6:00 p.m.
Sand Hill School Community Center, 16 Dewey Avenue & via Remote Participation Software

Present via ZOOM: Erik Van Buskirk, Chair; James Killion, Vice-Chair; Robert Jensen; Chase Terrio; and Gerry Nye
Absent: Christopher Neeven and Mary Foley
Also Present via ZOOM: Ralph Vitacco, Director of Planning & Economic Development; Leanne Drake, Town Planner; Brendan Brides, Building Commissioner; Justin Perrotta, Esq., Town Counsel; and Maureen McCabe, Sr. Administrative Assistant

Mr. Van Buskirk states that this regularly scheduled meeting of the Sandwich Zoning Board of Appeals is being conducted remotely. On June 16, 2021 Governor Baker signed into law an Act extending certain COVID-19 measures adopted during the State of Emergency. This Act includes an extension, until April 1, 2022, of the remote meeting provisions of his March 12, 2020 Executive Order suspending certain provisions of the Open Meeting Law. All Board members are participating via videoconference. Mr. Van Buskirk reads the Board of Appeals' Opening Statement. He says that each vote taken this evening will be by roll call vote. The Pledge of Allegiance is recited.

Approval of Minutes

Mr. Jensen motions to approve the minutes of the meeting held February 8, 2022, as written. Mr. Nye seconds. Unanimously approved by roll call vote 4-0-1. Mr. Terrio abstains.

Old Business

There is no Old Business to discuss.

New Business

- #22-03: 10, 20, 30 and 40 Colonial Way, Map #25 Parcel #s 123, 124, 125 and 126 – Appeal of Decision of the Building Commissioner – Swift

Mr. Jensen motions to open Public Hearing #22-03. Mr. Killion seconds. Unanimously approved by roll call vote. Mr. Van Buskirk reads the Public Hearing Notice into the record. In addition, Mr. Van Buskirk reads the following comment memos into the record:
The applicant, Michael Swift, says he is looking for a continuance because he has gathered a lot of new material. He says he would like a continuance to whenever it is convenient for the Board. Mr. Van Buskirk responds by saying that the Board has a substantial amount of material in front of them now. The Board can go through it; the Public Hearing doesn't need to close tonight. It can be picked up at another date. Mr. Vitacco offers to share the screen with Mr. Swift so that he can present his information. Mr. Swift explains he only has hard copies; he wasn't expecting the need for soft copies.

Mr. Swift starts by saying that it has been a lengthy process for approximately 15 or 16 years. He says to address Mr. Brides' email: he really didn't discuss anything with me. He says he contacted Mr. Vitacco when this all started last year because they started drilling wells and he wasn't aware of the permit. Mr. Swift says from there he requested a meeting several times with Mr. Vitacco originally but with Mr. Brides it seemed to become an issue. Mr. Swift references a quote from Mr. Brides' email which states, "Our intention will be to discuss this matter with Town Counsel before meeting. We will contact you some time thereafter if advised to do so." He goes on to say that basically since this time he has been shut down. Mr. Swift says he believes the Permit is not valid. He says he would like to know from Mr. Brides, when does he believe the date of substantial; what is the date he is starting with. Mr. Swift says the Board signed a document in June 2019. He would like to compare dates with Mr. Brides. It has to be done within three years of the start date. Mr. Jensen says the term is "substantial construction." Mr. Swift asks Mr. Brides what his date is. Mr. Brides says he does not have an actual date; work started pretty substantially in 2017 with drainage and various other site work there. Mr. Swift states that the Board signed off on June 12, 2009; the Town Clerk stamp says August 2, 2011. He says he took the 2011 as the start date for any type of the "start of the Permit." From there it's 2014. The access road has been there for years. He references a diagram which he says you can see by the tree line there is very minimal clearing and that road was the existing road. The only thing added was the rough graded hammerhead which was added in 2012. That was the only thing done. Mr. Swift references a document sent to Engineering that says they are going to start construction; they didn't. Mr. Swift references a Farrell Electric bill in the amount of $8,000.00. He goes on to say that he requested a new Proforma. Mr. Swift says the numbers are really outdated. He says you have to put a dollar value on what would be called substantial. Usually there is a plan that backs up what is to be done. The foundations weren't poured until now. Mr. Swift says this is how he came up with the start date. Mr. Killion asks Mr. Vitacco to confirm that June 12, 2009 was the original date this was brought back to the Town. Mr. Vitacco says the Comprehensive Permit
was from the end of 2008; the Board made a minor modification in 2009. Mr. Killion asks when was it certified and brought back to the Board and when did the clock start running. Mr. Vitacco says it was registered at Registry of Deeds in early 2009. He says he knows the appeals were happening but can’t accurately speak to the timeline. Mr. Killion says if there were appeals ongoing that would change everything. Mr. Van Buskirk says if the Town Clerk didn’t stamp it in until 2011 there was probably a reason why. Mr. Killion adds that if there was an appeal ongoing it would be recorded with the Town. Mr. Swift says the amount of time it took to stamp things and get things sent over there is a huge lag of months; that might be normal for the Town to stamp in into the record. Attorney Perrotta says if there was an appeal there should be a Clerk’s stamp saying the appeal has either been dismissed or been successful somewhere. A discussion ensues as it relates to this matter. Mr. Van Buskirk states that the Board knows there were appeals. Mr. Jensen explains to Mr. Swift when the Board references “appeal” it means an appeal of the actual permit filed by a neighbor. Ms. Drake says on June 23, 2011 the Housing Appeals Committee and Sandwich Housing Partnership vs. the Zoning Board of Appeals are ordered to modify the Comprehensive Permit. Mr. Swift confirms to Mr. Killion that that was striking condition #22. Ms. Drake goes on to say there was a 2007 Superior Court decision and then there was the 2011 Housing Appeals Committee Decision. Mr. Killion states that the August 2, 2011 date was after the HAC Decision, then it was cleared and the then Town stamped it through. This is when the timeline would start. Attorney Perrotta concurs. Mr. Killion says this brings us up to August 1, 2014. Mr. Van Buskirk asks if this was when there was an extension of permits by the Patrick administration. A brief discussion takes place. Attorney Perrotta says permits would have been tolled. Mr. Swift states, and Attorney Perrotta agrees, that for the purpose of this meeting the date is 2011.

Mr. Swift states we are now up to 2014. The electric is out so the big debate is going to be what is considered substantial. Mr. Swift talks about the minor clearing that has been done to-date. He says a friend has cleared five to six acres and he paid only $12,000.00. Mr. Cusson interrupts to say this is irrelevant. Mr. Killion asks that all discussion be through the Chair. He says that we are now looking at the window between August 2, 2011 and August 1, 2014 and what work was completed between that time frame. This is where substantial completion between that three-year period must be established. Attorney Perrotta says barring discovery about some different dates in that record he believes this is the three-year window. Mr. Killion asks Mr. Swift what he would like to present to the Board to substantiate his claim that substantial construction had not been completed by August 1, 2014. Mr. Swift says you can see the minimal clearing which has been done; everyone refers to the road being regraded – it never was. Mr. Swift says he has pictures of all of this. The hammerhead was put in. Mr. Swift tells Mr. Killion he does not have exact dates; perhaps Mr. MacGregor does. The first time you start seeing this in Google is around approximately 2012.

Ms. Drake says there are letters to the Engineering Department: October 6, 2011 a survey was taken by Shane Mallen, PLS. They did the road layout and drainage system and staked it out on the ground. On October 17, 2011 there was a letter to the Engineering Department from Realcon, Inc. to say that the construction had commenced. Mr. Swift says it commenced but they didn’t do the road yet; the clearing was sometime after that.

Mr. Killion asks how, under ordinary circumstances, would you determine that this particular condition had been met. Mr. Vitacco answers by saying when staff initially
spoke with Town Counsel, Jonathan Silverstein, initially it was a determination between substantial construction and continued activity regarding the Permit. Under normal circumstances the activity we saw they didn’t lay foundations but they were always going through the 40B process and at every step it acted as a valid Permit. In 2015 they went to HAC for the Lottery Agreement. A few months after that they went before this Board for a minor modification. Mr. Killion says 2015 would be out of the three-year window. We have to look at activity that took place by August 2014. The discussion continues. Mr. Vitacco says when looking at a previous 40B the threshold wasn’t necessarily any major construction but it was activity taken by the applicant of which there was none. Using that criteria activity here was taking place. He references the 40B statute. Attorney Perrotta says there is no list of what constitutes substantial construction. It is an ad hoc view. Mr. Brides says that substantial construction depends on every job being unique. Clearing for a shed would not be substantial whereas the cleaning that they undertook for this project is clearly substantial between putting in the hammerhead and the other clearing they did. Mr. Swift says it’s not substantial in the overall cost. You should be able to attach a ten per cent, 15 percent I would think. Mr. Van Buskirk says he doesn’t know that it states that anywhere; Mr. Jensen says that it doesn’t. Mr. Jensen says that he went to the state section 2A of the General Laws. His interpretation from this reading is that the contract to do the hammerhead and the street was substantially complete. Mr. Killion says the Board is looking at substantial construction not substantial completion. The conversation continues. Mr. Killion says he believes it is important to determine whose responsibility it is to determine that this Permit is enforced. This project is certainly unique. It has been almost eleven years and nothing has been built; there are no houses there. There hasn’t been a lot done but clearly the applicant has been chipping away it after 2014. Mr. Killion says he believes the applicant would have to come back before the Board for an extension or some kind of remedy if the Board determines they had not fulfilled the obligation of that condition. If the developer can provide invoices as to what they did the Board can make a determination. The discussion continues. Mr. Swift asks the Board not to take his word on this but there have been cases where it actually comes down to the contracts or covenants with 40B, a lot of new stuff and I am not a lawyer but I have tried to do my due diligence just so I can talk to everybody. He tells Board members that he can already see that they are giving him a fair shake.

Mr. Killion asks if the developer, or a representative of the developer, is present. Mr. Paul Cusson introduces himself and says he represents the developer. He says that Attorney Ed Pare is also present. Mr. Cusson identifies the developer as Sandwich Partners II, LLC. They own the four lots in question and the road to those four lots. Mr. Swift says he didn’t see this in the Registry of Deeds. Mr. Cusson states there is recorded Deed which is Sandwich Partners II, LLC. Mr. Swift says they have been dissolved. Mr. Killion begins to respond to Mr. Swift but Mr. Swift interrupts to ask that he be signaled when he can speak. Mr. Cusson talks about the Governor’s extension of the permitting process a number of years ago. He says that was in effect. In addition, Mr. Cusson says there was an appeal. The applicant went to the HAC, the Housing Appeals Committee, who ruled that the Permit was ongoing in that there was also a modification granted to that Permit. Mr. Swift appealed; there was an appeal and eventually the Superior Court ruled in favor of MacGregor. Mr. Swift has already appealed this process and it has already been adjudicated through the court. Regarding the start of construction, there have been a number of cases in regard to the start of construction. Mr. Cusson says it is difficult to put it as a percentage. Construction starts way before a Building Permit is issued. He says there is much work that needs to be
done on a roadway. The Building Inspector will not issue a permit unless the roads are in or a substantial bond is placed. Mr. Cusson tells the Board how much the installation of a road costs today. Before construction starts the plans must be fully engineered. A Building Permit has been issued, and in Mr. Cusson’s opinion, a Building Permit would not have been issued if the Permit was not in full force and effect. Mr. Cusson says you could make the argument now that Mr. Swift is appealing something. That fact alone still makes the Building Permit active. He says he thinks the rules are a little different given 40B versus Subdivision Control Law. Mr. Killion says he thinks changes to the timeline were made; they may have done it after 2014. Mr. Killion says he thinks the appeals were all completed by June 2011. Mr. Killion asks Mr. Cusson if he agrees that the appeals were all completed and everything was issued, the Town stamped it on August 2, 2011. Does Mr. Cusson believe this was probably the date the Permit became valid. Mr. Cusson is in agreement. Mr. Killion asks Mr. Cusson if he can provide invoices or anything to substantiate that the work that was completed prior to August 2014. Mr. Cusson says he will check with the developer. He also says that Ms. Drake indicated that she had already gotten something from the Engineering Department saying the Permit was effective and the work had started. Mr. Killion asks Mr. Cusson to substantiate the work that was completed prior to August 2014. This would indicate to the Board that substantial construction had begun within that timeframe. The discussion continues. Mr. Cusson says the Board issued the minor modifications. If the Permit was not effective the Board would not have granted a minor modification. The Board would not have done that if the Permit expired. Mr. Jensen asks if there is a date on the Building Permit. Mr. Cusson says he is not sure of the actual date. Mr. Vitacco says there was a lot of work leading up to it but the initial Building Permits were pulled April 2021. Mr. Jensen says the Board needs to identify what happened between 2014 and 2021. Mr. Killion asks Mr. Vitacco if there is any record as to when the road was completed. Mr. Vitacco says it was completed before 2021. He turns the question over to Matt Dacey who is the builder. Mr. Dacey says he got involved with the project with Bruce MacGregor and filed for, and was issued, the Building Permits. A significant amount of work was done prior to that. In the process of filing for the Building Permits and for the Building Permits for the four new homes were issued steps were followed to confirm that everything was valid. The Building Inspector, Engineering Department and Health Department went through every step to be sure this Comprehensive Permit was valid and current. Mr. Dacey says it is his understanding that when the minor modification was made, and there were maybe one or two of them, on top of the previous appeal from the Supreme Court from the abutter, that was resolved and then the modification was granted so that means the Permit was still valid. Mr. Dacey says this was well before he was involved but MacGregor had Farrell Electric as well as the general contractor subgrade the road, subgrade and clear for the drainage, prep it all initially and they put in probably 600-800 feet of underground electric and livened the vault in the hammerhead. That was done approximately 2015-2016 so Mr. Dacey says he thinks that is within the time frames everyone is talking about. He goes on to say he’s not exact on the dates. He says you can look at road costs then and today. There was a lot of work going on between lawyers; there is a very involved and detailed plan provided by Atlantic Engineering that was paid for and worked on in the initial submission and adjusted throughout the process. Mr. Dacey says they did their due diligence and the Building Inspector verified back before the issuance of those four individual Building Permits. In preparation to all that Mr. Dacey says they did perc tests on all four lots, drove wells on all four lots. Prior to filing for the Building Permit all the plans were prepared; they paid for the permits and they were issued on behalf of the owner/applicant. The timeline was verified and checked. Mr. Dacey says he doesn’t
see where the person making, or questioning the appeal. Mr. Swift interrupts Mr. Dacey to say that he came in 15 years later. Mr. Killion asks Mr. Swift to please refrain. Mr. Dacey says he doesn't see that it makes sense where the timeline; there was significant work done, there was an appeal. Maybe during the appeal period, they didn't do the work; there was an extension. Putting in the electrical work was serious money and the vault has been live for several years. Mr. Killion tells Mr. Dacey that the Board has an invoice from May 2017 for the underground electric at a cost of approximately $9,000.00. Mr. Dacey says this is probably from Farrell but there was probably a fee to Eversource or Comm Electric at the time. Mr. Killion says that was 2017 which was three years after the date the work would have had to be done within the three years. Mr. Killion says he is trying to establish if the road went in prior to that. Attorney Perrotta says he believes the attorney for the developer is correct. The two-year extension was in effect then. We should make sure about that. The Permit would have been in effect in 2010 and so the two-year extension would have applied to any Permit that was in effect at that time even though it was branded in 2009. This is something that should be double-checked but it looks like, statutorily, the two-year extension was in effect at that time. Mr. Killion asks Attorney Perrotta about the issue of the modification which was completed sometime around 2015 which was granted. If the Board granted this, and there was a violation of condition 21 in effect, would that negate that or would the Board's lack of due diligence on condition 21 not being met be basically null and void. Attorney Perrotta says it depends on whether the work was substantially commenced or not. Mr. Killion says but if the work wasn't completed and the Board didn't know and didn't do due diligence to establish that and the Board granted the modification does that in fact basically make that violation null and void because the Board didn't act on it. Attorney Perrotta says the term would still be in effect; he doesn't believe it would nullify the revision. Either the work was substantially commenced or it wasn't. He goes on to say that he doesn't believe the revision would save that; he doesn't believe it would answer it one way or the other. Attorney Perrotta adds that he assumes the revision wasn't also an extension. Going back to your original point about the two-year extension, Mr. Killion asks where would that extend this to if the Board that given it a three-year window of substantial construction Attorney Perrotta says it's not substantial construction it's substantial commencement. Mr. Killion says that would bring it to 2016. Attorney Perrotta says he believes that it is correct but it should be checked. Mr. Jensen says the minor modification took place in 2015; doesn't that reset the clock. Mr. Killion says he doesn't think it would. Mr. Cusson says if it was granted in 2015 that gives it additional years. Mr. Killion says he doesn't think it works that way. Mr. Killion doesn't think you'd get an additional three or four years because of a modification. Mr. Cusson says there is a substantial difference between substantial commencement and substantial construction. Mr. Killion asks Mr. Cusson if he can gather up the associated costs so he can say this is what has been expended to move the project forward. It now looks like you had until August 2016 but that date will be confirmed. Mr. Cusson says he will work with Mr. Dacey and the applicant to see what they can come up with in that regard. He says it is important to set the timeline which will help the Board as well. Mr. Cusson says he can ask for an extension. Mr. Killion says the argument being made is that if it is already expired there is no extension to be made. The cleanest way is to establish that you have met the requirements of condition 21. Mr. Killion says he believes Attorney Perrotta will look into what the actual date is based on the two-year extension that the state implemented. In the meantime, whatever you can come up with to show what you've completed, what you've paid for prior to the worst case, August 2014, at the best case will be August 2016. Mr. Vitacco says the documentation is approximately 900 pages. The original Comprehensive Permit went through around 2008. The appeals
were done in 2011. The hammerhead was completed around 2012. This was considered a substantial activity. The activity taken by HAC and this Board, the lottery process and the minor modification then in 2017 we are looking at the electrical work. Everything that we view indicates it is a valid Permit from when it was issued going forward. Champion Builders started building in earnest in 2020. Going through the documentation it is our opinion, including Attorney Silverstein’s, Town Counsel, there was a chain of evidence showing there was no substantial reason on our part to believe that the Comprehensive Permit was not valid.

Mr. Jensen asks Mr. Swift if he would like some time to reconstruct a timeline and Mr. Cusson or Mr. Dacey can come up with a timeline and we can compare. The Public Hearing can be continued to another date. Mr. Swift agrees to this and says he has completed a lot of it already. He says that a lot of the documentation they had has gone amiss. Mr. Swift says Greg Smith created a timeline for a big presentation that he wasn’t invited to. This document will help immensely. But yes let’s do that, if you give me a week or two I will construct that for you. Mr. Swift asks Attorney Pare if the developer is Sandwich Partners II who is the actual applicant? Mr. Van Buskirk says that he doesn’t think it matters. Mr. Swift asks who is the owner of the 40B permit. One minute they do talk about Sandwich Housing Partners II. Then they stopped saying that and said it was KB Nominal Trust. Mr. Jensen says the original Comprehensive Permit was issued under KB Nominal Trust in 2006. Mr. Vitacco says it started off as KB Nominal Trust and then there was a change. Mr. Vitacco says he believes they went before HAC for a change of ownership. Mr. MacGregor changed the name from KB to Sandwich Partners II. Mr. Swift responds by saying this is a big point because Sandwich Housing Partners doesn’t exist, supposedly, because they got their dissolution by the courts for not filing for their LLC and there are actual blackout dates in regard to where they fell behind.

Mr. Van Buskirk opens the matter up to Attorney Pare who introduces himself and says he is on the next appeal and represents Seacoast Towers. He says he deals with the Permit Extension Act pretty frequently. Initially it was enacted for a two-year extension. After the initial pass they adopted an additional two years. Before Mr. Swift leaves tonight the Board may find that the Permit Extension Act actually suspended any valid permits for four years from the expiration date, not two years. Mr. Swift says that this will take us to 2018, correct? Attorney Pare responds that he isn’t saying it makes a difference. Rather than coming back. Mr. Swift interrupts to say that’s a great point.

Mr. Van Buskirk opens the matter up to the public for comment. Mr. Vitacco says there are no emails received from the public or comments received through the ZOOM platform. Mr. Jensen asks Mr. Brides if he has any comments. Mr. Brides says he has nothing further to add. Mr. Swift will submit his timeline and we will review it. He remembers the Extension Act and recalls that it was two years and thought it was extended one year but it was two years. Attorney Perrotta says it may have been extended two and two for any permit that was in effect in 2010.

Mr. Van Buskirk opens the matter up to Mr. Matt Dacey. He says that Mr. Vitacco has spelled out the time table which he drove initially and abided by and committed energy and effort and work towards. If it is three years plus the four years as Attorney Pare has pointed out that is seven years that gets us up to (working off the 2011 date) 2018 and certainly significant commencement seems to be pretty steady right along from 2011 through the appeals through the initial clearing of the land. Mr. Dacey says it would
seem to him that the ZBA would be more than happy to support their zoning officer and his determination on this situation. Attorney Pare says this is an appeal of the building official or the Commissioner's determination so he believes Mr. Swift has the obligation to convince this Board that his point is correct and there is deference to the Building Commissioner but it is his obligation to prove his case. Attorney Perrotta agrees. Attorney Pare continues by saying not through an open forum or discussion but he is questioning the determination of the Building official who gets deference. This Board would analyze the evidence that Mr. Swift puts forward and frankly Attorney Pare says he hasn't heard any evidence. Mr. Swift says part of this is because no one would even talk to him; he says they basically shut him down. Mr. Swift says he has a fair shake of saying why. Mr. Swift says let’s continue this and he will provide a timeline to prove it further, as requested. Mr. Vitacco says if it is the pleasure of the Board to grant the continuance the next meeting will take place on March 8, in person. Board members discuss their availability in March. Mr. Vitacco explains Board members can still call in; virtual meetings go until April 1. Mr. Jensen asks Mr. Swift if he is amendable to meet on March 8 or March 22. Mr. Swift agrees to March 22 and says that it will give him enough time to prepare. Mr. Jensen motions to continue Hearing #22-03 to March 22, 2022 at 6 p.m. Mr. Killion seconds. Unanimously approved by roll call vote.


Mr. Van Buskirk reads the Public Hearing Notice into the record. Mr. Van Buskirk reads the following comment memos into the record:

- Email to Maureen McCabe from Brendan Brides, Building Commissioner re: Request for Comment: #22-04: 150 Colonial Way (Cell Tower) Map 25 Parcel 109, dated February 17, 2022
- Email to Maureen McCabe from Sam Jensen, Assistant Town Engineer re: Request for Comment: #22-04: 150 Colonial Way (Cell Tower) Map 25 Parcel 109, dated February 16, 2022
- Memo to Erik Van Buskirk, Chairman Board of Appeals from David J. DeConto, Director, Department of Natural Resources re: Conservation Commission comments on #22-04, 150 Colonial Way (Cell Tower), Sandwich, MA, dated February 11, 2022
- Email to Maureen McCabe from David Mason, Director of Public Health re: Request for Comment: #22-04: 150 Colonial Way (Cell Tower) Map 25 Parcel 109, dated February 2, 2022

Mr. Jensen motions to open Public Hearing #22-04. Mr. Killion seconds. Unanimously approved by roll call vote.

Mr. Swift says this will be really quick because it's really a yes or no. He tells the Board he sent them the letter which is pretty straightforward. Originally there was a DRI Decision. The Cape Cod Commission came in and there were a bunch of meetings. There was heavy resistance against the cell tower and basically, at the end of the day, it was told to all of us that didn't want it that they would protect us by putting conditions in. Mr. Swift says he sent the outline, which he can go over, the issues he was hoping Mr. Brides would enforce. He says the issues seem pretty simple to him. The first issue is for security purposes a locked gate painted brown or another earth-tone color shall be located at the entry to the access road to the proposed tower. Mr. Swift says, as you
know, you guys have moved the gate, but again when we had those meetings that was number one there wasn’t to be any more building; and number two that’s why they said at the entry of the gate. Number ten was the access road proposed to the property; the protected site for Chase Road will be constructed in a manner that minimizes grade is located a minimum of 63 feet from the easterly lot line on the property to provide adequate buffering in relation to the adjacent lots. Mr. Swift says if you look at the map you will see that the road is (Mr. Swift says he will bring the map with him on March 22) the easterly line which basically would be the part of Chase Road is not 60 feet away. They have moved it over towards the abutting person’s property. Mr. Jensen asks Mr. Swift what is the value. Mr. Swift asks for clarification. Mr. Jensen says you said you measured it; what is the distance. Mr. Swift says he doesn’t have that paper with him. It is over 60 but Mr. Swift says he can provide the number. It probably is another 15 feet over towards Bayview is where it would have to be moved. Mr. Swift explains they are supposed to be taking RF readings up at the site, like wireless readings. The Building Inspector is responsible for doing that. He says they haven’t even done that in the last 16 years. Mr. Swift says he requested that and couldn’t get it. That is part of the conditions in regards to what they are supposed to be doing, which they are not. He says that the applicant shall not build or disrupt any areas other than those within project site. Once again, they subdivided the lots, which is a nonconforming lot, but we won’t go down that road because it is a discussion for next time. Mr. Swift says he believes they aren’t adhering to that due to that reason. There has been no inspection of the roadway. Mr. Swift says keep in mind that this is the guy you entrusted to upkeep this new access road because it is really not a road. Whatever you want to call Colonial Way. As Miss Cutler said it is not a road it is nothing. He says the Planning Board clearly states any of the conditions violated here if they put the 40B in there would be null and void. Mr. Swift tells the Board he will provide this date at the March 22 meeting. He says this is pretty straightforward and what would have made everything okay there is if Mr. Brides came back and said fine. Now Mr. Brides states that he reached out to him but he never told me, the Planning Department told me. Mr. Swift says he is wondering if you have gotten a response from him. Mr. Brides tells the Board that Mr. Swift’s concern is that he didn’t respond quickly enough to him. He says he did get a response from counsel. Attorney Pare will speak soon. Mr. Brides says the reason he was delinquent getting back to Mr. Swift immediately is because there were two storms in Town that happened around the time that Mr. Swift was looking for information. He goes on to say he was trying to decide whether to assist with someone’s house that was falling into the ocean on Salt Marsh Road or whether he should figure out if the hue of the gate is the correct earth tone, he will gravitate towards the person whose house is falling into the water. That’s what we do. Mr. Brides says he did contact the tower owners and he believes they are taking care of these minor matters. Mr. Swift says he wasn’t asking Mr. Brides to do anything right away; as always I have to wait to contact Town Counsel. Mr. Brides says Mr. Swift received a reply from Ms. Drake at his instruction because he knew Mr. Swift was waiting for an answer. Mr. Killion asks Mr. Brides if all the issues that Mr. Swift brought up have been addressed by the cell tower owner. Mr. Brides says, yes, he has been in contact with Attorney Pare who assured him that they will take care of these matters immediately. Mr. Vitacco has no comments to offer. Mr. Swift asks if any of the other enforcements you’re telling me are a no go basically, right? Mr. Killion asks Mr. Swift which other enforcements? He says the ones he just mentioned. Mr. Swift says to let Attorney Pare speak.

Mr. Van Buskirk opens the matter up to Attorney Pare who introduces himself. He says that people can have opinions and ask questions but there isn’t any evidence provided.
Attorney Pare says he told Mr. Brides that they will deal with the conditions that have been raised by Mr. Swift to the extent he is citing something that is truly a violation. Condition 9 states that there will be a locked gate at the entrance to the access road. He says he doesn’t know if this is an issue with the color of the gate and would like to hear from Mr. Swift if that is the violation. Mr. Swift says the gate was in relation to the original DRI Decision that basically said in order to protect the abutters that they would place the gate at the entry of Chase Road. Attorney Pare interrupts to say it didn’t say that; this is about evidence. It doesn’t mention Chase Road it mentions the beginning of the access road. Attorney Pare asks Mr. Swift if it is the presence of the gate or the color of the gate that he is objecting to. Mr. Swift says presence of the gate. Attorney Pare asks Mr. Swift if he is aware that the end of Colonial Drive, the gate was moved there at the commencement of construction and there are boulders surrounding the gate. The abutters are protected. It is actually a locked gate at the entrance to the access road to the tower. Attorney Pare asks Mr. Swift if he is aware that the gate is there. Mr. Swift says he is aware it is there but are you allowed to move that gate. On the access road it specifically said, so now you are coming in and basically saying well no the beginning of the cell tower has now been moved down to where they are. Mr. Swift says he is trying to get a feeling of where everybody is. Attorney Pare says they are complying with the condition because the gate was placed per the words of the Cape Cod Commission and by incorporation into the Special Permit. There is a locked gate to protect the abutters. We don’t want people using the road; that is our road. It is Mr. MacGregor’s private property or an entity Mr. MacGregor controls. People using that access drive are trespassing. Mr. Swift says it is not a drive it is an access road. Attorney Pare says they have satisfied condition 9. Condition 10: the access drive was installed per the plans in 2001. These documents will be provided to the Board at the end of the Hearing. The Cape Cod Commission issued a final certification of compliance on February 20, 2001. They went out and inspected and there were no issues with the access drive or any conditions that the Cape Cod Commission imposed. This will be submitted to the Board and is evidence that we are in compliance. Condition 21: this is with respect to the emissions. This is probably the most overlooked condition that is placed on cell towers. When cell towers first came out there was great concern about the emissions. Each of the carriers have to comply with the FCC emissions standards. The FCC is the exclusive authority of emissions. The carriers don’t always provide the paperwork; they don’t always submit and people don’t reach out with respect to compliance to make sure these reports are submitted. It is a good intent to require an annual filing. No one is interested in them because the emissions levels are so low and this tower is so far away. Anyone living in the area, it will never come close to violating the FCC emission requirements. However, it is the requirement, we note the requirement. We are obligated to notify the Building official and the Planning Board with a report based on an independent analysis. Mr. MacGregor has undertaken to do that. We will speak with Mr. Brides and the Planning Board and will get the tests and the actual readings completed and the report will be issued in accordance with the conditions of the Planning Board and Mr. Brides. Mr. Swift can request that report through the Freedom of Information Act or he can get it from Mr. Brides’ office. Attorney Pare says he will order the tests and expects this will be done in the next couple of weeks or so. Condition 24: Attorney Pare says he thinks Mr. Swift is raising an issue that the Permits pursuant to the 40B application are the violation here. We have not developed the land any further; we comply and haven’t issued or obtained any permits to further develop the tower access drive and the tower parcel. Attorney Pare says he will assume it is the 40B which was approved and appealed, it has been through litigation. We have not violated the condition with respect to number 24. With respect to the
access drive. Special Permit condition number three, Attorney Pare says he has no idea if the access road has been inspected. When Mr. MacGregor returns from traveling he will meet with Mr. Brides, they will do a site visit to inspect the road so that we comply with that provision. If any repairs are necessary Mr. MacGregor is committed to doing so. Attorney Pare says he believes these are the five issues Mr. Swift has raised. Attorney Pare says he thinks Mr. Swift disagrees that the tower has been there for the last 20 odd years. Attorney Pare thinks Mr. Swift disagrees that the 40B should have been approved. Mr. MacGregor and his entities are exercising their property rights. Attorney Pare says they will be in compliance with each of the issues Mr. Swift raised and he thinks Mr. Brides will be satisfied in the near term. He asks the Board to uphold the Decision of the Building Inspector. You have on the record that the two open issues will be resolved; the other three, frankly, we are not violating them. Attorney Pare says he will send pictures of the gate to show that it is at the access road. He will also send the DRI modification which is evidence that the final certificate of compliance was issued. He says he believes the whole issue with the permitting thing is the objection to the 40B and nothing they have done with respect to the tower has any impact on that.

Mr. Killion asks Attorney Pare if he is conceding that on condition 21 that has not been kept up for the last twenty plus years; no testing was ever really done or submitted. Attorney Pare says that is what he really doesn’t know. He doesn’t know if the Board is aware that Seacoast owns the tower so they own the steel that rises. They don’t emit anything. To address this issue, Mr. MacGregor is willing to engage in an independent firm to measure the emissions. That’s not something we are even aware of; it’s kind of a glitch that is in the Cape Cod Commission requirements. Seacoast doesn’t emit anything; we don’t have any of that information but we can hire an independent third party to come out and do it. Technically we are the applicant. Attorney Pare says he doesn’t know if any filings have been done with the Cape Cod Commission. It didn’t sound like Mr. Brides had any reports from any of the carriers either.

Mr. Killion recalls that the Board was concerned that the 40B Permit they were issuing was going to violate a lot of the conditions of the existing cell tower. In fact, the Board conditioned it as such and they went to great lengths to eliminate that condition. We were trying to look out for the applicant but no good deed goes unpunished. Attorney Pare says he read through the documentation and noted that condition 22 related directly to the cell tower that was, in fact, stricken by the Housing Appeals Committee and a new permit was issued in accordance with that. The whole concept of permits issued with the 40B violate the tower Special Permit. There is a direct ruling against that. Attorney Pare says if there is something else it is not clear to him what Mr. Swift is alleging.

Mr. Van Buskirk asks if there is any further comment. Mr. Swift says, for the record, he is not against the 40B. What he is against is that the cell tower made a promise, that was it and that is why the conditions were there. Had it been a better site and location he wouldn’t be talking about the 40B. Mr. Swift goes on to say if you give up the tower put the 40B. He says this was his only point. Attorney Pare asks to share the Zoom screen. Attorney Pare shows the approved plan and points out where the cell tower is located and the lots are titled in Mr. Swift’s name. He says the Cape Cod Commission came out to show what a well-built cell tower and compound looked like. This is far away from most residences and covers a huge swath of Sandwich. The tower is well designed and Mr. MacGregor has always done his most to maintain these properties. He points to where the tower is located and where the 40B is located. Attorney Pare
says he wanted to give the Board a sense of how far Mr. MacGregor went in constructing the access drive to keep the tower as far as possible close to highway traffic but at the same time keep it away from neighbors and protecting residences, including Mr. Swift's. Mr. Swift tells Attorney Pare that he is incorrect. The cell tower actually is near a lot of residences. Mr. Swift references the Archibald property which he says Attorney Pare's client paid off so he could get a fall zone over there. Mr. Van Buskirk interrupts to say the Board doesn't need conjecture. Attorney Pare says he is not here to present actual evidence this is just your opinion of where the cell tower may be located. Mr. Jensen suggests the discussion move on; Mr. Van Buskirk agrees. Mr. Swift says he's done.

Mr. Van Buskirk asks Mr. Vitacco if there is any public comment. Mr. Jensen says he has a question about the whole process. The cell tower was a Planning Board Permit. Mr. Van Buskirk agrees. Mr. Jensen asks what was the decision of the Building Inspector that Mr. Swift is challenging. Mr. Van Buskirk says it is that he didn't enforce the conditions. Mr. Van Buskirk says the Building Inspector seems to have addressed them. There are no further questions from the Board. Mr. Brides says he is going through the items again and says condition number 21, as Attorney Pare mentioned, is something that needs to be addressed and it will be addressed in the near future. Mr. Brides says he will be happy to look at the road and see what condition it is in. It is a private road so I'm not sure I'd be doing that but will make sure that is part of what was approved. The other matters are minor and can be resolved quite easily with the owners. Mr. Jensen asks Mr. Brides about the road. The gate is actually by the fourth lot. From that gate down to the cell tower is the cell tower owner's property. Mr. Brides agrees. Mr. Jensen asks how much grading he has to do on his own property. No one should be driving down there but the owner. Mr. Brides says went down there for an inspection of the cell tower a few years ago; it is pretty rural. Mr. Brides says he drove down there in a regular vehicle and it seemed quite fine to him. Obviously if there is a divot somewhere we will find it and fill it in. Mr. Vitacco confirms that there are no emails received from the public or comments received through the ZOOM platform. Mr. Jensen begins a motion to close the Public Hearing. Mr. Killion suggests continuing this Public Hearing until the issues are resolved. What can the Board rule on tonight without any evidence; testing information will be provided. The Building Inspector said he would visit the site and see what needs to be done. Board members have a discussion as it relates to this matter. Attorney Pare says conditions can be imposed because it is up to the Building official and the Planning Board to determine if the emissions study is adequate and obviously none of us know what Mr. Brides wants or needs for the roadway. The roadway might be just fine when they drive up there and no maintenance is required but the inspection was done. This is a matter of reporting by Mr. Brides and inspection by Mr. Brides. This Board could rule they are upholding the Building Commissioner's decision subject to condition 21 and Permit condition number 3 being satisfied. Mr. Van Buskirk says in this Appeal it's really an up and down vote of yes or no; there are no conditions. Mr. Killion agrees which is why he suggests leaving this Public Hearing open until it is resolved. Mr. Jensen motions to continue Public Hearing #22-04 until March 22, 2022 at 6 p.m. Mr. Killion seconds. Unanimously approved by roll call vote.

**Board Discussion**

There are no items to discuss.
Deliberations

There are no items to deliberate.

Other Matters Not Reasonably Anticipated

- Mr. Vitacco says there are no other matters from the Planning office.
- Mr. Cusson asks to speak. Mr. Van Buskirk advises Mr. Cusson that the Board can't accept any further comment at this time. Mr. Cusson says he has a general question about his Hearing. He asks if the Hearing was continued to March 8 or March 22. Mr. Van Buskirk advises Mr. Cusson that his Hearing has been continued to March 22.
- Attorney Pare thanks the Board for their attention.
- Mr. Swift thanks everyone.

Adjournment

Mr. Jensen motions to adjourn. Mr. Nye seconds. The vote is unanimous. The meeting adjourns at 7:45 p.m.

Respectfully Submitted,

Maureen McCabe

Supporting Documents:

1. Draft Minutes dated February 8, 2022 (4 pages)
2. 10, 20, 30 and 40 Colonial Way Public Hearing Notice (1 page)
3. 10, 20, 30 and 40 Colonial Way Appeal of Decision of the Building Commissioner Application (23 pages)
4. Email to Maureen McCabe from Brendan Brides, Building Commissioner re: Request for Comment: #22-03: 43 Chase Road/Colonial Way (40B) Map 25 Parcels 123, 124, 125 & 126, dated February 12, 2022 (1 page)
5. Email to Maureen McCabe from Sam Jensen, Assistant Town Engineer re: Request for Comment: #22-03: 43 Chase Road/Colonial Way (40B) Map 25 Parcels 123, 124, 125 & 126, dated February 16, 2022 (1 page)
6. Memo to Erik Van Buskirk, Chairman Board of Appeals from David J. DeConto, Director, Department of Natural Resources re: Conservation Commission comments on #22-03, 43 Chase Road/Colonial Way (40B), Sandwich, MA, dated February 11, 2022 (1 page)
7. Email to Maureen McCabe from David B. Mason, Director of Public Health re: Request for Comment: #22-03: 43 Chase Road/Colonial Way (40B) Map 25 Parcels 123, 124, 125 & 126, dated February 2, 2022 (1 page)
8. 150 Colonial Way Public Hearing Notice (1 page)
9. 150 Colonial Way Appeal of Decision of the Building Commissioner Application (42 pages)
11. Email to Maureen McCabe from Sam Jensen, Assistant Town Engineer re: Request for
Comment: #22-04: 150 Colonial Way (Cell Tower) Map 25 Parcel 109, dated February
16, 2022 (1 page)
12. Memo to Erik Van Buskirk, Chairman Board of Appeals from David J. DeConto, Director,
Department of Natural Resources re: Conservation Commission comments on #22-04,
150 Colonial Way (Cell Tower), Sandwich, MA, dated February 11, 2022 (1 page)
13. Email to Maureen McCabe from David B. Mason, Director of Public Health re: Request
for Comment: #22-04: 150 Colonial Way (Cell Tower) Map 25 Parcel 109, dated
February 2, 2022 (1 page)
14. Email to Michael Swift from Brendan Brides re: colonial way, dated December 15,
2021(1 page)
15. Document signed by the Board of Appeals on June 2019 (document not provided to the
Board)
16. Mr. Swift's unlabeled photograph date stamped 12/30/21 (1 8 1/2 x 11 color photograph)
17. Farrell Electric, Inc. Invoice, Invoice # 5867, dated May 25, 2017 (1 invoice)
18. Board of Appeals Comprehensive Permit Decision dated December 28, 2006 (6 pages)
19. 2007 Superior Court Decision (copy not provided to the Board)
20. 2011 Housing Appeals Committee Decision (copy not provided to the Board)
21. Swift references a document stamped in by the Town dated 8/2/11 (copy not provided to
the Board)
22. October 6, 2011 letter to the Engineering Department (1 page)
23. October 17, 2011 letter to the Engineering Department (1 page)
24. Mr. Dacey references an Involved and detailed plan provided by Atlantic Engineering at
the start of the project (plan not provided to the Board)
25. Greg Smith's timeline (copy not provided to the Board)
26. Mr. Swift's map which he discusses relative to application #22-04 (map not provided to
Board)
27. Sandwich Partners II, LLC recorded Deed (copy not provided to the Board)
28. Memo to Barbara Walling, Town Clerk re: Special Permit Decision/Seacoast Limited
Partnership, Applicant and Sprint Spectrum Limited Partnership, Co-Applicant for a
Wireless Telecommunications Facility with attached Special Permit Decision, dated
February 23, 2000 (22 pages)
29. Planning Board's Cell Tower Special Permit Modification Certificate of Approval dated
April 21, 2004 (7 pages)
30. Cape Cod Commission Cell Tower DRI # TR98035, Final Certificate of Compliance for
the AT&T Installation, dated March 31, 2003 (5 pages)
31. Cape Cod Commission Cell Tower DRI# TR98035, Final Certificate of Compliance for
the NEXTEL Installation, dated August 28, 2001 (5 pages)
32. Cape Cod Commission Modification of an Approved DRI Decision, dated May 21, 2001
(3 pages)
33. Cape Cod Commission Cell Tower DRI# TR98035, Final Certificate of Compliance for
the Sprint Spectrum LP/Sprint PSC Installation, dated April 19, 2001 (5 pages)
34. Cape Cod Commission Cell Tower DRI# TR98035, Final Certificate of Compliance for
the Monopole Facility, dated February 20, 2001 (4 pages)
35. Cape Cod Commission Cell Tower Modification of an Approved DRI Decision dated
February 14, 2001 (3 pages)
36. Cape Cod Commission Cell Tower Modification of an Approved DRI Decision dated
January 19, 2001 (3 pages)
37. Cape Cod Commission Cell Tower DRI# TR98035, Partial Certificate of Compliance,
dated November 6, 2000 (5 pages)
38. Cape Cod Commission Cell Tower DRI Impact Decision dated July 28, 1999 (14 pages)
39. Cape Cod Commission Cell Tower Minor Modification Type #1 dated June 30, 2017 (3 pages)