Petition FOR APPEAL

Hyannis Main Street Waterfront Historic District Commission Appeals Committee

Verizon New England, Inc.
Appellant

vs.

Hyannis Main Street Waterfront Historic District Commission

1. This is an appeal from the decision of the Hyannis Main Street Waterfront Historic District Commission (copy attached) on June 5th, 2019 (Applicant) application for Verizon New England, Inc. (Project) located at 49 Ocean Street, Hyannis, MA 02601 dated October 23rd, 2019 and approved / disapproved by the HMSWHDC on June 5th, 2019 (date) and filed on June 11th, 2019 (date).

2. The reason for the appeal is: The Appellant / Applicant is aggrieved by the disapproval of the application for Certificate of Hardship for the communications tower extension at 49 Ocean Street, as described in the application submitted on October 23, 2018. (See attached).

3. The relationship of the appellant to the subject of the appeal is that of Applicant and Property Owner
(Applicant/abutter/other aggrieved party).

4. The remedy sought by the Appellant is The Appellant seeks a reversal of the HMSWHDC decision and the issuance of the Certificate of Hardship, consistent with the proposed findings attached, or a remand to the HMSWHDC for further proceedings consistent with the decision of the Decision of the Appeals Committee,
(reversal of HMSWHDC decision/annulment of HMSWHDC decision/remand application to HMSWHDC)

5. I hereby certify that I have given notice of this appeal to Town Clerk, Town Committee & Applicant, if different. 6/28/19 (date)

Appellant's Signature

[Signature]

[Attorney for Appellant]

Tel. Number (508) 430-1400

Appellant's Address 6 Bowdoin Square, 9th Floor, Boston, MA 02114

Also include name, address & telephone of designee if appellant is not self-represented.

Ford & Ford Attorneys at Law, 72 Main Street, PO Box 485, West Harwich, MA 02671
The Appellant is aggrieved by the Commission's disapproval of the application for a Certificate of Hardship. The Commission Decision is unsupported by the evidence and exceeds the authority of the Commission as follows:

- The Commission failed to consider extensive oral and written testimony provided by the Applicant at the public hearing, as acknowledged by the Commission in Paragraph 4. of its findings.
- Prior to the opening of the evidentiary hearing, the Commission caused staff to draft extensive negative findings, which were distributed to each Commission member before the opening of the hearing. These draft findings substantially became the basis of the Commission's Decision of denial. It was clear from the proceedings that the Commission had prejudged the Applicant's request for a Certificate of Hardship.
- The Commission Decision was based in part on an analysis of the fall zone of the proposed tower extension, which was clearly outside the purview of the Commission jurisdiction under the Ordinance.
- The Commission Decision is unsupported by the evidence presented at the hearings and erroneously relies on reports filed in the proceedings of the Planning Board relating to matters beyond the jurisdiction of the Commission.
- The Commission Decision fails to consider the extensive evidence provided by the Applicant with respect to the minimal effect the tower extension will have on the historic resources within the district.
- The Decision of the Commission fails to take into consideration that the tower is an existing lawful structure that predates the creation of the Historic District.
- The Decision of the Commission in denying the Certificate of Hardship is otherwise erroneous, arbitrary, capricious and otherwise in excess of the authority of the Commission under the Ordinance.
CERTIFICATE OF HARDSHIP FINDINGS

Should the Commission disapprove the application for a Certificate of Appropriateness, the Applicant has also applied for a Certificate of Hardship. In granting any Certificate of Hardship, the Hyannis Main Street Waterfront Historic District Commission’s Procedures for review of applications (Code of the Town of Barnstable, 112-31) state:

J. The Commission shall issue a certificate of hardship to the applicant if the Commission determines that:

(1) owing to conditions especially affecting the building, structure, setting, or place involved, but not affecting the district generally, failure to approve an application will involve a substantial hardship, financial or otherwise, to the applicant; and

Given the nature and uniqueness of the tower as a structure that pre-existed the creation of the historic district, the proposed project qualifies for a Certificate of Hardship under Section 112-31 of the Barnstable Ordinance. The existing tower dates back to 1963 and is unique to the district. The conditions especially affecting the tower structure are that the tower extension is necessary to prevent outages on the Nantucket to Hyannis Microwave network including E911 calls. Failure to approve the tower extension will involve a substantial hardship to the Applicant, who will be unable to provide a reliable network. (See affidavits of Joseph Baker Licensed FCC General Radio Operator and Michael E. Shea Senior Manager of the E911 Customer Care Center for Verizon attached hereto).

(2) such application may be approved without substantial derogation from the intent and purpose of this chapter; and

The Applicant at the Planning Board stage was asked to provide a list of key visual points throughout the district to determine what impact the increase in height might have on these locations. These images were submitted with this filing as well. In looking at the images, it was determined that the tower was already visible in all the key locations requested by the town and that while the height is being increased, it is already visible in all the areas that were determined to be key visual points within the district, such that the Planning Board found no detriment to the neighborhood would result from the height extension. Further, pictures compiled during the preparation of the EA and submitted to the Commission show that the increased tower height will not adversely affect the historic buildings in the neighborhood. Additionally, as part of its construction of the tower extension, Verizon has agreed to substantial mitigation (conditions contained in the Planning Board Decision) by agreeing to fund ($116,000) towards Phase 2 of the Town Green Visual Improvements Plan for completion of the HY Artist Shanties Master Plan. The Town indicated to the applicant that implementation of this project would result in a transformative visual enhancement to the area, and support for a program that positively contributes to the creative, visitor and downtown economy. Further Verizon has agreed
as part of its construction of the tower extension, to upgrade the sidewalk along its frontage with concrete/vertical curb to match the sidewalk to the south along the Town Overlook Property. Accordingly, the application can be approved without substantial derogation from the intent and purposes of the Ordinance.

\[2) \text{the application may be approved without substantial detriment to the public welfare.}\]

The purpose of the tower extension serves as a benefit to the public welfare, by increasing the reliability and dependability of the microwave service network which includes E911 calls originating from Nantucket. In addition, as noted above, the existing tower is already visible in all the key locations identified by the Town. The associated mitigation package, required as a condition of the Planning Board Special Permit, will benefit the public welfare. Accordingly, the application can be approved without substantial detriment to the public welfare.
Decision – Certificate of Hardship
Verizon New England, Inc.
49 Ocean Street, Hyannis

Applicant: Verizon New England, Inc.
6 Bowdoin Square, 9th Floor
Boston, MA 02114

Property Address: 49 Ocean Street, Hyannis
Assessor’s Map/Parcel: 326/025
Hearing Date: May 1, 2019; June 5, 2019

The Hyannis Main Street Waterfront Historic District Commission, pursuant to the Code of the Town of Barnstable Chapter 112, Historic Properties, Article III, Hyannis Main Street Waterfront Historic District, hereby issues a disapproval of a Certificate of Hardship for 49 Ocean Street, Hyannis, Assessor’s Map/Parcel 326/025.

Procedural & Hearing Summary

An application for a Certificate of Hardship for the proposed reinforcement and 50+/- ft extension to the existing tower at 49 Ocean Street, Hyannis, was filed at the Town Clerk’s office and office of the Hyannis Main Street Waterfront Historic District Commission on October 23, 2018. This application followed an application to the Barnstable Planning Board to permit the expansion of a preexisting nonconforming use and the expansion of a preexisting nonconforming structure to allow the tower extension. The Planning Board granted this Special Permit on September 24, 2018, with findings and conditions, referencing the necessity of approval from the Hyannis Main Street Waterfront Historic District Commission.

A public hearing before the Hyannis Main Street Waterfront Historic District Commission was duly advertised and notice sent to all abutters in accordance with MGL Chapter 40C and Chapter 112, Article III of the Code of the Town of Barnstable. Pursuant to section 112-31(E), the applicant agreed in writing to extend the time limits for the Commission to make a determination on the application on six occasions:

- November 8, 2018: Agreement to extend time limit to January 23, 2019
- January 16, 2019: Agreement to extend time limit to February 13, 2019
- February 4, 2019: Agreement to extend time limit to February 27, 2019
- February 14, 2019: Agreement to extend time limit to April 10, 2019
- April 2, 2019: Agreement to extend time limit to May 7, 2019
- May 1, 2019: Agreement to extend time limit to June 12, 2019

The public hearing on this application was opened on May 1, 2019 and continued to June 5, 2019. The applicant sought a Certificate of Hardship in order reinforce and extend an existing steel tower by 50+/- feet. Commission Members deciding this appeal were Cheryl Powell, Taryn Thoman, Marina Atsalis, Jonathan Kanter, Timothy Ferreira, and Cecelia Carey.
During the proceedings, Attorney Michael Ford represented the Applicants before the Board. Ellen Cummings of Verizon New England, George Maier of Orion Broadcast Solutions, and other Verizon witnesses provided testimony regarding the proposed tower extension in support of Verizon’s position that it was entitled to a certificate of hardship.

The Commission received a significant amount of written and oral public comment in opposition to the application throughout the hearing process. Those in opposition generally questioned the necessity of the tower extension and whether the criteria for the grant of a certificate of hardship had been satisfied.

After consideration of the testimony given and materials submitted by the applicant and members of the public, the Commission unanimously made the following findings of fact for the Certificate of Hardship Application filed by Verizon New England on October 23, 2018:

1. There is no conclusive evidence that failure to approve this application will involve a substantial hardship, financial or otherwise, to the applicant to provide service via the tower. Supporting this finding, the Commission reviewed several documents submitted to Planning Board in support of a Special Permit application, including:

   a. An affidavit from Michael Shea, Senior Manager of the E911 Customer Care Center for Verizon, submitted by the Applicant indicates that under normal conditions, 911 calls are carried via the microwave transmission system, which includes the Nantucket-Hyannis link.
   b. Regarding the necessity of tower extension, the Applicant submitted an affidavit from Joseph Baker, a licensed radio technician holding an FCC General Radio Operator’s License assigned to Cape Cod and the Islands for Verizon, which documents the Hyannis-Nantucket link’s high susceptibility to atmospheric conditions. Mr. Baker concludes that reengineering the path to include an elevated position for the transmitters and receivers should avoid total network outages in the future with regards to path interference.
   c. In accordance with MGL Chapter 44, Section 53G, the Applicant funded an independent consulting engineer who provided a peer review of the whether the proposal will fulfill the objectives outlined by the Applicant, an assessment that the proposed improvements to the tower are the minimum necessary to accomplish the Applicant’s stated objectives, and an assessment of any available alternatives that would equally serve the Applicant’s stated objectives. David Maxson, WCP, of Isotrope, LLC, was the selected consultant. The consultants’ initial report was issued May 31, 2018 followed by additional correspondence with the Board and Applicant resulting in a Final Report issued on September 12, 2018. Mr. Maxson concludes that the Applicant’s design approach would be typical of a new tower proposed for the first time, but states there is no pressing need for the tower extension with respect to either public safety or the provision of Verizon’s telecommunications service. Mr. Maxson’s final report indicates that calculations submitted by the Applicant suggest the tower extension results in a nearly imperceptible increase in reliability of the Hyannis-Nantucket link. The report indicates it is best practice to study historical logs of link performance to assess the risk of subrefraction events that cause the link to degrade or fail, but “the Applicant keeps no logs.” The report also indicates that the estimation method used in computer modeling submitted by the Applicant may result in excessive antenna heights.
2. This application will involve substantial derogation from the intent and purpose of this chapter as follows:

   a. The purpose of the Hyannis Main Street Waterfront Historic District as described in Section 112-24 is to “promote educational, cultural, economic and general welfare of the inhabitants of the Town of Barnstable, and the Town’s unique community character” through several measures, including “the preservation, maintenance and improvement of appropriate settings for such buildings, structures, and places, and the encouragement of new design which is compatible with the existing historical and community character.”

   b. Along with application, the applicant submitted a Visual Impact Analysis prepared by Advanced Engineering Group, PC showing renderings of the proposed tower extension from roads, intersections, public parks, and gateways throughout Downtown Hyannis. The proposed tower extension will create one of the tallest structures in the Hyannis Main Street Waterfront Historic District, significantly increasing the visibility of a structure that will be incompatible with the character of the Hyannis Main Street Waterfront Historic District from major streets, public parks, and Hyannis Harbor. The tower’s proposed height at 150’ far exceeds that of other surrounding structures; for comparison, the height of Town Hall, one of the tallest buildings in the district, from grade to ridge is 71’.

   c. The subject property is directly adjacent to the Municipal Group Historic District and in close proximity to the Pleasant - School Street Historic District, both of which are included in the National Register of Historic Places for their associations with the early development of Hyannis and the variety and quality of historic architectural styles found within the districts. In addition to Town Hall and the School Administration Building, the Municipal Group Historic District includes the Village Green (Town Common) as a significant landscape in the district. The communication tower at 49 Ocean Street is located approximately eighty feet from Town Hall, and approximately twenty-five feet from the Village Green landscape. Both of these National Register districts are within the Hyannis Main Street Waterfront Historic District. The immediate vicinity of the subject property also includes one building individually listed on the National Register of Historic Places, within 1000 feet of the project site. The position of the proposed tower extension in relation to buildings included on the National Register of Historic Places is not compatible with the districts’ historical and community character.

   d. The Commission considered, among other things, the historical and architectural value and significance of the site, structure, setting, and place; the general exterior design, scale, color, placement on the lot including dimensions and setback, arrangement, proportions, texture, material of the structure; the setting, topography, landscaping, and general appearance of the tower extension and the relation of the proposed tower extension to similar features of buildings and structures in the surrounding area; and the position of the tower extension in relation to the streets, ways and to other buildings or structures. The Commission also considered the appropriateness of the size, shape, and location of the building or structure, both in relation to the land area upon which the building or structure is situated and to buildings, structures, and general setting in the vicinity. The proposed tower’s increased height, industrial appearance, and lack of any architectural value make it visually incompatible with historic residential, municipal, and commercial buildings in the immediate vicinity and throughout the district.
e. The topography of the site (at elevation 30', as compared to portions of the district surrounding Hyannis Harbor, at elevations 3' - 20') make the tower and proposed extension highly visible within the district and, as demonstrated by the visual impact study.

f. The Commission finds the proposed tower extension at 49 Ocean Street, Hyannis, to be inappropriate and incompatible with the preservation and protection of the Hyannis Main Street Waterfront Historic District.

3. The application will involve substantial detriment to the public welfare, including “educational, cultural, economic and general welfare of the inhabitants of the Town of Barnstable” referenced in in Section 112-24, Purpose, of District regulations, by:
   a. Significantly increasing the height and visibility of a structure incompatible with the preservation and protection of the distinctive characteristics of buildings, structures, and places significant in the history and architecture of Barnstable;
   b. Extending a tower that will be incompatible with the preservation of appropriate settings for such buildings, structures, and places significant in the history and architecture of Barnstable;
   c. Extending a tower that will be in incompatible with the existing historical and community character; and
   d. Failing to preserve and enhance the amenities and historical aspects of the various villages and areas which make Barnstable a desirable place to live and for tourists to visit.
   e. Extending a tower in a location where Town Hall, the Village Green, the Harbor Overlook, and Artist Shanties are within the tower’s fall zone. Large portions of the fall zone are located outside of property on which Verizon New England has a legal interest.

4. The applicant submitted evidence to the record at the public hearing on June 5, 2019, giving the Hyannis Main Street Waterfront Historic District Commission insufficient time to review evidence prior to the deadline for the Commission to make a determination on June 12, 2019. The meeting on June 5, 2019 is the final regularly scheduled meeting before the deadline to make a determination on this application.

The vote to accept the findings was:
AYE: Cheryl Powell, Taryn Thoman, Marina Atsalis, Jonathan Kanter, Timothy Ferreira, and Cecelia Carey
NAY: None.

Based on the findings of fact, a motion was duly made and seconded to issue a disapproval on the application for a Certificate of Hardship for the communications tower extension at 49 Ocean Street, as described in the application submitted on October 23, 2018, as the application fails to meet the conditions of a Certificate of Hardship.

The vote was:
AYE: Cheryl Powell, Taryn Thoman, Marina Atsalis, Jonathan Kanter, Timothy Ferreira, and Cecelia Carey
NAY: None
Chair, Cheryl Powell  
Hyannis Main Street Waterfront Historic District Commission

cc:  Applicant  
     Building Commissioner  
     File

I, Ann Quirk, Clerk of the Town of Barnstable, Barnstable County, Massachusetts, hereby certify that twenty (20) days have elapsed since the Hyannis Main Street Waterfront Historic District Commission filed this decision and that no appeal of the decision has been filed in the office of the Town Clerk.

Signed and sealed this ______ day of ____________________ under the pains and penalties of perjury.

Ann Quirk, Town Clerk

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