

Case: 47-17
Date Filed: 7 November 2017

RECORD OF PROCEEDINGS

I, Lisa C. Morrison, assistant to the Zoning Board of Appeals of the town of Edgartown, hereby certify that the following is a detailed record of proceedings pertaining to the appeal by Dana & Robert Strayton of a determination by the Zoning Inspector under M.G.L. Chapter 40A Sections 8 & 15 relative to property located at 14 Sampson Avenue, Assr. Pcl. 34-197 in the R-120 Residential District. The appeal concerns the decision of the Zoning Inspector not to enforce the zoning bylaws relative to an 80-foot tower located on the above-captioned property owned by MV WIFI LLC.

1. On 7 November 2017 the application, a true copy of which is marked "A," was presented to the Town Clerk.
2. In addition, an advertisement, a true copy of which is marked "B," was published in the Vineyard Gazette on November 17th and November 24th 2017.
3. Notice of the hearing, a copy of which is marked "C," was mailed, postage prepaid, to the petitioners; the abutters - owners of land adjacent to the subject property within 300 feet of the property lines - all as they appear on the most recent, applicable, certified tax list; and to all the proper town boards and departments.

On Wednesday, 6 December 2017 at 7:15 p.m. the public hearing was held in the Town Hall. The following board members were sitting for this hearing: Martin Tomassian – Chairman, Richard Knight, Carol Grant, Nancy Whipple, and John Magnuson.

Joseph Bierwirth, Jr., of Hemenway & Barnes was present for the appellants, Dana & Robert Strayton, who were also in attendance. Mr. Bierwirth referred to his letter to the board dated 2 November 2017 in which he explained the history of the Strayton's appeal. [See file]. Mr. Bierwirth said that neither the tower itself nor Mr. Fynbo's business, MV WIFI LLC, received any special permits, building permits, or height variances. On 4 October 2017, the Strayton's sent a letter to the building inspector requesting that he enforce the bylaws "with respect to ongoing zoning violations." The building inspector replied by e-mail on 19 October 2017 saying that his records indicated that Mr. Fynbo had a tower long before 2010, and possibly before 2001.

Mr. Bierwirth said that Mr. Jason had no basis for those comments and referred to a letter from former resident of 15 Sampson Avenue, Gary Lichtenstein. Mr. Bierwirth said that Mr. Lichtenstein stated that the current 80-foot guyed tower was erected during the summer of 2009. He said that he received no notice from the planning board, the zoning board, or saw any type of building permit displayed.

Mr. Bierwirth asked the board to instruct the building inspector to issue a cease and desist to MV WIFI to stop operating and remove its unlawful tower for the following reasons: (1) Mr. Fynbo is operating a business in a residential neighborhood with no special permit under 11.6 b. (2) Mr. Bierwirth contends that the operation is not a home business because it is not contained within a residential structure and, therefore, is not allowed as of right. (3) It does not comply with the height restriction on Chappaquiddick, which is 26-feet.

Building and Zoning Inspector Lenny Jason said that prior to the adoption of Article 23 Personal Wireless Service Facilities (PWSF) at town meeting in April of 2011, no permits were required for wifi antennas. Mr. Jason said he recalled visiting the site in 2009, when Mr. Lichtenstein's attorney registered a complaint with his office. He said that he visited the site with Ron Rappaport, Town Counsel, and found no zoning violation. Mr. Jason said that at that time, no further action was taken by Mr. Lichtenstein or his attorney.

Mr. Tomassian asked Mr. Strayton when he bought his property at 307 Chappaquiddick Road. Mr. Strayton replied that it was in June of 2015. Mr. Tomassian asked if the tower was up at that time. Mr. Strayton replied that it was. Mr. Tomassian asked if the tower was up when he first visited the property with a real estate agent prior to purchase. Mr. Strayton said that it was. Mr. Tomassian asked Mr. Strayton what bothers him about the tower. Mr. Strayton replied that he is bothered by the LED lights on the tower and the fact that it is an illegal structure.

Mr. Bierwirth said that part of the issue is that AT&T is using this tower to "bootstrap" their proposal to construct a larger PWSF at this location by saying that the proposed tower will not be more detrimental than the existing tower.

Mr. Tomassian said that Mr. Bierwirth is speaking about something that may happen in the future, not the issue currently before the board.

Mr. Bierwirth said that the current tower is unlawful as no special permit or variance were ever issued to allow its construction. He said that an 80-foot tower does not comply with the requirements of a home business listed in 4.1 d (2) as an 80-foot tower is unsightly and cannot be screened from the public view. No special permit under 11.6 (b) [Small-scale businesses and industry in Residential Districts] was ever applied for.

Mr. Tomassian asked if the tower interfered with radio or television reception.

Mr. Strayton commented that his property is 170-feet from the tower. He said that the lights on the tower are visible from his property year-round, but that it is more visible when the leaves are off the trees. He said he was surprised when he discovered that the tower had no permits and had never been before the Martha's Vineyard Commission as a development of regional impact.

Molly Pickett, an abutter at 24 Sampson Avenue, commented that she bought her property in 2011. She said she had always assumed that the tower had been fully permitted and was surprised to find, after extensive research in the town hall, that no permits had ever been issued for the tower. She said she found this confusing given the amount of paperwork she had been required to file to renovate a one-bedroom structure. She noted that AT&T is using this tower to support their application for a larger tower on the property. She said that her property values have been reduced. She said that she currently has an offer for her house, and that she is taking a big loss.

Mr. Knight, a long-time year-round Chappaquiddick resident commented that the tower was up well before there was any bylaw and that it was not the practice of the building inspector to issue building permits for towers.

Grant asked for the dimensions of the base of the tower. Mr. Fynbo replied that is a triangle with 12-inch sides.

Mr. Bierwirth commented that the tower does not predate all zoning, that residential zoning restrictions relative to height and use were in effect at the time it was constructed. Mr. Tomassian asked if it was a structure. Mr. Bierwirth said that, in his opinion, it was.

Georgiana Greenough, assistant to the Planning Board, commented that there is currently a 104-foot temporary tower on the property in addition to Mr. Fynbo's 80-foot tower. AT&T is currently applying for a 115-foot tower. If approved, both the temporary tower and Mr. Fynbo's tower will be removed.

There was some discussion of whether or not Section 7 of Chapter 40A of the Massachusetts General Laws – also known as the ten-year rule – applies. Mr. Jason explained that the ten-year rule only applies when a permit has been issued, but the construction does not comply with the permit. If there have been no issues or complaints within the ten-year period, then the construction is considered legal. If no permit was ever applied for, then the ten-year rule does not apply and the construction would be considered a violation.

Mr. Tomassian then closed the public portion of the hearing for discussion by the board. At the request of Mr. Bierwirth, Mr. Tomassian agreed to accept a copy of Mr. Lichtenstein's letter and it was read into the record, with the exception of the second page, which was illegible.

The board then agreed to continue the hearing for deliberation to Monday, October 18th at 4:30 p.m. in the town hall. The board will visit the site independently prior to the hearing. Mr. Tomassian said that no new information will be taken at the continuation.

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The board reconvened on 18 December 2017 at 4:30 p.m. in the Town Hall. Martin Tomassian - Chairman, Richard Knight, Carol Grant, John Magnuson, and Carol Grant were all in attendance.

Mr. Tomassian said that there were some 'housekeeping' issues to attend to. He said that a letter faxed to the office by Mr. Strayton's attorney and dated 13 December 2017 will not be

addressed as it was received after the hearing was closed. Mr. Tomassian said that no more testimony will be taken.

Mr. Tomassian said that he was inclined to uphold the decision of the building inspector and put forth the following reasons for the purpose of discussion by the board.

1. Mr. Tomassian read the definition of 'structure' in the town's bylaw. In his opinion the 80-foot with a 12-inch triangular base does not fit the town's definition of a structure – "a combination of materials assembled at a fixed location to give support or shelter...."
2. He went on to say that when the town adopted Article 23 - the Personal Wireless Service Facilities Bylaw at town meeting in 2011, Mr. Fynbo's tower was specifically exempted on the town meeting floor when Article 23.4 (c) was amended by a unanimous vote to read: "PWSF towers supporting exposed antennas and apparatus that are existing as of the date of adoption of this By-law (April 12, 2011) may be exempted from this concealment requirement...."
3. Mr. Tomassian said that until the PWSF bylaw was adopted, no permits were required from the building department or the planning board.
4. Mr. Tomassian said that, in his opinion, Mr. Fynbo's business is a permitted use under 4.1 (d) 2 "Use of the premises or building thereon in connection with his or her trade by a resident..., provided that no offensive noise, vibration, smoke, dust, odors, heat, glare, or unsightliness is produced, and provided that all accumulated building, construction, or other materials used in connection with the trade are screened from the ground floor level of neighboring properties and from public and private ways, and provided that no more than two commercial vehicles are regularly stored or parked overnight on the property, and provided that any signs comply in full with the sign regulations of this By-law."
5. Mr. Tomassian said that, in his opinion, Mr. Fynbo does not require a special permit from the zoning board to operate a small-scale business in a residential area (11.6 b) because no traffic is generated by the business and no clients come to the property to conduct business.
6. Mr. Tomassian added that the appellants were fully aware of the existence of the tower when they purchased their property in 2015.

Mr. Knight said that he visited the site and said that he could not see the tower from Sampson Avenue. He said that a faint green light was visible at night from Enos Avenue, but that he did not find it intrusive. He said that he believes the building inspector was correct in his decision not to require the applicant to file for either a building permit or a special permit.

Ms. Grant said that she too visited the site and did not find the tower to be intrusive.

Mr. Magnuson agreed that the building inspector was correct and that no permit was needed for the tower when it was constructed in 2010.

Ms. Whipple also agreed that the building inspector was correct.

Mr. Tomassian made a motion to uphold the decision of the building permit that no permit was necessary for the construction of the tower in 2010 and that no special permit is currently required for the operation of this particular business in a residential district.

Mr. Magnuson seconded the motion and voted to uphold the decision of the building inspector for the same reasons.

Mr. Knight, Ms. Grant, and Ms. Whipple also voted to uphold the decision of the building inspector.

Respectfully submitted,

Lisa C. Morrison, Assistant

After the close of the hearing Mr. Strayton asked why his attorney's letter of 13 December 2017 was not admitted, when Mr. Fynbo's email was. Mr. Tomassian replied that Mr. Fynbo's email was submitted on 1 December 2017 and made part of the file. Mr. Tomassian said that the Mr. Strayton's attorney should have reviewed the file prior to the start of the hearing.