . . . An ex parte contact between a zoning board and an interested party which is neither revealed to other interested parties nor made a part of the public record is a ground for reversing a decision of a zoning board." See also *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 31, 294 N.E.2d 501 (1973) (private meeting between the board and another town board did not invalidate the decision where "there is nothing to suggest that the merits of the pending case were discussed or that the basic decision of the board of appeals to grant the permit was influenced in any respect")"

Pozzi v. Zoning Bd. of Appeals, 1993 Mass. Super. LEXIS 80 (1993).

Even if ex parte communications occur, a decision of a local board will be overturned only if "substantial justice" was not achieved in light of the communications. See *Fandel v. Bd. of Zoning Adjustments of Boston*, 280 Mass. 195 (1932) (upholding zoning decision where plaintiff failed to show that zoning authority relied on communications provided after the close of the public hearing); see also *Valley Properties, Inc. v. Pinnacle Partners, Inc.*, 14 LCR 52, 64 (2006).

The applicant and other interested persons are entitled to know the facts and other material in the board's possession on which it intends to rely in formulating its decision. Accordingly, communications with the board should be confined to

- documents on file with the board as public records prior to the public hearing,
- information presented to the board at the public hearing, and
- documents filed with the board as public records subsequent to the public hearing pursuant to a request for additional information made by the board at the public hearing.

There is nothing in the law to suggest that one elected board (the Selectmen) has any authority to require or suggest that a member of another elected board recuse him/herself from a hearing on the basis perceived bias.

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