

On August 24, 2023, on a motion by Mr. Martin seconded by Mr. Fraprie, the Board voted 5-0 to approve these minutes.

**TOWN OF YARMOUTH
ZONING BOARD OF APPEALS
MINUTES for JULY 13, 2023**

YARMOUTH TOWN CLERK
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The Yarmouth Board of Appeals met in quorum at 6:00p.m. on Thursday, July 13, 2023 in the Hearing Room at the Yarmouth Town Offices, located at 1146 Route 28, South Yarmouth, MA. The meeting was held in hybrid mode, where the public could attend in person or via Zoom.

Board Members Present and Voting: Vice Chair Igoe (via Zoom); Mr. Martin, Mr. Fraprie, Mr. Mantoni in-person; Ms. Murphy (Alternate) voted on all matters, except Petition 5005 (Blue Sky Towers) because she was not yet appointed at the previous hearing.

Staff Present: Dolores Fallon

PETITION 5032: Dennis McKenna, 2 Bass River Parkway, South Yarmouth, MA. Map & Lot #: 34.276. Zoning District: RS-40. The Applicant seeks a Special Permit per §104.3.2(2) and/or Variance from §203.5 for front setback relief for a 10' x 14' shed.

Dennis McKenna and his wife, Paula. Mr. McKenna provided an overview: The home was built in 2018/2019. Moved into the home in June 2019. The corner lot is a little undersized (close to 0.5 acre). The subdivision was created in the 1920s. Petitioner uses the driveway located on Bass River Parkway, off South Street. Have frontage on both Bass River Parkway and South Street. The rear of the property (where the garage is) is used as a rear yard on a private way known as Posies Path which is a wooded area. The McKenna's property is in the flood zone. Brought in fill and built the home in the middle of the property. Now, there is an incline. The home is above the existing grade of the street. The shed could go in the backyard within 6 feet of the property line, but because Posies Path is considered frontage. Didn't want to put the shed too close to the house because it's most visible because the property is higher as you go into it. Our plan is to build the fence into the shed, so that the front of the shed is facing our driveway, 12 feet off the property line of Posies Path, and 45.8 feet away from rear property line with the neighbor. The shed would be enclosed behind a 7-foot fence. One part of the shed would be visible (from South Street toward the driveway).

Board Questions:

Mr. Martin: There are potentially buildable lots on the other side of Posies Path. There are constraints to the lot with 3 frontages. Did you try to pull it a little further back from the lane? I would like to see more than 12 feet, if it was possible.

Mr. McKenna: My younger son is a resident at Riverview School in Sandwich. When he's home with us and drives his 3-wheeler bike that's currently in the garage. Between the 3-wheeler and the other kids' bikes, there's no second car in the garage. For him, the issue is getting the 3-wheeler into the garage. We're building a shed primarily for bikes. The further away, the steeper the slope, the harder it is for him. So, half the time, we walk the 3-wheeler for him down to Posies Path. It's better for him and the positioning of the shed, if it's closer to the lot line.

Mr. Igoe: The relief is a Variance; does not qualify for a Special Permit.

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Mr. Fraprie: Three fronts are always a challenge. When I drove by, looks like there's a stockade fence already in place, halfway up to South Street.

Ms. McKenna: We were waiting on the Variance for the shed to finish the fence. The fence will be built to the shed [specifications].

Mr. McKenna: The existing stockade fence is along Posies Path. We have to have the shed in place in order for the fence to be finished to the corner of the garage.

Mr. Fraprie: The reason you don't want to move the shed back is because there's a slope there?

Mr. McKenna: Yes, there's a slope. It was raw land, but we had to create the slope because of the flood zone. We didn't want to put the house on stilts.

Mr. Mantoni: So, this grade increases from this corner to the house.

Mr. McKenna: From all roads, it increases to the house.

Mr. Mantoni: So, it slopes down in all directions?

Mr. McKenna: Every side of the house.

Mr. Mantoni: I drove by. I saw the driveway on South Street.

Mr. McKenna: There are two different driveways. There's a rear driveway straight from the garage to Posies Path. There's a front circular driveway on Bass River Parkway. We use both [driveways]. To access the rear driveway, you have to come through Posies Path, but to go into the front of the house, you come in on the Bass River Parkway. There's no entrance on South Street; that's where the septic system is. Because of the water table, we had to put in a retaining wall, etc. on that side.

Ms. Murphy: No questions.

Mr. Igoe: I appreciate the reasons that you need to put the shed there. However, I am familiar with your lot. I'm wondering why you can't put the shed to comply with the setbacks; move it in 30 feet. With the frontages, we can go as low as 25 feet on the front setback. It appears to me from your testimony that you want to put it there because that's where you want to put it, not that you need to put it there.

Ms. McKenna: I have a son with cerebral palsy who drives an adult tricycle. We do not have a basement because of the flood zone. I have no other storage other than the garage. And that [the 3-wheeler] takes up a lot of room. For him to get his bike in and out independently, that really is the best place.

Mr. Igoe: So, where is the door to the shed going to be?

Ms. McKenna: Coming onto the driveway, so he can take it right out on the driveway.

Mr. Igoe: I know your house. You have a driveway on Bass River Parkway, don't you?

Ms. McKenna: Yes, but I'm talking about the rear driveway, going to Posies Path.

Mr. Igoe: Where is that driveway?

Ms. McKenna: It comes out of my garage and goes down to Posies Path.

Mr. Igoe: He rides his tricycle on that driveway?

Ms. McKenna: He'll try to walk it down to Posies Path.

Mr. Igoe: Can we move it in a little bit? You have 12 feet. Can we move it in another 10 feet?

Mr. McKenna: The further you move it in, the steeper the grade gets. Plus, the further you move it in, it actually becomes visible outside of the fence.

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Mr. Igoe: We don't care that it's visible outside of the fence; we care about setbacks. Our concern is zoning. I certainly appreciate your situation, but we look at these things as a permanent structure. Posies Path could be developed and probably will be developed one of these days. That vacant property is prime real estate. One of these days, there will be a house across the street. You're really required to meet a front setback. I appreciate the situation, but I think you can do better than 12 feet on a front setback.

Mr. McKenna: If that is your concern. It's not the concern of any other neighbor, including the only neighbor presently who could even see it, across the street on South Street, he has no issue.

Mr. Igoe: The neighbors' concerns are not our paramount charge. Our paramount charge is to interpret the bylaw. Need to meet the criteria of a Variance. I'm not sure you've met that criteria yet.

Mr. McKenna: As a corner lot, respectfully, I think we have. There are other garages that are close to the setback line on Posies Path on existing homes. As we walk down Shore Drive, there's a neighborhood with frontage on Shore Drive, there are several sheds that are within 6 feet of Shore Drive. This shed does not get installed in the ground. It sits above the ground on cinder blocks. The Building Department does require that you ensure it doesn't blow away. There's no foundation. That's where we thought would make it the least obtrusive, including if there's ever a neighbor across the street [on Posies Path]. Putting it closer to Posies Path poses the least issues for a future, eventual neighbor.

Public Comments:

Letters/Emails of Support (8) for Petition #5032: Joanna LaPlaca, 1 Bass River Pkwy; Jeff Jannitto, 91 South St; Michael & Margaret Lynott, 4 Bass River Terr; Matteo Gallo, 19 Bass River Pkwy; Dick Shea, 24 Bass River Pkwy; Lu & Paul Farrington, 11 Bass River Pkwy; Jody McNamara, 23 Bass River Pkwy; Rick O'Leary, 14 Bass River Pkwy.

Board Discussion and Deliberation

Mr. Fraprie: Sean, I know you're concerned about the setback. Having three "sides" is a challenge for the lot. Seems like we could come up with something that's reasonable vs. the 30 feet. Would 20 feet be acceptable?

Mr. Igoe: Under the bylaw, you can go down to 25 feet. We can reach some alternative. 12 feet is a little too close. If there's an issue with grade, the owner can adjust the grade. I appreciate the hardship with the child. We should consider that a factor. I do think we need to move this a little further away. Another 10 feet. I would be open to suggestions from the Board. Bear in mind: They do have the ability to place this [shed] on this lot and be in compliance. Most of the lots that we deal with are very tight, so they can't really place them. Here, you've got plenty of room. I understand we have a child, so we have an issue. However, I do think that they can comply, so that's my biggest concern. Go ahead, Jay, what are your thoughts?

Mr. Fraprie: I'd like to consider the child's issues. Having it right on the driveway makes it easier for him. I've had some experience with that. You have to be concerned about it being too close. I was thinking 20 feet off the line.

Mr. Martin: I'd agree with Jay. 20 feet is logical. The lot is difficult with 3 frontages. If this was a normal lot, 20 feet would be the rear setback [in this zoning district]. The topography is

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difficult with the driveway. It would bring it more into conformity without being overbearingly close to the road layout. 20 feet would be a good option.

Mr. Manton: I'd go along with 20 feet. There's definitely room to come off the street. The grade is something they have to deal with. 20 feet is reasonable to me.

Ms. Murphy: I think they have plenty of room to move it back a bit, and I agree there's a concern with future building along Posies Path. Even moving it back, it still gives your son access to the driveway with his bike. I would agree. Move it back a bit.

Mr. Igoe: Mr. McKenna, you've heard the Board's thoughts on this. We're willing to grant you relief on 20 feet setback vs. your 12 feet. That means you have to move it back 8 feet. Do you want us to take a vote on that or take a vote on your original proposal?

Mr. McKenna: I'd like you to take a vote on your alternative proposal. I've heard the reasons, so I'm not going to try to dissuade you from that and I'd ask you vote on that.

Vote:

A motion was made by Mr. Martin and seconded by Mr. Fraprie to approve a Variance with the condition that the shed be positioned a minimum of 20 feet from Posies Path.

On a voice vote (5-0), the request for a Variance, with the stated condition, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Manton: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

A request was made by the petitioner to withdraw the Special Permit, without prejudice.

A motion was made by Mr. Martin and seconded by Mr. Fraprie to allow the petitioner to withdraw the request for Special Permit, without prejudice.

On a voice vote (5-0), the request to withdraw the Special Permit, without prejudice, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Manton: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

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PETITION 5035: Jase Parker, Property Location: 12 Whites Path, Unit 4, South Yarmouth, MA. Map & Lot #: 97.12. Zoning District: B-1 & APD. The Applicant seeks to overturn the decision of the Building Commissioner and/or a Variance from §202.5 to allow J-3 use in a B-1 zone for a tattoo studio.

The petitioner, Jase Parker, was joined by Julie Manchester, property manager, Oscar Taylor's LLC.

Vice Chair Igoe: You filled out a Zoning Determination for a Business Certificate, and it was denied because it is not an allowed use in this zoning district.

Mr. Parker: I've been tattooing professionally on the Cape for about a decade. A private studio for me and my clients. I know the parking lot isn't very big. It would be me and the client. Just looking to have a clean, legal place to do my work. The space has the perfect amount of square feet; other places have 3,000 square feet which is huge. I'm not looking to hire anybody else. This was just perfect. The area has Sea Dog (Pub) and I spoke to everyone in the plaza. No one seems to have a problem with anything.

Vice Chair Igoe (addressing the property manager): Has he entered into a lease with you yet?

Ms. Manchester: No. We drafted an agreement. We got the paperwork for the occupancy and that's when we found out about the zoning problem.

Vice Chair Igoe: Have you been to the Board of Health or are you required to go to the Board of Health (licensing)?

Mr. Parker: Currently, I'm licensed in the Town of Bourne, where I'm working right now. I've been licensed in Hyannis. I would need to get a license (in Yarmouth).

Vice Chair Igoe: Jase, is there anything else you'd like to add, before we go to Board questions?

Mr. Parker: Previous tenants didn't seem to work out in the space; it's very small. There's not a lot of parking which limits retail. They won't add another food establishment because Subway is there. I think I would be the perfect tenant for the unit.

Board Questions:

Ms. Murphy: You say you have a place in Bourne?

Mr. Parker: I'm working for someone else currently, but I am licensed professionally.

Ms. Murphy: So, this would be the first place you'd have on your own?

Mr. Parker: Yes, ma'am.

Ms. Murphy: How long have you been doing this?

Mr. Parker: Ten years professionally.

Mr. Mantoni: I know where the property is and it appears it would be a good location. The issue is "it's not allowed". It's pretty black & white. Have you considered any other locations in town?

Mr. Parker: There's nothing really in this town that would work for what I'm trying to do. I have to be able to afford it and be able to sustain it. I've been looking for quite a bit and nothing would work for what I'm trying to do. I'm willing to comply with anything you guys could come up with.

Mr. Mantoni: Do you do body piercing?

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Mr. Parker: Absolutely not. Just tattooing, sir.

Mr. Fraprie: Sean, I have a question. Does this need to be a Variance or a Special Permit?

Vice Chair Igoe: This would need to be a Variance. We have 2 issues. He is requesting that we overturn the decision of the Building Commissioner. We'll have a discussion on that. Then, afterwards, the relief that he is seeking, it's not an allowed use in this district, so it would have to be a Variance.

Mr. Fraprie: By overturning the decision of the Building Commissioner, we're challenging the J-3 [use] identification?

Vice Chair Igoe: If we did not believe that J-3 was the proper classification, and we determined that there was another classification that was allowed by Special Permit in the B-1 district, we could grant a Special Permit.

Mr. Fraprie: Looking at the map, there are very few places in town where you can do this. We have a lot of B-1 territory, but this is the one thing that's not allowed. HMOD-1 looks like it could and that's along [Route] 28. I understand what you want to do; just not how to deal with it.

Mr. Martin: It's definitely a Variance. I could see it coming under a J-6 Miscellaneous services as well. If the Building Commissioner has it under J-3, as far as I'm concerned, we need to look at it as J-3.

Vice Chair Igoe: Jase, is there anything else you'd like to add at this point?

Mr. Parker: No, sir.

Public Comments:

Letters of Support received at the hearing:

- Julie Manchester, Property Manager, Oscar Taylor's LLC, 23B2 Whites Path, South Yarmouth, MA.
- Kristina Klimont, Botanique of Cape Cod, 23 Whites Path, Unit P, South Yarmouth, MA.
- Petitioner stated he has verbal support from everyone else in the plaza.

Board Discussion/Deliberation:

Vice Chair Igoe: First thing to address is overturning the decision of the Building Commissioner.

Mr. Fraprie: We know he [the Building Commissioner] uses a detailed book (NAICS) to identify how this is classified [J-3].

Vice Chair Igoe: Even if it was classified as J-6, it wouldn't work, because those certain conditions are not met.

Mr. Fraprie: Footnote 23 is what's "knocking it out".

Vice Chair Igoe: So, it's "no" still.

Footnote 23 from the Zoning Bylaw: Except no for Body Art Establishments, as defined in Section 500 - Definitions.

Mr. Fraprie: I don't think we can overturn the Building Commissioner in that regard.

Mr. Martin: I would agree with that.

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Mr. Mantoni: I agree. I believe this does fall under J-3. It is the right category and it's clearly not allowed under J-3.

Ms. Murphy: I agree.

Vice Chair Igoe: I would agree, too. It's a national classification book used by zoning bylaws across the country to determine uses. It's not the Building Commissioner's personal feelings; he doesn't just pull this out of a hat. That's where this one falls unfortunately.

Vote:

A motion was made by Mr. Fraprie and seconded by Mr. Mantoni to uphold the decision of the Building Commissioner regarding the J-3 use classification.

On a voice vote (5-0), the motion to uphold the decision of the Building Commissioner, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Mantoni: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

Board Discussion/Deliberation:

Vice Chair Igoe: Let's review the criteria for a Variance. We can only grant a Variance if we find the following:

1. Literal enforcement of the provisions of this bylaw would involve a substantial hardship, financial or otherwise, to the petitioner or appellant.
2. The hardship is 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.
3. Desirable relief may be granted without either: substantial detriment to the public good; or nullifying or substantially derogating from the intent or purpose of this bylaw.

I would suggest that the petitioner meets Criteria 1 & 3; those elements. It's always the second one that's tough because it's really not owing to soil conditions, shape or topography. I would say he definitely has a hardship that there's really nowhere in town to place this, unless he's out on Route 28, and that's probably going to be a substantial financial hardship. I don't personally know the commercial property on Route 28, but I would imagine it's probably cost-prohibitive for his business. I would say that should the Board want to move on with this Variance relief for this petitioner, you could probably rely on that hardship, and the fact that there's nowhere else in town, but for a very expensive place along Route 28 for him to set up shop.

Mr. Martin: I'd agree with that. I'm not even sure about Criteria 1 actually. There are some locations and that doesn't really come into play here as much. That particular use is not deemed appropriate for that zone. It's not for us to decide that; Town Meeting decides if that is to be

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changed. I think you have trouble meeting the criteria that we have to look at in order to provide a Variance in this case.

Mr. Fraprie: Footnote 23 specifically calls out what he'd like to be able to do. It refers to the definition in 500.

Definition from the Zoning Bylaw: BODY ART ESTABLISHMENT - means a specified place, location, premises, or business that has been granted a permit by the Board of Health, whether public or private, where the practices of Body Art are performed, whether or not for profit.

Mr. Martin: Potentially allowed in B-2; most places on Route 28.

Mr. Fraprie: Obviously, this was put together to *not* allow that in a B-1. B-2 and HMOD-1 are the only places that it would fit. If we're going by the bylaw, which we're supposed to do, then this doesn't work.

Mr. Mantoni: I agree with these fellas. He's in a pickle. I don't see that there's a lot we can do about it.

Ms. Murphy: I agree with John, Jay, and Dick.

Vice Chair Igoe: I'm going to go back to the petitioner. Jase, you've heard the Board and what and the restriction that the bylaw puts on us in granting relief for you to set up shop over there. We could take a vote on this tonight; I think you would lose. I would suggest that you ask the Board to withdraw your petition, without prejudice. Perhaps, you can come back with something else in the future. If we did take a vote, and it's a negative vote, you couldn't come back for two years for this petition at this site; you could come back for other sites.

Mr. Parker: I'd like to do that.

Vice Chair Igoe: I don't think anyone said it's a bad location for this or a problem with your business. The only problem that we have is that we're charged by the Town and by the state statute is to interpret this bylaw. And, under the bylaw, it's not a permitted use in this zoning district. And, in order for you to get there, you need to qualify for a Variance, and it doesn't seem that you've met the three elements necessary to get there. That's the reason why we can't say "yes". It's not that we want to say "no". It's that we can't say "yes".

Mr. Parker: I understand. I appreciate your time.

A request was made by the petitioner to withdraw the Variance, without prejudice.

A motion was made by Mr. Martin and seconded by Mr. Fraprie to allow the petitioner to withdraw the request for Variance, without prejudice.

On a voice vote (5-0), the request to withdraw the Variance without prejudice, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Mantoni: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

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PETITION 5036: Steven Hetzel dba Lewis Bay Builders, 60 Bayberry Road, West Yarmouth, MA. Map & Lot #: 22.227.1. Zoning District: R-25. The Applicant seeks a Variance from §203.5 for maximum building coverage to build a 10' x 14.5' shed.

Steven Hetzel, the petitioner provided an overview of the project: It's a small lot, closer to the water. It's in a flood zone, so we put the house on a slab. We had a big basement in our former house and now we're lacking storage space. Our current house that we're building is approximately 24.8% lot coverage. The proposed shed is about 145 square feet which would increase the lot coverage – over the limit – about by 1.5%. All the setbacks would be according to code. We would exceed lot coverage and we're claiming a hardship for storage.

Board Questions:

Mr. Martin: Pretty self-explanatory. You'd like a shed on a small lot with a big house.

Vice Chair Igoe: For clarification purposes, you want to go from 25% lot coverage to 26.5%?

Mr. Martin: 26.4% from 24.7%. 25% is already a pretty lenient amount compared to other towns. I know Dennis is only 15% lot coverage. On the other hand, I find nothing terrible with you having a shed there; it's meeting the setbacks. You don't have a basement. It's a maxed-out house on a small lot. The question is whether we want to max out a little more.

Mr. Fraprie: Dick said it, so I'm good.

Mr. Mantoni: I don't have any questions.

Ms. Murphy: I don't have any other questions.

Vice Chair Igoe: I don't have any questions either. I would make a comment that he is in a flood zone, so he can't put a full basement in; doesn't have that room there. In terms of the Variance criteria, I do think he meets the Variance criteria (number 2: the soil conditions). In the past, we have allowed increases beyond 25% for houses themselves, depending on the situation, and not accessory sheds. But that's just my initial comments. Anything else from the Board? Hearing none. Steve, anything else you'd like to add?

Mr. Hetzel: The location of the shed is not visible from the street at all, so that doesn't create a problem. The lot behind us: I'm not sure if it's buildable or not, but it's all wooded, so there's nobody right behind us. We need someplace to put our extra materials when we move in. We'd still have to sell; give things away because it's [the shed] 145 square feet, but our [former] basement was probably 1,000 square feet, at least.

Public Comments:

No one spoke in favor of the petition.

In opposition: Tom Maloney, speaking on behalf of his father, also Tom Maloney, who is the trustee (Lewis Realty Trust) of two parcels (30 & 34 Lewis Bay Boulevard) that touch the applicant's property. Believe it's a self-created hardship. The applicant is a seasoned builder. The house plans maximize living space; not storage. There's a 334 sq ft garage. The shed seems oversized. We don't know how high it is; there's a cupola on top. The house is 8.4 feet off our property line. We oppose an additional building being erected 6.5 feet off the property line of 34 Lewis Bay Boulevard which is the "vacant lot" that Mr. Hetzel talked about.

Vice Chair Igoe: Just so you know. He does meet the setbacks.

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Board Discussion and Deliberation:

Mr. Martin: I'm very much on the fence. I understand the reasoning, the need, and it does meet the criteria otherwise. On the other hand, I have to agree with the abutter who just spoke that's it's essentially a self-imposed hardship. You built right up to the maximum size house you could fit on here, and now you want more space. There is a garage. I'm sure you have an attic.

Mr. Fraprie: I'm with Dick. I'm having a hard time from a Variance perspective.

Mr. Mantoni: Dick raises a very good point that we don't often see many petitions over 25% [lot coverage]. I'm struggling with it myself.

Ms. Murphy: My concern is the size of the house taking up a lot of the lot, and then still wanting a shed.

Vice Chair Igoe: I would agree with what everyone has said about their concerns. With the exception of he's in a flood zone, so he couldn't put a basement in, and if he could, he wouldn't be here. He's met his setbacks, so in terms of putting a big house on a small lot, while building it, they could have planned to not go over 23.5% [lot coverage] because we want to put a shed in. He can't put the cellar in, so I think that's a major factor. I do think he meets the criteria of a hardship (soil conditions) under the bylaw. We have allowed petitioners to go over 25% [lot coverage] on a case-by-case basis. This is a shed that can be picked up and moved. Water can run underneath the shed and permeate to the ground; it's not a home. I do find this different from asking that the house be 26.5% lot coverage. What he's asking for is 1.5% relief on lot coverage for an accessory building that meets the setbacks. I would be in favor of this petition. I think it is a hardship given where the lot is in a flood zone.

Mr. Fraprie: The basement is a good point. In a flood zone, they can't put one in, so storage can be a problem.

Mr. Mantoni: Same here.

Mr. Martin: I would still have a problem in terms of the Variance. I wouldn't call it a "soil condition" [being in a flood zone]. I think you can push it and say maybe there's a hardship, though a lot of that is self-imposed.

Vice Chair Igoe: He's met the setbacks. The size of the building; he's not in excess of what is allowed. We're really just talking "building coverage" here. We've tried to be lenient with petitioners on sheds. If it's reasonable, we try to find a way for things to work.

Vote:

A motion was made by Mr. Fraprie and seconded by Mr. Mantoni to approve the Variance as requested.

On a voice vote (5-0), the request for a Variance was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Mantoni: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

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PETITION 5037: David and Nancy Holt, Property Location: 154 Center Street, Unit 4, Yarmouth Port, MA. Map & Lot #: 140.58.C4. Zoning District: R-40. The Applicant seeks a Special Permit per §104.3.2(2) to raze/replace and expand a nonconforming structure and §104.3.2(4) to expand preexisting, nonconforming use, and/or a Variance from §203.5 for rear setback relief and §202.5 to expand nonconforming use.

Brendan Lowney, Senior Project Manager, Lewis & Weldon, presented on behalf of the petitioners. Rebuild the existing condo #4 due to fire damage on February 19, 2023. A demolition permit has been issued due to the safety of the building; it had to be knocked down. Appeared before Historic [Old King's Highway] for the rebuild and possible expansion which is almost 92 square feet. The property is preexisting nonconforming with the rear setback (7.1 feet). New square footage would not infringe on existing setback of the 7.1; we're just squaring off the building. Little more comfort for the unit and the year-round tenant – who has been there for a couple of years – back as soon as possible. The current property is ~329 square feet and this rebuild/expansion will bring it up to 420 square feet.

Board Questions:

Ms. Murphy: No questions.

Mr. Mantoni: I'm confused. What is the square footage?

Mr. Lowney: 420 (with the addition of 92 square feet). Right now, it's a "T" and we're filling in [each side of the "T"].

Mr. Mantoni: Not getting any closer to the lot line, right?

Mr. Lowney: That's correct.

Mr. Fraprie: The patio is currently there?

Mr. Lowney: The whole building and foundation has been removed.

Mr. Fraprie: I'm trying to understand the layout. The patio and trellis are facing Center Street?

Mr. Lowney: In the rear of the property.

Mr. Fraprie: It's going to be taller?

Mr. Lowney: Ultimately, it would be taller. It will go from 15.4 to 17 feet [at the peak].

Mr. Martin: I understand what you're doing. I have some issues. This is an increased square footage and closer as 7 feet on the back lot line where 20 feet would normally be required. If all these little cottage colonies that get condominium-ized, we've been adamant about the footprints don't change, or at least not for additional living space. We've allowed porches and decks.

Vice Chair Igoe: There's already an existing nonconformity to the rear setback. One could suggest that you're increasing the size of the nonconformity by running down the property line, which you would be creating a new nonconformity. It could go either way [Special Permit or Variance].

Mr. Lowney: We did look at the possibility of moving it. It's already 11 feet from the septic tank and about 20 feet from the leaching. We're not going to be able to move it forward to Center Street. Mr. Holt is providing year-round housing to someone on Cape Cod.

Vice Chair Igoe: On your Site Plan, is this being built in an "exclusive use area" on the property?

Mr. Lowney: Within the "dotted lines", yes.

On August 24, 2023, on a motion by Mr. Martin seconded by Mr. Fraprie, the Board voted 5-0 to approve these minutes.

Vice Chair Igoe: Does this change the condominium documents at all in terms of percentage of ownership or anything like that?

Mr. Lowney: Mr. Holt owns all the units. I don't believe it does.

Vice Chair Igoe: What do the condo docs say?

Mr. Lowney: It's by percentages from what I can see in the first line. Not by square feet.

Vice Chair Igoe: If you're changing the square feet, I think it would change the percentage of ownership.

Mr. Fraprie: Unit 4 is 21%.

Vice Chair Igoe: This was condominium-ized in 2006 or was that when this just changed hands?

Mr. Lowney: I believe it's when it changed hands.

Mr. Lowney: If we didn't move the structure forward, we'd still have a height issue, correct? We're adding the square footage and the height.

Vice Chair Igoe: To answer your question about going up, yes. [From the Deed], I have Unit 1, Gray's Beach Condominium, created pursuant to M.G.L.c.183A (which is the condominium statute) created by Master Deed dated June 19, 2006. What size is this piece of property that it's on right now?

Mr. Lowney: The total lot area is 19,876; a little less than half an acre.

Vice Chair Igoe: You've got three units on a piece of property that's about half the required size. So, I'm wondering how you converted this to condominiums in 2006 without coming before us.

Mr. Lowney: That's a question I cannot answer.

Vice Chair Igoe: I don't have the answer either. Do you have the condo docs?

Mr. Martin: We don't have the condo docs.

Vice Chair Igoe: We don't have them in ours. I was asking the petitioner.

Mr. Lowney: I just have the Condominium Site Plan.

Vice Chair Igoe: As a general rule, we've had a lot of these. We have to consider this as we classify them. We have a lot of cottage colonies in the town. They're multiple, small cottages on one piece of property. There's no setbacks. They don't meet the area requirements. They condominium-ize themselves, but when they do that, generally we'll not allow them to expand on that. And we have had a number of people that have come before us. I see what the petitioner wants to do in terms of size; that doesn't seem like a lot. But as an expansion of the property on an undersized lot, we've said "no" to others in the past. I'm not sure that you meet the criteria of the bylaw. I think that you can rebuild on the footprint that you have with what you have. But if you want to go up or go out, you have to come back.

Mr. Martin: If it's a nonconforming structure, going higher, that alone would require.

Mr. Lowney: In the plans that were submitted, we do have the height for the proposed. Would you be able to approve the height tonight?

Vice Chair Igoe: We can always grant you "less" than what you want; we can't grant you any "more". If the Board determines that what you're asking here is to change your roof pitch, add no more square footage, and stay within your footprint.

Mr. Lowney: Every property is unique.

Mr. Martin: We understand that. It can be rebuilt the way it was. How do you look at it, Sean, with the height?

On August 24, 2023, on a motion by Mr. Martin seconded by Mr. Fraprie, the Board voted 5-0 to approve these minutes.

Vice Chair Igoe: He did show the height on his proposed plan. If he's talking about changing the roof pitch within the same footprint, I think we can grant him relief for that. A single story building with an increase in roof pitch. If we were inclined to do that, we'd want to see a revised set of plans.

Mr. Fraprie: They're showing existing and showing proposed, but not what you're outlining.

Mr. Lowney: Either way, the property would get higher because of the new foundation.

Vice Chair Igoe: We've talked about the additional 90 square feet and it sounds like at least two of us can't support it, and you need 4 votes, so I don't think that would succeed.

Public Comments:

Elizabeth Halpert, 15 Mattis Drive, Yarmouth Port (abutter to the rear of the property): Not in complete opposition, but had concerns about the building that is 7 feet from her property line. 1) Building height. 2) Integrity of my property line. 3) Ms. Halpert might want to build a fence and a shed within her property line across the rear of property. How will this larger/taller building affect her future plans? 4) Would this increase the number of tenants living in the space?

Vice Chair Igoe: Only considering a building within the existing footprint with a steeper roof (from a 5-inch pitch to an 8-inch pitch). Are we allowing them to extend or add on? No. You can build a fence and a shed, as long as you conform to the setbacks. If you don't, you'll have to come in and see us.

Mr. Lowney (regarding the building's height): We're going from 15.4 to 17 feet. With the new code, the building will be higher; we can't get around that.

Board Discussion and Deliberation:

Vice Chair Igoe: In consideration of the original plan with the extension and alteration, if you're in favor of it, we'll have further discussion.

The Board Members would vote "nay" on the original plan.

Vote:

A motion was made by Mr. Martin and seconded by Mr. Mantoni to approve the Special Permit with the following conditions: the rebuild of the existing structure in the same footprint with an 8-pitch roof shall not exceed 17.2 feet in height and the petitioner shall submit a revised plan showing the elevations and height prior to the Special Permit being issued.

On a voice vote (5-0), the request to approve the Special Permit, with the stated conditions, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Mantoni: AYE

On August 24, 2023, on a motion by Mr. Martin seconded by Mr. Fraprie, the Board voted 5-0 to approve these minutes.

- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

A request was made by the petitioner to withdraw all other forms of relief requested, without prejudice.

A motion was made by Mr. Martin and seconded by Mr. Mantoni to allow the petitioner to withdraw all other forms of relief requested, without prejudice.

On a voice vote (5-0), the request to withdraw all other forms of relief requested, without prejudice, was approved.

- Mr. Martin: AYE
- Mr. Fraprie: AYE
- Mr. Mantoni: AYE
- Ms. Murphy: AYE
- Vice Chair Igoe: AYE

PETITION 5005: (continued from 3/9/23, 6/22/23) **Blue Sky Towers III, LLC dba BSTMA, LLC. Property Location: 1044 Route 28, Yarmouth, MA. Map & Lot #: 50.189.1; Zoning District: B-2, HMOD-1, VC-3.** The Applicant seeks a Special Permit per §103.2.2 and §408 to construct a 110-foot wireless telecommunications facility tower.

Blue Sky Towers participants: Attorney Ricardo Sousa, Prince Lobel Tye; Blue Sky Towers Site Acquisition Agent & Program Manager, Sean Gormley; T-Mobile RF Engineer, Ryan Monte de Ramos; AT&T RF Engineer, Isam Halwani (in-person); Radio Frequency Emissions Expert, Don Haes (via Zoom).

Other participants: Consultant David Maxson, Isotrope (in-person); Town Counsel Liz Lydon (via Zoom).

Attorney Sousa: At the last hearing (3/9/23) which was our first public hearing, the Board directed that the Town would hire an outside consultant (David Maxson, Isotrope) to serve as a peer review of the application, including: Is there a significant gap in coverage? Are there any alternatives to what is being proposed? We were presented with his report on/about June 30. We have reviewed the report. Blue Sky has a few consultants, including Sean Gormley (a project manager for Blue Sky Towers) and two radiofrequency engineers (from AT&T and T-Mobile), who can speak to Mr. Maxson's report.

Mr. Maxson, Isotrope: I assisted the Cape Cod Commission in reviewing their [Blue Sky Towers] application for approval of a Development of Regional Impact (DRI) for this same tower. I have reviewed the materials the applicant submitted and I also watched the video from the first hearing, so I know what questions the Board was asking at the time.

On August 24, 2023, on a motion by Mr. Martin seconded by Mr. Fraprie, the Board voted 5-0 to approve these minutes.

Two key questions: 1) whether there's "a gap" in service for the two carriers involved in the application; 2) alternatives. The Board did a good job discussing some of the alternatives that had come up in the Cape Cod Commission proceeding as well. Some large parcels in the area that were considered [by the Cape Cod Commission], and there was some further discussion at the Board level [ZBA]. Properties at and around the Skull Island entertainment area. A couple properties behind a shopping area to the northeast [of the proposed location]. A large parcel with a trailer park and other uses to the southeast of the proposed location. These properties stood out as the most likely places where you might be able to place a tower with potentially less visual impact on the community.

Whether these properties are available or not is an entirely separate question. The applicant has submitted some additional information in that regard, reinforcing what they have already presented to the Board (and also to the Cape Cod Commission).

As far as how far to look for an alternative [location], I think for the most part, if there were places a little further to the north, such as east or slightly north of Swan Pond, would be ripe for consideration as well because what the engineers for the two carriers describe as "the gap" is a pretty large area between Route 6 and going south across Route 28 to the coast, where they have this area of less-than-optimal/sub-standard service. I note in my report that I generally don't opine on whether or not there is a "significant gap" because it's not an engineering term; it's a Court term, so I regard it as my job to reinforce or counter the information provided by the applicant's engineers as to the "sufficiency of coverage". I would say that, in this particular area, these two carriers do need additional facilities to provide an appropriate level of competitive service.

The other aspect of looking at alternatives is: Are there other ways to address these needs? Verizon is on a concealed antenna monopole that is 80 feet or less in height, not very far from this proposed location. That is something the Cape Cod Commission has deemed as *not* a Development of Regional Impact (DRI) and does not require Commission review; that's how Verizon got it built. That's not something that's tall enough to handle multiple carriers, so I think the applicant was appropriately dismissive of doing anything to attach to the Verizon CAM (concealed-antenna-monopole) for either of the other carriers.

If the approach in the Town were to be to encourage more CAMs (concealed-antenna-monopoles). I hesitate to call them flagpoles because they're "fat"; they don't really look like flagpoles, but at least they have a clean architectural appearance. What you would end up with is probably four concealed-antenna-monopoles to replace the proposed cell tower. Those four poles would probably provide more coverage than this cell tower would provide, but *one* pole for each carrier, it probably would not, because we've seen from the carriers' information that as you go lower – even on the proposed tower – down to heights like 90 feet and below, that the coverage reduces pretty significantly.

This other alternative of concealed-antenna-monopoles, smattered around the community on different properties where they're much shorter and potentially, collectively, of less visual impact than a single, very prominent tower on a major road. But, on the other hand, as bylaws

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often say, we'd rather not have a lot of towers, so we're willing to tolerate having a taller tower to handle multiple carriers (co-location). That's part of the decision process here. If you're looking for alternatives, is it something that the community would prefer to see carriers going in the direction of the concealed-antenna-monopoles approach that Cape Cod Commission finds to be not a Development of Regional Impact (DRI), but still as something that affects how additional cellular facilities would be deployed here in the community.

The carriers also talk about some difficulties they have with concealed-antenna-monopoles because they have to cram a lot of antennas, and now some radio equipment, inside the pole. Because the radio transmitters are often put next to or below the antennas, instead of on the ground. This provides some additional difficulties with the dimensions of the pole, with thermal regulation of the equipment inside the concealment, inside those poles.

The other thing that people often ask about is this whole thing of "small cells and 5G". 5G is really just like 4G; they still need the cell towers; they still need macro facilities like Verizon concealed-antenna-monopoles or on building rooftops. It's just that they also have this ability with 5G technology to "fill in" or add capacity with antennas, largely on utility poles, in busy commercial areas.

I don't see in this area, because of the size of the region of sub-standard service for both these carriers, you can't solve that just with small cell. You're going to need to have something on buildings, on existing structures, on concealed-antenna-monopoles or on a new cell tower. Those are the choices that are before you.

Mr. Igoe: The concealed monopoles. Having a number of them scattered out. In order to make up what you would get with this tower that they're proposing, did you determine how many of these lower monopoles that you would need around town and what height they might have to be at to get the same coverage?

Mr. Maxson: I estimated based on the 80-foot maximum height that would be allowed by the Cape Cod Commission without a DRI review. That gets you to above the trees, for the most part. There are, of course, places where clusters of pine trees are taller than 80 feet. You'd have to be sure that you're in the right place. As I say in my report, if there were two 80-foot CAMs in appropriate locations for T-Mobile, and two 80-foot CAMs for AT&T, I think they could get slightly more coverage than the proposed tower would give them. If they only did one, they would not be able to achieve the amount of coverage that the proposed tower is providing.

Mr. Igoe: So, if we did a total of four, spread out, at 80 feet, in various locations, that would be sufficient for both carriers to get what they want on this large, 110-foot tower?

Mr. Maxson: Yes, with the assumption that the CAMs are at the "right" locations that they can supplement each other and provide the coverage in relation to where the network coverage already exists.

Mr. Fraprie: If you went with the CAM solution, could the T-Mobile and AT&T CAMs be close to each other, on the same site, or would they have to be totally separate?

Mr. Maxson: They could be on the same site. It's generally something they like to avoid having two sets of antennas from different carriers aimed at each other at the same elevation. But I have seen places where there are cell towers of the same height that are 75-100 feet apart, and they just do the engineering necessary.

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Mr. Fraprie: Do they have to move the antennas so they don't conflict with each other?

Mr. Maxson: What they would do is aim the antennas accordingly. They may have to put in additional filtering which slightly reduces the performance of the facility. The farther apart they are, the better, up to a point.

Mr. Igoe: If we went with 80-footers, how far apart would you suggest they be?

Mr. Maxson: Let's assume level ground and all things are very simple, I've seen facilities that are 75-100 feet apart. I think they're more comfortable with a couple hundred feet apart. Their primary preference is: If they're on the same property, they'd rather stack them, one above the other, so that they don't cause potential interference to each other.

Mr. Igoe: I want to ask the petitioner. Had you considered this as well? A number of different monopoles located at different locations to get to where you want to be, achieve the same goal as the location by the church?

Attorney Sousa: No, we did not consider this alternative. I should say we ruled it out as really a very inefficient way to fill the gap in coverage for these carriers. Because you're also talking about, there's another carrier, DISH, which is coming into the market. You'd have to build two more for them as well. Verizon has very, we think, from looking at what propagation we would get from, if we placed an installation where their CAM is, most likely they need one also, further north [of Route 28], towards Route 6. You're talking many more than just four to really fill all the coverage gap. This is a fairly large coverage gap. What we're trying to do is: Develop one facility that's going to be able to accommodate the various wireless carriers. Your bylaw itself encourages co-location. That's really the nature of what most bylaws in the country do. They try to find one location, so that you can accommodate multiple carriers at a height that's sufficient to really cover that very large, significant gap in coverage. I think with respect to prong #1, I don't want to put words in Mr. Maxson's mouth, but I don't think he's disputing the fact that there's a significant gap in coverage. This gap in coverage has existed for a number of years. We have correspondence going back to 2016 with a Town official, trying to fill with one of the carriers trying to fill this gap in coverage, trying to find a solution. We've been working at this for a long time, and we're trying to find a responsible way to build a communications facility that allows for co-location, so that in an aesthetic way, we believe we have done that in this last proposal, especially. In fact, the Cape Cod Commission felt we did it in their application without a clock tower. Then, we took guidance from both Site Plan Review and Design Review in this Town to change it to a clock tower. We're following your lead with respect to design, but I think it is important to try one solution that fills most of this gap in coverage. If you look at the propagation map for what AT&T and T-Mobile would get from installing on this proposed clock tower, it would be a substantial fill-in of this gap along Route 28 which is incredibly well-traveled, and which really needs to be covered better than it is covered right now, and with the area north of Route 28. The other thing to take into consideration, and you haven't asked Mr. Maxson to design where those four [CAMs] are going to go, that would be unfair, I think. But, you have to remember, the area north of Route 28, is substantially residential, very large residential areas with very small lots, so you're going to have some challenges, trying to find a parcel that's going to be able to accommodate a CAM, no less two CAMs. So, what we're trying to do is really, the nature of network building is: it's an incremental process. You can never fill an entire gap [snaps fingers] like this; it just never happens. Otherwise, in 1997, one year after the Telecommunications Act in 1996, we would have ubiquitous coverage throughout the country, and that hasn't been the case; it can't be the case. It happens in an incremental basis. So, you try to find responsible locations. We feel this is the responsible location to try to fill most of that

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significant gap in coverage, and that's what I think, I think that's a much better proposal than conjecture of four, five, maybe six CAMs, spread out in an area maybe we don't know will even work.

Mr. Igoe: Let me ask you. Because you just said it will take care of most gaps. Are you saying after you build this tower, we're still going to have gaps?

Attorney Sousa: Yeah, the propagation plots that we submitted. There'll still be an area to the north of where we're going to be propagating, just south of Route 6, where there still will be some gaps. As I said, none of these networks work perfectly. It cannot fill an entire gap. If you allowed us to build a 150-foot tower or 190-foot tower, I believe we could cover that [the gap south of Route 6], but not at 110 [feet].

Mr. Igoe: Don't you have 190-foot tower on Whites Path?

[From March 9, 2023 ZBA hearing: AT&T antennas on Route 28 are 287 feet high].

Attorney Sousa: Yeah, there are a number of surrounding towers that fill *those* gaps in coverage, but they don't reach to our area on Route 28. There's a limit on how far the signal will travel, in order to...

Mr. Igoe: How far will the signal travel?

Attorney Sousa: It's not a defined number. Mr. Maxson can probably answer that better. It's typically one to two miles, depending on topography, depending on obstacles, but that's typically the normal range. But I would defer to an RF engineer, there are two others in the room from AT&T and T-Mobile who could help answer that question as well.

Mr. Igoe: I want to just say that I think we all realize that there are gaps in coverage, and we need to do something about it. Anybody who was around over the July 4th weekend experienced that in the Town of Yarmouth. It was very difficult to make a call from *anywhere* here in the Town. We're certainly not unappreciative of your efforts to solve that problem. I just think that the issue we have as a Town is we're very concerned about having a structure that tall sitting in the middle of Town where you just can't escape seeing it. I know you're trying to dress it up, but we would be very interested, I think, to see if we could find some alternatives, or at least an alternative site to the one that you're on, or whether they be: shorter poles, more of them around Town. We all understand that we're going to have to do something. Can I ask you a question before I turn it over because I want to give the other Board Members a chance. Did you ever talk to Mr. Nickinello over there on Skull Island?

Attorney Sousa: We did. Well, a letter was sent, a certified letter, and I have Sean Gormley who works with Blue Sky Towers as a Site Acquisition Agent; he's here with me today. As you know, our first meeting was cut short; it was a very short meeting. I think the Board decided it wanted a peer review. We didn't get to put in that much testimony. But I did submit a fairly extensive spreadsheet, together with this...

Mr. Igoe: My question is: Did you talk to Mr. Nickinello?

Attorney Sousa: We did not talk to him, but we sent letters to...that property.

Mr. Igoe: I'll tell you what I want you to do before you leave here tonight. I want you to leave your telephone number with Dolores [ZBA Office Administrator]. Because I'm going to go over and see Mr. Nickinello when I get back and I'm going to ask him. Because I already talked to his son and they were interested in it. I talked to them 3 months ago. They might be interested and that may be an alternative site. It's in the back. They have a driving range. Right now, they've poles that run 85 feet tall down the right side of their driving range. You go to the back of their property, I don't think you'd be within 1,500 feet of anybody, and I think you'd probably get what you want. I mean we can have a discussion about that. I don't know how the other Board

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Members would feel. It would be a better alternative to this particular site. It might get you what you want, but I'd be more than willing to talk to him, see if they're interested and let you know. You guys can begin a dialogue. That would be something different. But are you saying there's no other alternative sites that you've investigated? Thoroughly investigated. That's another question: Are you just sending out a letter? Do you really try to follow up with this and other locations?

Attorney Sousa: Yeah, so these letters were sent out prior to the Cape Cod Commission in 2021. But the effort to essentially talk to property owners and find somebody who was interested, and the Catholic Church was interested. These letters were sent out. There were some responses. But many of them, there just simply wasn't any response. I can provide copies of the certified letters, or I should say the certified receipts and the USPS tracking numbers, and I'll leave that with Dolores tonight.

Mr. Igoe: I believe your representation; I'm not questioning that.

Attorney Sousa: Once you do get a property owner, in the vicinity of the gap, who is interested, you clearly have to start that process because you can't pursue more than one candidate at the same time. You find somebody who's interested. Clearly, if there were three/four people who got back to us, who responded to the certified letter, and said, "Yes, let's talk." Then, I think there would be something to talk about. But, as you can see in the spreadsheet, there were a lot of "No" responses. And there were some that simply said, "Property owner not interested." What we tried to do as well is do an analysis because as you know, you have a 1-to-1 fall zone. So, you have to pick a parcel that's large enough, where you have to meet that setback, you have to meet all the side yard setbacks. And this actually tower on this subject property does, but it also meets that fall zone as well.

Mr. Igoe: I just want to address your fall zone for a second. If that thing [cell tower] goes over, what is the fall zone?

Attorney Sousa: It's 1-to-1. So, it's the height of the tower. It will not fall over our property line.

Mr. Igoe: So, if you build this structure that has the clock on it, is it 4-sided?

Attorney Sousa: It is 3-sided at the moment.

Mr. Igoe: It's 3-sided. If that gets picked up by a big southwesterly wind, for instance, are you saying that thing could not fall beyond the 1-to-1?

Attorney Sousa: First, they would have, this tower is not, this is built to industrial standards. It's going to be built to the Mass. Building Code. We take these kinds of builds very seriously. Building Inspector is going to have to sign off. There will be a structural report that's going to be submitted to the Town. As you can see in our Site Plan, there is a 1-to-1 fall zone within our property. So, it won't fall over our property line, if it falls.

Mr. Igoe: On the northwest side on your Sheet 32, I believe, on your original submission. You show a 69-foot, what appears to be a fall zone, to a building on Byron Lane. Are you showing that?

Attorney Sousa: Which sheet again? I apologize, Mr. Chairman.

Mr. Igoe: Number 32. This is in your original submission.

Attorney Sousa: What is the Plan Number on the bottom right-hand corner? A3 of the plan.

Mr. Igoe: Are you showing the properties on Byron Lane?

Attorney Sousa: I apologize. A2. It's a Radius Plan, surrounding the tower. The dashed circle. It essentially says, "to the clock tower base".

Mr. Igoe: It has 69 feet to a compound in the northwest corner. See the compound 69+/?

Attorney Sousa: Yes, I see that notation.

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Mr. Igoe: Is that 69 feet to that building right there?

Attorney Sousa: I think that's the distance from our compound. The fence line around the clock tower to that property line.

Mr. Igoe: OK. The other one says 120 feet to clock tower face.

Attorney Sousa: Right. Because the clock tower is well within our fenced compound, that's going to be a much longer distance from the clock tower face itself to that property line.

Mr. Igoe: So, you're suggesting that on the 1-to-1 in the fall zone, that would not fall onto that property.

Attorney Sousa: Right. And, in fact, as you know, the tower is shorter now. It's 110 [feet].

Mr. Igoe: You have this placed right next to the parking lot of a church. You do know that on the weekends in the summertime, the parking lot is full of parishioners, right?

Attorney Sousa: Yes, I do.

Mr. Igoe: What would happen if the tower came down during a Mass.

Attorney Sousa: As I said, Mr. Chairman, I think that's conjecture. We really build these structures to an industrial level pursuant to Mass. Building Codes. There will be wind load analysis. There will be a structural analysis. There will be a fair amount of scrutiny.

Mr. Igoe: Have you built these before? Where the fall zone has been within a commercial parking lot?

Attorney Sousa: Maybe we could have Mr. Gormley, since he's a Program Manager for Blue Sky Towers. It's not appropriate for me to answer that question. Sean, if you could state your name and address, and your position at Blue Sky Towers.

Mr. Gormley: Sean Gormley. Program Manager at Blue Sky Towers. I live in Clinton, Massachusetts. Just a brief history. I've been building towers for the last 20+ years or so. And yes, to answer your question, Mr. Chairman, I have built towers in parking lots. I couldn't tell you exactly where because I've probably built well over 200 towers in my career. But one thing I could tell you though, looking at some of the zoning and location of sites, there's a reference point in Connecticut. I've seen towers built right next to homes and whatnot. I can think of one cell tower that I built in Vermont, probably 10 years ago, it was in the parking lot of an Agway [Garden Center] in Brattleboro.

Mr. Igoe: Have you built these 3-sided clock towers before?

Mr. Gormley: I have not built a clock tower with 3 legs. Most of my towers have been either monopoles or self-supporting towers. Self-supporting towers have 3 legs as well.

Mr. Igoe: If you have a monopole, I think we could agree that the wind resistance would be less than if you have something that's 3-sided and has "faces" to it that are like "sails".

Mr. Gormley: I might have to disagree with that. I'm not a structural engineer, but if you look at a design like this, you do have 3 legs. If you look at the design itself, you have 4 sections of panels, and there is a space between each one of the panels that does allow the wind to go through. I can't tell you "numbers" about the force of the wind, but as Rick alluded to before, all towers are designed per what's called "Rev G specs" which is demanded in Massachusetts. Rev G specs point back to the T.I.A. (Tower Industry Association) specs. Every once in a while, they look at tower loading, the design, the structural capacity of towers, wind loads, and whatnot, and over time, they have actually increased the structural resistance of these towers; they become more "beefy" over the years. They would actually take into consideration the wind, typical winds on the Cape. We are close to the ocean, so you would actually have higher wind speeds. Because we're in close proximity to the ocean, you would typically see the same thing like on top of a mountains and whatnot, if you're in lowlands inland, your wind speeds are decreased.

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Mr. Martin: Does it have a hurricane rating in terms of what kind of winds it could withstand?

Mr. Gormley: Ah, I'm going to say "yes" because I'm thinking broadly about the towers that I've designed in the past. Typically, you look at anywhere between inland (85/95 miles per hour) and the coast (115+ miles per hour). I actually built a tower up in eastern New Hampshire that had a wind load of, I think it was 135 miles per hour because we were on the top of a hill.

Mr. Igoe: Can you get us some documentation that shows the wind rating of this facility that you're building?

Mr. Gormley: Ah, yes.

Attorney Sousa: Just to your other point, Mr. Chairman. You do see these on major arteries quite a bit. You see towers on the Mass. Pike, the Merritt Parkway [Connecticut], close to very heavily trafficked roads. Once again, they're built to industrial standards. Because of the confidence in which they're built, they can be placed that close to major arteries.

Mr. Martin: Can you get away with it being any lower? You're at 110 feet now?

Attorney Sousa: Yes, we reduced it from 120 to 110, from the Cape Cod Commission process.

Mr. Martin: How's 90?

Attorney Sousa: It really starts to impact that second and third carrier. We're trying to build a communications facility to accommodate multiple carriers.

Mr. Martin: You look at these pictures of the [proposed] tower from the close proximity of the immediate area, including some residences, and it's awfully noticeable. I know everybody wants that coverage and I understand that, but it's still, I won't use the word "obnoxious", but it sure is visible.

Attorney Sousa: The nature of the technology, it has to be at a height, so that it can propagate properly. What we've tried to do is take the signal from the various boards that we've met with: the Cape Cod Commission, Design Review, Plan Review, and your [Town] Planner, to try to improve the design and the aesthetics. I think this last iteration is a huge step forward in trying to, once again, mimic a clock tower, something that you would see in a New England town.

Mr. Martin: Even the idea of the clock tower doesn't completely work for me because the clock is halfway up. I understand why that is, too, but a normal clock tower, the clock's at the top. So, it doesn't really look that much like a clock tower.

Attorney Sousa: We think we can work with you on that issue. Mr. Maxson, in his report, suggested that there are ways to perhaps move the clock aperture closer to the top. We'd have to get the carriers to approve it. We want to make sure there's no interference from the mechanicals associated with the clock to interfere with that signal.

Mr. Gormley: Part of the clock issue is you have your mechanism in the middle which is about a foot/foot-and-a-half wide and it's metal. So, at the top of the tower, you have AT&T and T-Mobile, and they have 4 panel antennas at the top. If they [the antennas] were pointing straight out of the [clock] face, I believe there wouldn't be an issue. Once you have to rotate your antennas to achieve your azimuth [definition: the angle of horizontal deviation, measured clockwise, of a bearing from a standard direction, as from north or south]. If you can picture: Here's the clock mechanism, and here's one of the panel antennas and it's pointed this way. It's pretty tight face at the top. So, now that antenna doesn't propagate straight out, so it has the potential to hit the metal, and interfere with the signal. They can't have that sort of experience. We'd have to talk to the carriers about that, but the reason why we moved it [the clock face] down to the third spot on the tower is because DISH has shown interest in going on this particular tower itself, and they [DISH] have only 2 panel antennas. We can make sure there's

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that separation from the clock mechanism and provide the azimuth and not have that interference.

Mr. Fraprie: I read both reports. Mr. Maxson's report, which I thought was very helpful on trying to understand what the options were. I understand your preference to go with the one single tower, but the place you're putting it is at the confluence of so many streets and so much traffic. I'm just having a real problem with the location. I think the design, if you can move it [the clock face] up a section, that's fine, but the location for me is still a problem. I'd like to see it someplace, set back from Route 28, which would be visible as people are driving through. I don't want to call it an "eyesore", but to some extent, yeah.

Attorney Sousa: Part of that's driven by "where's the gap?" The gap is along Route 28 and north and south of that as well.

Mr. Fraprie: I agree there's a gap. I think that was clearly identified. You've identified it. Mr. Maxson also agreed with the gap. But I think there may be other locations. Sean suggested one. I'd like to see if you could pursue something that would be less obstructive with the visibility of people driving up and down Route 28.

Attorney Sousa: There's a lot of factors that go into what makes a site viable. The Courts will look at that. It has to work from the radiofrequency perspective; the propagation has to fill that gap in coverage; that happens here. And it could happen at another parcel. But one of the most important things that we're having a challenge with, that we had a challenge with is: it [a site] has to be available. Mr. Maxson reiterated that in the report. We can have a design in our minds that we'll put all these towers on all these parcels to fill the whole gap in coverage, but if those sites are not available, if they're not large enough to accommodate a tower, and if the property owner is not willing to enter into a lease, or even respond to us, it makes it a not viable site.

Mr. Fraprie: I'm just not comfortable at this point in time that you've done enough to try to find that out.

Attorney Sousa: We respectfully disagree. We submitted a spreadsheet.

Mr. Martin: I understand that, too. I just might add that in terms of the Sports World [Skull Island Adventure Golf & Sports World] site, I think he has some ideas of a bigger development plans for that site, which would probably preclude something like this.

Attorney Sousa: That often happens. Clearly, property owners like to try to have the revenue associated with a site like this, but it's not going to compete with a traditional ROI [return on investment] on a real estate development; it simply is not. So, many property owners simply choose not to pursue a tower on their property because they have a better, higher use where they are going to generate more revenue.

Mr. Mantoni: This Alternative Site spreadsheet. Were all of these locations pursued since our last meeting [March 9, 2023] or is this something that happened before we even met the first time?

Attorney Sousa: It happened before we even met, before we even filed with the Cape Cod Commission. Unfortunately, the nature of any development in Cape Cod is that you have to go through a number of layers. In many tower developments, I'd have to go to one board. It wouldn't necessarily be dragged out as it has been here, two-and-a-half, three years, but this exercise [Alternative Site Analysis] did happen prior to that Cape Cod Commission application.

Mr. Mantoni: So, since our meeting, what additional locations were pursued? Any?

Attorney Sousa: We have not pursued additional locations because we already filed an application for this site at Cape Cod Commission and with this Town.

Mr. Mantoni: Because our problem is still the same problem we had last time. We have a 110-foot tower right off Route 28 that the whole Town can see. And that was our issue, so could we

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find another location that would satisfy the coverage, but not be so objectionable. I know Sean [Vice Chair Igoe] mentioned there is another fellow willing to consider this. I would encourage some sort of communication with him, if that's possible.

Mr. Martin: There's only about 8 sites, right?

Attorney Sousa: That were viable. That could have accommodated a tower. Many of the other parcels on this [the Alternative Site Analysis spreadsheet] are very small.

Mr. Martin: One apparently said "no". The others didn't respond.

Attorney Sousa: Right. And all the sites below were either residential lots or sites that were owned by the Town. The Town has been aware of the Telecommunications Act since 1996. It could have put out an RFP [Request for Proposals] for towers on Town-owned sites since then, and we're not aware of any such activity. If this was 1988, I don't think there would necessarily be an obligation on behalf of the Town; they could still be thinking about it; have Town Meeting. But this has been quite a long time.

Mr. Fraprie: Out of curiosity, in 2014, AT&T went through this process [with the ZBA for this location: 1044 Route 28]. Did they never build anything or did they put it in the church?

Attorney Sousa: I think it was a design to alter the steeple just for themselves [AT&T]. It was not done. I was not involved with that application, so I don't know the particulars.

Mr. Fraprie: It's not there now?

Attorney Sousa: It's not there now. There are a number of church steeples that can accommodate wireless installations. There's one in Barnstable I've worked on recently.

Mr. Fraprie: That would not adequately meet your needs?

Attorney Sousa: It's just not the type of steeple that could accommodate a wireless installation. You would have size configuration, design, and structural problems. Some of the churches, where you've been able to install wireless installations, are much beefier, much larger, where you can actually hide the antennas right inside the steeple. Remove the wooden louvers, replace them with fiberglass louvers, and propagate through that area. That's just not the nature, the design of this church.

Mr. Fraprie: The church would sell you the land, but they won't put it in the tower.

Attorney Sousa: They did not sell us the land; they leased us the land. That was the only way to accommodate our communications facility.

Mr. Fraprie: It's a big tower right off the main road. I would like to see an effort to try to do something in another location.

Mr. Igoe: How many carriers you plan on putting in this tower?

Attorney Sousa: It can accommodate up to 4 carriers. If you look at the elevation on the plans.

Mr. Igoe: Do you have agreements with 4 carriers?

Attorney Sousa: Not at the moment. We have agreements with AT&T and T-Mobile, and we have a letter of interest from DISH.

Mr. Igoe: So, if you only had agreements with 2 carriers, would you need a tower this tall?

Attorney Sousa: We want to be able to maximize the revenue on this site and maximize co-location. There's clearly a third carrier out there, DISH, that's in the process of building out a network.

Mr. Igoe: You don't represent a carrier. You're not AT&T. AT&T comes to us and says, "You have to provide us with telecommunications." We say, "OK, we understand the law." But you're not AT&T; you're just building towers and then soliciting people, aren't you?

Attorney Sousa: I wouldn't say "just". We're a telecommunications infrastructure company that builds telecommunications infrastructure in partnership with our tenants. So, AT&T and T-

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Mobile are both FCC-licensed carriers who have rights under the Telecommunications Act, and they are a part of this application. We are trying to fill the gap in coverage that they have in their wireless networks. We're also, as part of this communications facility, that will help them preserve their rights under the Telecommunications Act to provide robust, reliable coverage to their customers.

Mr. Igoe: And those carriers could demonstrate, right now, if they were in a Court of Law, that without this tower, they couldn't fulfill their needs.

Attorney Sousa: I believe they can, yes, Mr. Chairman. Remember, we're not doing this on spec, as you first characterized it, that we build towers, then we reach out to carriers to lease. Here, the demand, the need, comes from the wireless carriers themselves and their customers. There are customer complaints. There's gaps in coverage that they can see in their network. Optimization maps. And they know there's a gap in coverage. They know there's a problem with capacity, and they're trying to fill those gaps through this communications facility

Mr. Igoe: The reason that I ask that is because you said a while ago that DISH may be interested in coming onto this tower. So, I'm just wondering, who's really on the tower? Right now, you're telling us that AT&T and who else is on there?

Attorney Sousa: The two co-applicants are T-Mobile and AT&T.

Mr. Igoe: And you have written agreements with those people?

Attorney Sousa: Yes, we do, Mr. Chairman.

Mr. Igoe: I just want to clear that up.

Attorney Sousa: The reason we don't have an agreement with DISH is they are a new entrant to the marketplace; they only started to build out their network recently.

Mr. Fraprie: I guess to that point I understand your desire to maximize the revenue and the ROI from the build, but we're also trying to optimize the visibility and aesthetics of our Town. I'm not sure that your precedent overrides our precedent.

Attorney Sousa: I think they're both legitimate interests. I try not to emphasize the ROI; that's not why we're here. But building a taller tower allows us to optimize co-location, and that is something you emphasize in your bylaw, trying to put all carriers on one structure, if you can. So, the height drives our ability to accommodate multiple carriers.

Mr. Fraprie: To a limit.

Attorney Sousa: To a limit. It's always to a limit. The nature of these installations is that they're not perfect. The CAMs themselves; they are challenging from an equipment perspective. So, we know Verizon's across the street, but we also feel that they're limited in the type of technology that they can deploy from such a small installation. That's why they typically like to go on a traditional monopole, traditional telecommunications tower, or a facility that's large enough that allows them to deploy all 4G/5G technologies and the remote radio heads that David [Maxson] alluded to as well, right near the antennas, so that you can have optimized propagation. That's not something they can do in a CAM.

Mr. Igoe: Does the Board have any further questions?

"No" from the Board.

Mr. Igoe: Is there anything that the petitioner would like to submit at this time?

Attorney Sousa: Not at this time, Mr. Chairman. We feel we have submitted a pretty comprehensive record. Not only in our initial filing, but in the supplementary filings, including the filing at the beginning of this week.

The petitioner submitted additional materials on July 11, 2023:

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- *Full Alternative Site Analysis: Spreadsheet of alternative sites listing mailed candidates & rejected candidates.*
- *Google Maps Overlays: Outlining various candidates listed in spreadsheet.*
- *Cover Letter regarding supplemental materials.*
- *Mass DEP Order of Conditions*

In response to Mr. Maxson's report, a detailed listing of the alternative site analysis that we did, together with all the lots that we looked at. We feel the design itself is a responsible design as well. The radiofrequency plots submitted by both AT&T and T-Mobile show a significant gap in coverage. We rest on the record as we've submitted it to the Board.

Mr. Igoe: I don't know what the Board's feeling is on this. Do we need another continuance on this matter to figure out alternatives that we could present back to the petitioner? And if we do, petitioner, are you going to take our recommendations, or are you not going to consider them?

Attorney Sousa: I think we would listen to them, but we feel that this is the only viable location for this telecommunications tower. As you can imagine, we've spent a significant amount of time and resources on this particular site, based upon the fact that this was the site, this was the landlord that was interested, this is a location that's buildable, this will fill the gap in coverage, and we also feel that it complies with the bylaw as well.

Mr. Igoe: How do you feel it complies with the bylaw?

Attorney Sousa: In the sense that, together with the Special Permit that we're requesting, if the Board grants it, then it will comply with the bylaw, together with the waivers that were requested as well, for height and other matters.

Mr. Igoe: Speaking of the waivers, how is it that you meet the criteria of the bylaw, if we don't grant you waivers? Do you think you meet that criteria without our waivers?

Attorney Sousa: No, I believe you have to grant the waivers, Mr. Chairman.

Mr. Igoe: I've seen some of the waivers you're looking for, and I don't know that I would be inclined to grant those waivers. I don't know how the others feel about that. I do want to say that I think we need a solution to this matter, but I think you look at it through a different prism than we do. You're saying, "This is the best place. We've got a lessor; he's ready, willing and able. This meets our clients' gap in coverage, so let's build it right here." But you want to put 110-foot tower in the middle of the busiest part of Yarmouth that will be visible from Osterville to Harwich, when you're driving up and down Route 28. I think there's got to be a balance here. I think you've got some blinders on: we're going with this site. If we had an alternative site, it doesn't sound like you'd consider it. It doesn't sound like you want to invest the time to investigate it. Would I be wrong about that?

Attorney Sousa: I think it would have to be a viable location for us to look at it. I think it's hard for me to answer that question in a vacuum. I do want to address your point. We did do a crane/balloon test and derived some photo simulations from that, and I would dispute that you can see it from as far as of a distance as you suggested.

If you look at those photo sims [simulations], there are very few locations where you can see it [the cell tower]. We did it at 100 feet, 500 feet, and 1,000 feet level, as requested by the bylaw. Clearly, when you're up-close, coming towards it, going west on Route 28, you can clearly see it, but we can't do much about that. That's why we've tried to work with the aesthetics. I just wanted to address that point. I do think we've done a good job designing a location and a design, coming up with aesthetics that I think minimize the visibility.

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Mr. Igoe: Are you prepared to submit to us an engineering report saying that the tower can withstand hurricane-force winds? I think we asked you for that and you said you could that for us.

Mr. Gormley: We can get you zoning drawings that do address the wind loading, seismic factors, ground factors, and whatnot. So, yes, we can do that.

Mr. Maxson: I have been involved in reviewing not just applications for cell towers, but cell tower design, and radio tower design. I have a Construction Supervisor's License in Massachusetts, and I have built towers over the years, not cell towers. I think something to be understood about the building code is that it refers to this TIA-222 standard and Rev G is the revision that is currently in the Mass. Building Code. There is a Rev H but that hasn't been adopted yet. The way that standard works is: You don't just say category 5 hurricane. They have meteorological maps with wind zones. If you have a certain probability of a certain level of hurricane and you have a certain probability of certain basic wind speeds, the engineer designing the structure, will look at those tables and those maps and determine a number of different categories that then all coalesce into a structural design to a wind loading and also ice loading characteristic, depending on the region. That structure is built to meet those criteria. So, the criteria for Cape Cod will have a much higher basic wind speed than something that's inland in lowlands, away from the coast. It will probably have a much higher icing threshold because it's near the coast in New England. All of these things are taken into account, including the size of the structure itself. The question about the difference between a monopole and a three-legged clock tower with solid faces, is that three-legged clock tower has to be designed to withstand those same wind and icing conditions. It's going to be inside the clock tower, much more beefy, than just a single, slender monopole would be. You wouldn't see it because it's covered by the clock tower face. It's not just a simple question of "What category hurricane is the thing designed to?" There's a very complex matrix that all towers in compliance with this standard, have to be built. As Mr. Sousa said, these are industrial structures built to this structural standard for weather conditions. They will withstand weather that will destroy the church, for the most part. There's always a possibility that there's a maintenance problem or something went wrong, and the structure might fail under heavy conditions. But, for the most part, when you see these cell towers in places like Florida that are designed for the kinds of hurricanes that they get, they withstand that weather. The antennas might be torn off, but the towers, largely stand. And all of the structures in the area (buildings) are destroyed. I don't think there's needs to be a lot of focus on the integrity of the structure because that's under Massachusetts Building Code, and that's the purview of the Building Commissioner. One thing that I have experience with and am cognizant of is: If you have something like icing, and the sun comes out, and the ice starts to shed off the tower, I've worked at a place where we had to cordon off part of the parking lot for the time that the ice was shedding, but we had a protocol in place for doing that. There are safety things that need to be taken care of, if a structure is next to a building, or next to a parking lot.

Mr. Martin: The church is closed in the winter.

Mr. Maxson: If the church is closed in the winter, that certainly helps. It's not a simple answer, other than to say the structure will be built to code, and your Building Commissioner will make sure that that's the case.

Mr. Igoe: Thank you for clarifying that. I certainly appreciate it. We have a number of people sitting out there, waiting. I'm not sure if we're going to settle this matter tonight or if we're going to ask for a continuance or whether the petitioner wants an up or down vote tonight. Let's hear from some people in the audience right now.

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No one spoke in favor.

In opposition:

Richard Neitz, South Yarmouth: Long-time resident of Yarmouth and an alternate member of this Board of Appeals for many years. Mr. Neitz expressed his disappointment, including with the Town of Yarmouth, who has let down the people by not offering one of the many sites that the Town owns as an alternative to this site. That tower in this site is an atrocity. I sat on the ZBA when we granted the monopole behind the post office. Spent a lot of time to make it look more like a flagpole and less like a cell tower. Need verification of the cell tower company's existing lease on that property; I'm not sure that the lease extends to all of the site (beyond the initial lease for cell equipment in the steeple); the physical aspects of the lease (not the financial details) we should be asking about. There are a lot of alternatives that the petitioner has been lazy to investigate. They knew from the last time you meet (March 9, 2023) that you were serious about alternative sites, and yet they didn't send out any more letters. They did no investigation with any other property owner in Town, admittedly tonight. I think there are a lot of other possibilities.

Jamie Veara, on behalf of The Davenport Companies: Davenport Realty Trust is the owner of properties that received abutter notifications; we are parties of interest. Two aspects of the Special Permit criteria: character and hazard.

- Hazard: The fall zone area is in close proximity to Route 28. Potential for the tower to fail and/or objects to come off the tower onto the roadway. The church parking lot: If this parcel was owned by someone other than the church (who is leasing to the applicant), I would think they would be concerned about the parking lot being in the fall zone. Perhaps, they put revenue over risk. Someone can be on that site at any time of the year. Open or closed, there is still use of that parking lot.
- Character: I don't think South Yarmouth wants a 110-foot clock tower. It's out of character with the neighborhood and the Town of Yarmouth. From the applicant's own information, you can see the tower from West Dennis Beach. You can see this from another town: Bass River, then the Windmill, then the cell tower. Is that really the picture we want to represent?

Mr. Maxson wrote his report for the ZBA, but he submitted two reports to the Cape Cod Commission (May 23, 2021 and August 3, 2021) where the needs of the carriers were analyzed. The needs of AT&T and T-Mobile can be met by existing towers (XTK radio tower and Whites Path tower) and/or alternative locations. Carriers can get the coverage they need without a tower that the bylaw doesn't support, is out of character with the Town, and alternatives exist by your own consultant's reports that were submitted to the Cape Cod Commission and should be part of this record as well.

Mr. Igoe: Does the petitioner wish to respond?

Attorney Sousa: We do have an existing lease with the Archdiocese [of Fall River] for this site; not the steeple, but the exact location of the parcel where we are proposing the tower. That lease is viable and in place. We did submit a letter of authorization as part of the application as well. None of the tenants themselves will be on the outside of the clock tower. The clock tower will be built as it's proposed in the plans and the photo simulations. None of the antennas will be on the outside. In addition, the radiofrequency plots that were submitted and Mr. Usmani (Radiofrequency Engineer & Consultant for C-Squared Systems on behalf of AT&T) who testified at the first hearing. He cannot fill this gap in coverage from any of the other surrounding

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sites that exist. There are no other existing sites that can be modified, altered or extended in order to fill this gap in coverage. This is a fairly large gap in coverage. They are getting the propagation they can from those other existing sites in the vicinity of this particular location. This site is necessary, not because we don't want to utilize another tower that's close by, but simply because there is no tall enough structure that's in the vicinity of this gap to be able to fill that gap in coverage.

Mr. Igoe: So that wasn't true that AT&T or another carrier could attach to the Seagull Beach XTK Tower in West Yarmouth and put some smaller towers within the gap zone to make up what you're claiming is this total gap zone? So that wouldn't work?

Attorney Sousa: That's a different analysis. That site is pretty far away from this particular location. And if we could, I could bring Mr. Usmani up here and speak in more detailed fashion, I think it would be helpful on that particular point.

Mr. Maxson: Mr. Chairman, this is David Maxson. I might be able to short-circuit that. During the Cape Cod Commission process, it was an iterative process in terms of coverage analysis. That "moving target" that I referred to in my report to the Cape Cod Commission got resolved. In the end, there was information presented which I found satisfactory and that's the information that I presented to you. You do not have a moving target. What you have is the information that shows what the area that is claimed to be "a gap" is for T-Mobile and for AT&T. It shows that AT&T is not occupying the XTK Tower, but we determined previously that even if it did occupy the XTK Tower, it would not significantly affect the performance of AT&T with the proposed tower that we have today which is a 110-foot tower.

Mr. Igoe: My question to you is the same question to them. They attach to the XTK Tower and similar alternatives like CAMs on top of telephone poles or smaller monopoles behind post offices, could we make up that coverage?

Mr. Maxson: Yes, and that's completely, basically the XTK Tower is irrelevant to that question. It's something AT&T should be doing anyway; they get more coverage over there. Some alternatives are regarded by the Courts as reasonable alternatives and other alternatives are regarded by the Courts as being too far in the future or too hypothetical. I can't say what alternative is "good" or "not good" in that respect. You might want to get some advice of Counsel on how to weigh these different alternatives. CAMs are a potential alternative, if that's the direction that the Board and the Town want to go. Bear in mind that you have an application before you for a cell tower and the question of how and where these CAMs would be approvable and viable is something that has not been thought through or evaluated from a Planning or Radiofrequency Engineering perspective, so that's a little uncertain. As far as alternative sites, the one that seems to pop up as the most promising is the one where the Chair mentioned he has had personal communications with somebody involved with the Skull Island properties. That there might be interest now, even though there was not a response two or three years ago to a registered letter. That might deserve a little more due diligence on the Board's part, and perhaps on the applicant's part. I do recall hearing, I'm not sure if it was at a ZBA hearing or a Cape Cod Commission hearing, that there was not an objection radiofrequency-wise from using one of those parcels by Skull Island. And that might be a question to ask the applicant right now: If Skull Island were available, and if it were something that was more appropriate in the Board's and the Town's perspective, is it something that the wireless carriers, AT&T and T-Mobile, would be able to accommodate? Would they be comfortable using that site instead of the proposed site? This is something that, because the Telecommunications Act is implicated, you

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have this issue of considering alternatives, in a way that you wouldn't with any other kind of zoning application. And therefore, you should be talking to Counsel about how to interpret that. Mr. Igoe: We'll certainly talk to Counsel about that. But in terms of the direction, of the way the Town wants to go and everybody else, that whole question has been dropped on this Board's lap. Because there's been plenty of time for the Town to take up this matter, I heard from Mr. Neitz. We have Town sites that are alternatives to this, wherever they are in Town, in the middle of well fields or cranberry bogs, why aren't those viable sites? Why isn't the Town offering that? Why am I hearing that the only alternative – from the petitioner's standpoint – is smack dab in the middle of Route 28 in South Yarmouth. I, quite frankly, am hearing mixed signals from everybody. I hear there are alternative sites, but maybe they're not feasible or viable. When I hear that the XTK Tower is "far away" from this site, as the crow flies, there's no way that that's more than, I'll give you 2.5 miles – tower to tower. And you're telling me that 2.5 miles, you can't pick up a majority of the coverage gap that they're complaining about right now? I just have a hard time fathoming that there aren't some alternatives. We have some big towers in Town, and we can't build some little towers. And quite frankly, what I'm hearing from the petitioner is: This isn't AT&T and T-Mobile. This is the petitioner building cell towers and soliciting people.

Attorney Sousa: Mr. Chairman, I said just the opposite, I apologize. This is to fill the gap in coverage for FCC-licensed carriers: T-Mobile and AT&T.

Mr. Igoe: I certainly think that we should try to explore alternative sites. Quite frankly, the petitioner has thrown a lot of cold water on that idea. Doesn't sound like you want to investigate any alternative sites. I gotta be honest with you. You come here tonight, and you throw a letter at us that you threw at us months ago, telling us who you solicited. I get the impression that you're trying to say that you sent all those letters out again. You didn't do that. This is old news.

Attorney Sousa: Why would we send them out again?

Mr. Igoe: I don't know. Don't come in here with a letter dated in July [2023] that this is what we did.

Attorney Sousa: In response to Mr. Maxson's report which we just got on/about June 30 [2023]. The reason I shared those with the Board again is to be responsive to the questions that were posed by Mr. Maxson's report, relative to alternative site analysis. He mentioned a few that are all on that spreadsheet, and we did reach out to them, prior to starting this whole process, prior to developing plans, prior to getting radiofrequency plots in place, prior to spending a fair amount of money on consultants, and starting the Conservation process.

Mr. Igoe: We understand what you did.

Attorney Sousa: With respect to WXTK [Tower], the plot shown by T-Mobile. T-Mobile is actually on that tower, and the plots they submitted as part of their application, still show the propagation. With the permission of the Chairman, I'd like to just share these with members of the Board. They show the coverage from that tower and they still show the significant gap in coverage in the vicinity of our tower and Route 28 and to the north of Route 28.

Mr. Igoe: When you tell me stuff like that, it calls into question whether this tower is going to do what it says it's going to do.

Attorney Sousa: What these plots show is that T-Mobile is using that tower, and notwithstanding the propagation and the coverage they get from that tower, because it is so far away from our proposed location and where the gap is, they still experience a significant gap in the vicinity of this proposed tower at the church site. So, as much as it may be close "as the crow flies", the evidence – the radiofrequency plots submitted by T-Mobile who is utilizing that tower with their

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antenna installation – still shows that gap in coverage. If AT&T chose to go on that site, would have the same problem from a propagation standpoint. They would still experience the gap in coverage that they have now.

Mr. Igoe: When you say that they have a problem just north of Route 28 in West Yarmouth, that Tower is a mile from Route 28. From my standpoint, it calls into question how viable *this* tower is going to be, once it's built. You'll come back in 5 years, 3 years, and you know what, we still have a gap in coverage. Now we want to build one down at the Bass River Bridge. I've been listening to this for many, many years. I've approved dozens of these things. Every time you come to us, you tell us you have a gap in coverage; we're gonna solve it. Then you come back and you still have the problem.

Attorney Sousa: I think I said just the opposite.

Mr. Igoe: That's what I said. Not you.

Attorney Sousa: Network building is an incremental process. It's not "put up a tower" and you're just gonna fill that whole gap in coverage. From a territory perspective, that area between Route 6 and 28 and just south of 28 – both east and west of our site – is a fairly large area. We're trying to solve that gap as much as we can. With this proposed tower, we do fill a substantial portion of it. But it is an incremental process. The carriers will still have a problem just to the north of where we're going to propagate.

Mr. Igoe: I don't know how the Board feels about this for tonight's purposes. But if I have to take a vote on this tonight, I would not support this right now. I'm not sold on this site. I'm not sold on your efforts to find an alternative site. I asked you to try to track somebody down months ago; you didn't do it. You didn't do it. It's a viable site; I don't even know if they're interested in doing it. Here I am, a Board Member, and you guys are the petitioner, and I'm out trying to do your job. I tell you who to talk to; you don't talk to them. You're not making an effort. It's this site or no site. So, I don't know. Why don't we talk to the Board. I don't want to argue with you back and forth all night. Board Members, what are your thoughts on this?

Mr. Fraprie: I have a real problem with it right now and I wouldn't be able to support it either. I'd rather see a different site or a different technology, whether it's the CAM or whatever. I just don't think this would be appropriate for the Town.

Mr. Martin: I'd have to concur with that, too. There's too many if's, and's, or but's. I think there may be some ways to solve them, other than having this sitting right on Route 28, with that kind of viewscape.

Mr. Mantoni: Like I said before, we're still in the same predicament that we were at the last meeting. We haven't rectified anything. And I'm very disappointed that we didn't pursue any alternatives. This [the spreadsheet of Alternative Site Analysis] is "old hat". Last meeting, Sean [Vice Chair Igoe] had recommended that one site [Skull Island] and nothing was done about it. We're serious about *not* liking this site.

Attorney Sousa: Applicants can't be pursuing two sites at one time. You understand that. If you look at your bylaw, and the extent to which the information that you want on any specific site that's being applied for, is extensive. Look at the size of our application. It is extensive. You can't pursue two sites.

Mr. Martin: There's no doubt about that, but there's no reason why you can't somehow get a hold of the owner...

Mr. Mantoni: ...and find out if there's any interest.

Mr. Fraprie: First of all, if I agree with you, then we should reject it.

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Attorney Sousa: But you're signing a lease agreement with a property owner; you're agreeing to pursue that site. Then you're filing an application that says, "this is a site that works". Then we have to prove to you that we did an alternative site analysis, which we did do. Then we have to prove to you that this site will work from an RF standpoint. That it's also constructable. Above and beyond that, what direction we were getting from Design Review and Site Plan Review, "Oh, let's fix the design now." Even though the Cape Cod Commission approved our "lower profile mounts" and the "lower height". Then there was further direction, "OK. Let's work on that design as well. Let's work on making sure that it's more aesthetic." So, we did that as well. It's very hard to pursue – it's almost impossible I should say – pursue two different property owners for the same solution. We feel we did a responsible job in doing an alternative site analysis that was thorough. A zoning analysis that was fairly thorough as well in connection with a very difficult zoning bylaw. And we put together all the supporting information necessary to support that one site. I think it's very difficult for towns to get into the business of network building. That's why you hire a peer review consultant to make sure that we've done the right things from a...that there is, in fact, a significant gap in coverage, that, in fact, there are no other alternatives that are viable, and the applicant has cooperated, both with the Cape Cod Commission and with this Board in connection with that effort.

Mr. Manton: So, where do we go from here? We don't like that site. And you're saying that's the *only* site. So, what happens now?

Attorney Sousa: It's the decision of the Board to whether or not it wants to vote tonight on this application.

Mr. Fraprie: You want us to vote? Or do you want to withdraw without prejudice?

Attorney Sousa: We do not want to withdraw without prejudice. We believe in this application. We believe in this site. So, we want the Board to make a decision.

Mr. Martin: I think that answers your question, Sean [Vice Chair Igoe].

Mr. Igoe: Well, it does answer our question. What I did hear though was: A definite lack of sincerity or misrepresentation at the last meeting where you (the petitioner) represented that you may be interested in an alternative site, when I mentioned it to you. We talked extensively about alternative sites and where they might be better. You showed interest that was not sincere. You just admitted that. [Attorney Sousa starts to interject.] Wait a minute. You just said to us that you can't negotiate with two different people at the same time; it doesn't work that way. Even if we did go with the alternative site, we'd have to go through all this process all over again. So, when you told us, we were talking about a possible alternative site, you're going "Yeah, sure. We'd consider those." You were lying to us. Is that what you do?

Attorney Sousa: I disagree with that characterization.

Mr. Igoe: We can play the tape back, if you want to. We can continue the hearing. We'll get that tape. Then, we'll play it back and see exactly what you said.

Attorney Sousa: Understood. The only thing that I could do is hear you out and talk to my client about it. I don't have the decision to pursue another site on my own. So that is something...

Mr. Igoe: You shouldn't be making representations that you would be interested or that your client would be. I don't even know who your client is. Your client isn't AT&T and T-Mobile; we know that.

Attorney Sousa: Blue Sky Towers is the client, is my client. Their tenants are AT&T and T-Mobile.

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Mr. Igoe: I think the best thing for us to do tonight is: Why don't you go back to your client, and talk to him about whether he's sincere or not about exploring alternative sites that this Board seems to be putting more effort into, than you are.

Attorney Sousa: I strongly disagree with that characterization. We submitted a pretty comprehensive spreadsheet.

Mr. Igoe: We know what you did. Have you read all the recommendations from Site Plan Review and Design Review? Everybody in Town hates this. They don't want it. You're the only person that wants it. I don't think that you have offered a viable alternative. You offered one site. "Oh, we sent a bunch of letters out. We didn't hear back from them." They might have been alternative sites, but you can't negotiate with two people at once. Once we get somebody, get the church, good, stay with this one. We'll jam it down the Town's throat. We'll convince them that it's going to be beautiful and cell coverage is going to be great and all the problems are going to be solved. No, you're not trying to find an alternative site. What you're trying to do is put your blinders on, full speed ahead, we're going with this, or nothing. That's what you've just told us tonight. You didn't tell us that last time. That's not the way you were talking last time.

Attorney Sousa: Mr. Chairman, I only have the right to apply for this location.

Mr. Igoe: I understand that, but don't tell us you're interested in alternative sites.

Attorney Sousa: I have standing to apply where I have a lease agreement. The nature of zoning is that you apply for one site. It's not as if we come and have a discussion regarding 3 or 4 sites because my client doesn't have any lease rights in those other parcels. So how could I possibly pursue those?

Mr. Igoe: Because your client should be a good neighbor and he should make the effort to pursue more than one site. And if you have a lease, go with an alternative. Is there a penalty if you get out of this lease right now?

Attorney Sousa: I'm not sure. I don't have the lease in front of me.

Mr. Igoe: Would you provide us with the lease?

Attorney Sousa: I could provide you with a redacted copy of the lease.

Mr. Igoe: We'd like to see that. We'd also like to see your leases with T-Mobile and AT&T.

Attorney Sousa: We can get a letter confirming that those leases are in place.

Mr. Igoe: I just don't think that you're acting in good faith. I don't think you made an effort. Above and beyond that, I totally agree with what Mr. Veara said. This is a hazard. He said it best. There's a reason you have a fall zone. In case it falls over. This thing could fall over into a parking lot on a Sunday Mass. I know you tell me it never will. And the Titanic was never gonna sink. But there's a reason you have a fall zone, in case it falls. Now, you got an icing zone, too, that you have to cordon off. Maybe you can't go to Dunkin' Donuts on a certain day because the wind's blowing and the ice is blowing off that tower. I don't know. Maybe an engineer could tell us that. But I do think this is a hazard and I think it's an aesthetic nuisance to this Town. And I don't think you made your best efforts to try to find a site that would do what your client needs to do and be a good neighbor as this Town has always been to all the telecommunications petitions that have come before this Board. I've been on this Board for 20 years, and I've approved dozens of them, all over Town. And this is the one that you guys come up with. I can't support this. I think you should go back to your client or we can take a vote tonight, if you want. The choice is yours.

Attorney Sousa: I think the Board should vote on the application that's before you.

Mr. Igoe: OK. We close the matter to the public discussion and we're going to move to the Board for discussion now. Board, any further discussion on this matter.

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Mr. Fraprie: I think everything's been said.

Mr. Igoe: I don't think this applicant has demonstrated that this petition is *not* going to be a substantial detriment to the Town, to the zoning district, or to the neighborhoods that surround this petition. I think it's a potential hazard. I think the fall zone indicates that someone could get seriously hurt or killed. I think snow buildup on this tower will result in snow or ice blowing around, who knows where, during the winter. You don't need the church open for ice to be blowing around and be dangerous. I see this thing could fall and I've seen no evidence – I've only heard representations – but I think if that thing blows over, I think it's going to fall further than the 1-to-1 that a monopole might. Because I think this is going to act as a "sail" but we have no evidence to support that. And there's been no evidence given by the applicant that demonstrates that wouldn't happen. In fact, I don't think there's been any evidence at all submitted by the applicant to show that this is not hazardous to the public in its current location. Therefore, I don't think they've met their burden. I think this does represent an undue hazard, nuisance and congestion to the Town. It does not have the support of the Town. For those reasons, I think we should vote against this petition.

Mr. Martin: Mr. Chairman, I'd like to move to approve Petition 5005 as requested.

Mr. Igoe: Do we have a second?

Mr. Fraprie: Second.

Mr. Igoe: So, on this vote, a vote to approve the petition as requested. A "yea" vote is in support of the petition. A "nay" vote is against the petition. All those in favor, please say "AYE". Hearing none. All those opposed, please say "NAY". [Board Members say "NAY" followed by Vice Chair Igoe via Zoom, saying "NAY".] The NAYs have it. 4-0.

OTHER BUSINESS:

Minutes: A motion was made by Mr. Fraprie and seconded by Mr. Mantoni to approve both the June 8 & June 22, 2023 minutes. On a voice vote (4-0), the minutes for both the June 8 & June 22, 2023 were approved.

Adjournment: Mr. Martin made a motion to adjourn, and Mr. Mantoni seconded. The July 13, 2023 Zoning Board of Appeals meeting adjourned at 9:51pm.