COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS.

MISCELLANEOUS CASE
NO. 20 MISC 000073 (HPS)

Galina Filippova, as Trustee of the PROSPECT STREET REALTY TRUST,
Plaintiff,

v.

FRAMINGHAM ZONING BOARD OF APPEALS, and STEPHEN MELTZER, EDWARD COSGROVE, SUSAN CRAIGHEAD, JOHN MCKENNA, JOSEPH NORTON, HEATHER O'DONNELL, and LAP YAN, as they are the Members of the FRAMINGHAM ZONING BOARD OF APPEALS,
Defendants,

and

Fredric W. Schelong, Trustee of the FREDRIC W. SCHELONG 1997 REVOCABLE TRUST,
Defendant-Intervenor.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Galina Filippova, Trustee of the
Prospect Street Realty Trust

By her attorneys,

Ethan Blair Dively (BBO# 703372)
Miyares and Harrington, LLP
40 Grove Street, Suite 190
Wellesley, MA 02482
Tel: (617) 489-1600
edively@miyares-harrington.com

Fred Hopengarten
(Maine Bar # 1660, DC Bar # 114124)
Six Willarch Road
Lincoln, MA 01773
Tel: (781) 259-0088
fred.hopengarten.law@bc.edu

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The Plaintiff Galina Filippova, Trustee of the Prospect Street Realty Trust submits this Memorandum, pursuant to Mass. R. Civ. P. 56 and Land Court Rule 4, in support of its Motion for Summary Judgment.

Introduction[1]

In 2019, Mikhail Filippov,[2] an electrical engineer with a passion for Amateur Radio, applied for a building permit to construct an accessory Amateur Radio tower in the rear yard of the home where he and his wife, Galina Filippova, have resided since 2010. For Mikhail, the tower represents the realization of a lifelong passion which he may now enjoy in retirement. Mikhail emigrated to the United States from Russia and maintains friendships with fellow Amateur Radio operators in St. Petersburg, Moscow and Israel. Mikhail wishes to be able to communicate with these friends and proposes to build the tower to a height of eighty feet. This proposal compromises Mikhail's ability to reliably communicate with his friends, but he limited the height to avoid the conflict that a larger, more effective tower would likely bring. Alas, no joy.

In October 2019, the Building Commissioner issued a building permit (the "Building Permit") for the construction of the Amateur Radio tower, which is permitted as an as of right use in the residential zoning district where Mikhail lives. While Mikhail prepared the foundation, a group of neighbors, including the intervenor, appealed the Building Permit to the Zoning Board of Appeals ("ZBA"). In a decision which disregards basic cannons of bylaw interpretation, the ZBA revoked the Building Permit. The ZBA elected to subject the Amateur Radio tower to a portion of one subsection, within a section, of the City of Framingham Zoning By-Law

[1] Plaintiff provides this information for context only and does not advance it as "material facts" necessary to resolve this Motion for Summary Judgment that lie beyond the Joint Statement of Agreed Facts, Plaintiff's Statement of Material Facts, and other materials fairly referenced therein.

[2] In Russian culture, convention provides for gendered surnames. This Memorandum refers generally to Filippova except where a detail is specifically relevant to Mikhail.

("Bylaw") which is inapplicable to accessory Amateur Radio towers in its entirety. This case is an appeal by Galina Filippova, as Trustee of the Prospect Street Realty Trust, seeking to annul the decision of the ZBA and to reinstate the Building Permit.

Statement of the Issue Presented

Whether the ZBA erred in applying the Wireless Communications Facilities section of the Bylaw, § V.E., instead of the Amateur Radio tower section, § II.B.2.G, rescinding a building permit properly issued in the first instance by the Building Commissioner for an as of right use.

Statement of the Legal Elements

A. Summary Judgment Standard

Summary Judgment "shall be rendered forthwith if...there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Flesner* v. *Technical Communications Corp.,* 410 Mass. 805, 809 (1991); *Community National Bank* v. *Dawes*, 369 Mass. 550, 553 (1976); Mass. Civ. P. 56(c).

B. Standard of Review Under G.L. c. 40A, § 17

An appeal under G.L. c. 40A, § 17 involves a "peculiar combination of de novo and deferential analyses." *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 381 (2009) (internal quotation and citation omitted). After finding the facts *de novo*, the court's "function on appeal" is "to ascertain whether the reasons given by the [board] had a substantial basis in fact, or were, on the contrary, mere pretexts for arbitrary action or veils for reasons not related to the purpose of the zoning law." *Vazza Props., Inc. v. City Council of Woburn*, 1 Mass. App. Ct. 308, 312 (1973). The court must give deference to the local board's decision and may only overturn a decision if it is "based on a legally untenable ground,

or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970).

"Though the board's own findings are due no evidentiary weight, judicial review is limited: "[s]o long as 'any reason on which the board can fairly be said to have relied has a basis in the trial judge's findings and is within the standards of the zoning by-law and the Zoning Enabling Act, the board's action must be sustained regardless of other reasons which the board may have advanced.'" *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 78 Mass. App. Ct. 233, 244 n.25 (2010), *aff'd*, 461 Mass. 692 (2012), *quoting Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 76 (2003). There was only one reason on which the ZBA relied to justify the revocation of the Building Permit. It was wrong.

Factual Background

The relevant facts are few, straightforward, and undisputed. Mikhail Filippov possesses an Amateur Radio license issued by the Federal Communications Commission and holds a beneficial interest in the Prospect Street Realty Trust, the record owner of 273 Prospect Street, Framingham Massachusetts (the "Property"). Joint Statement of Agreed Facts in Support of Motions for Summary Judgment ("SOF") ¶¶ 5, 11; Joint Appendix in Support of Motions for Summary Judgment ("Joint App.") Exhs. 2, 7.

On October 10, 2019, Mikhail Filippov was issued a building permit for an Amateur Radio tower, which was later transferred to Galina Filippova, as Trustee of the Prospect Street Realty Trust ("Filippova"). SOF ¶ 10; Joint App. Exh. 5. The Amateur Radio tower allowed by the Building Permit is proposed to be 80 feet tall and located 45 feet from the Intervenor's property and 37 feet from the closest abutter's property. SOF ¶ 9; Joint App. Exh. 6.

The Property is situated in the City's Single Residence (R-3) Zoning District, where Amateur Radio towers are accessory uses allowed as of right. SOF ¶ 6; Joint App. Exhs. 3 & 4, pp. 27-28. The Bylaw requires a 15-foot side and rear yard setback in the R-3 Zoning District. Joint App. Exh. 4, pp. 116-117. The Bylaw also contains a separate section entitled Wireless Communications Facilities. Joint App. Exh. 4, p. 131, § V.E (the "WCF section").

A group of three neighbors opposed to the Amateur Radio tower appealed the issuance of the Building Permit to the ZBA. SOF ¶ 12. In a decision filed with the City Clerk on January 22, 2020 (the "Decision"), the ZBA revoked the Building Permit. SOF ¶ 15; Joint App. Exh. 8. The Decision revoked the Building Permit on the sole basis that the Amateur Radio tower did not comply with one of the setback requirements found in the WCF section. Joint App. Exhs. 4 & 8. On February 10, 2020, Filippova entered this appeal of the Decision in this Court. SOF ¶ 16.

Argument

The Decision revoking the Building Permit for the Amateur Radio tower may not stand where there is no reason on which the ZBA can fairly be said to have relied which has a basis in the undisputed facts and is within the standards of the zoning bylaw and the *Zoning Act*. *81 Spooner Rd. LLC*, 78 Mass. App. Ct. at 244 n.25. The ZBA's articulated rationale for revoking the Building Permit is solely the application of a sub-section of the WCF section which cannot reasonably be interpreted to apply to an accessory Amateur Radio tower. Joint App. Exh. 8, ¶¶ 7.10 and 7.11. Further, the ZBA's interpretation, if valid, would be unconstitutionally vague. This Court's review of the Decision may be *de novo* on the underlying facts, but is ultimately constrained to the reason articulated by the ZBA for revoking the Building Permit. The only basis for the Decision is legally untenable, unreasonable, whimsical, capricious, or arbitrary, requiring that the Decision be annulled, which has the effect of reinstating the Building Permit.

Notwithstanding the limitations of the scope of review, Filippova is entitled to the Building Permit as an as of right use pursuant to § II.B.2.G of the Bylaw. Joint App. Exh. 4, pp. 27-28. The WCF section, erroneously applied by the ZBA, is inconsistent with an Amateur Radio use on its face, and cannot be interpreted in a manner which applies it to accessory Amateur Radio towers. Joint App. Exh. 4, p. 131.

To the extent that the ZBA attempted to manufacture reasonable regulation of the Amateur Radio tower to avoid conflict with G.L. c. 40A. § 3 ¶ 10, it failed to do so as a matter of law. The *ad hoc* application of a selected sentence (but not the entire paragraph) in a bylaw cannot be reasonable regulation of an Amateur Radio tower protected by the *Zoning Act* and Federal law. Furthermore, the revocation of the Building Permit for the tower, leaving Filippova with no tower, cannot possibly be effective accommodation. This is particularly true where the Decision requires a particular setback calculation, but nevertheless suggests that compliance *or* compliance to a greater degree may be acceptable in a future application. Filippova cannot be made to blindly seek relief from a municipal board which has fumbled, inventing unreasonably vague requirements in the presence of otherwise clear regulations. The Decision must be annulled.

I. The Decision is Based on a Legally Untenable Ground, or is Unreasonable, Whimsical, Capricious or Arbitrary, and Must Be Annulled.

The ZBA relied on the following paragraphs in the Decision to determine that the Building Permit should be revoked:

7.10 §V.E.4 of the Zoning By-Law titled "Dimensional Requirements for Wireless Communications Facilities" sets out basic regulations of WCFs. This section does not state that the requirements are part of the Special Permit review process. §V.E.4.c.(2) reads:

7.10.1 "The setback of a free-standing WCF from the property line of the lot on which it is located shall be equal to *the height of the structure plus twenty feet*. The setback

of such a facility shall be a minimum of three hundred from a residential zoning district or residential use."

7.10.2 The Board finds that the setback requirements of §V.E.4.c.(2) constitute reasonable regulation of the location of a WCF, even one that may be exempt from the Special Permit requirement (see §V.E.4.e) and the full force of the City's zoning requirements. There is a rational basis to conclude that this setback rule is related to health, safety, and aesthetics, serving a legitimate public purpose and that this provision 'reasonably allow[s] for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.' See G.L. c. 40A, §3. In the proposed location, 37 feet from the nearest neighbor's property line, an 80-foot tower could conceivably fall on the neighbor's property and cause injury or property damage. The Appellants have also demonstrated that the aesthetic quality of their residential environment would be impacted. It is not necessary for the Board to make further findings on the likelihood of structural failure or the degree of impact to the aesthetic environment.

7.11 It is the judgment of the Board that the basic dimensional regulations are applicable to all tower applications, even those exempt from a special permit, and that the Board has the discretion, as land use boards have concerning other uses protected by Section 3 of the Zoning Act, to decide which of the regulations are reasonable as allowed by the statute. Therefore, the building permit is invalid and shall be revoked. Nothing shall prevent the respondent property owner from re-applying for a tower in a different location that complies with the height and setback requirements, at least to a greater degree. For example, the tower could be moved to a more central location on the property further away from the neighbors' properties.

Joint App. Exh. 8 (emphasis in original).

A. The Decision is Based Solely on a Sentence within a Subsection of the WCF Section that Does Not Apply to an Amateur Radio Tower.

Section V.E.4.c. is not applicable. Even if it were, the fatal error in the ZBA's application of § V.E.4.c.(2), is that they read only the first sentence, treating the second sentence as superfluous. That second sentence of § V.E.4.c.(2) requires that a Wireless Communications Facility subject to the height of the structure plus 20 feet setback provisions (hereafter "1:1+20"") must *also* be at least 300 feet from any residential zoning district or residential use. It

is the essence of arbitrariness to use only those words convenient to serve a purpose. The full text of § V.E.4.c.(2) forbids an as of right residential accessory use in a residential zoning district.

A reviewing court accords "deference to a local board's reasonable interpretation of its own zoning bylaw with the caveat that an incorrect interpretation of a [bylaw] ... is not entitled to deference." *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley*, 461 Mass. 469, 475 (2012) (internal quotations and citations omitted). Zoning bylaws are not to be construed in isolation but are read contextually. *Livoli v. Zoning Bd. Of Appeals of Southborough*, 42 Mass. App. Ct. 921, 922 (1997). Further, a reasonable interpretation must "avoid an absurd result when the language is susceptible to a sensible meaning." *Id.* It is an unreasonable and legally untenable interpretation of the Bylaw to conclude that the ZBA can apply only the first sentence of § V.E.4.c.(2), while conveniently ignoring the second sentence—rendering it superfluous. *Advanced Dev. Concepts, Inc. v. Town of Blackstone*, 33 Mass. App. Ct. 228, 233 (1992) ("We cannot approve interpretation that renders a significant portion of any regulation superfluous."). Moreover, § V.E.4.c.(2), when read in its entirety, is plainly inapplicable to Amateur Radio. Concluding otherwise would place absurd dimensional restrictions on a residential accessory use as defined by § II.B.2.G of the Bylaw. *Shea v. Town of Danvers*, 21 Mass. App. Ct. 996, 997 (1986) ("Requirements of one section of a zoning by-law may not be ignored by reason of another section unless strictly necessary."). A zoning bylaw "should be construed sensibly, with regard to its underlying purposes, and, if possible, as a harmonious whole." *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 129 (1999). Section V.E.4.c.(2) is harmonious with the rest of the WCF section, and the remainder of the Framingham Bylaw as a whole, when sensibly read so as to exclude Amateur Radio (an inherently non-commercial use).

The ZBA applied *only a portion of a paragraph,* of an *inapplicable sub-section,* of the *wrong section* of the Bylaw as the sole basis for revoking the Building Permit. With no other zoning violation, there is no basis on which this Court may uphold the Decision.

B. The ZBA's Application of the Bylaw is Unduly Vague.

The ZBA's application of § V.E.4.c.(2) to the Amateur Radio tower, when viewed with an eye for the procedure the ZBA employed and the standard it purports to create, yields the same conclusion: The Decision must be annulled. The ZBA has applied only so much of the Bylaw as it saw fit. Using its self-identified discretion, the ZBA revoked the Building Permit, and went on to state that:

> Nothing shall prevent the respondent property owner from re-applying for a tower in a different location that complies with the height and setback requirements, at least to a greater degree. For example, the tower could be moved to a more central location on the property further away from the neighbors' properties.

Joint App. Exh. 8.

The ZBA cannot have it both ways. With one hand it asserts that the 1:1+20' portion of § V.E.4.c.(2) applies, fixing the maximum height. With the other, the ZBA suggests that a different proposal that might comply "at least to a greater degree" would be sufficient. That standard, if you can call it that, is so unduly vague that if Filippova were to re-apply, she would have no reasonable opportunity to know what would be allowed or what would be denied. An unduly vague regulation violates due process. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law…And this is no less true of a municipal ordinance or regulation." *O'Connell v. City of Brockton Bd. of Appeals*, 344 Mass. 208, 212 (1962) (internal quotations omitted).

For these reasons, the Decision of the ZBA must be annulled.

II. Notwithstanding the Failures of the Decision, the Amateur Radio Tower is Permitted By Right.

The somewhat uncommon posture of this case[3], where a permit was granted and then overturned by the ZBA, burdens the plaintiff only with the task of demonstrating that no basis for the Decision on which the ZBA can fairly be said to have relied is supported by the material undisputed facts. *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 78 Mass. App. Ct. 233, 244 n.25 (2010), *aff'd*, 461 Mass. 692 (2012). Unlike cases in which the building permit or other relief at issue was denied in the first instance, Filippova need not prove entitlement to the Building Permit to obtain the relief she seeks.[4] If the Decision is annulled, the Building Permit is reinstated as a matter of law.

The Court can be comforted in annulling the Decision because Filippova was entitled to the Building Permit on the undisputed facts. The WCF section is, on its face, inapplicable to Amateur Radio. Filippova is entitled to the Building Permit pursuant to Bylaw § II.B.2.G. It was a ministerial decision, whether made by the Department of Inspectional Services, or the ZBA.

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[3] It is interesting to note, however, that this is the same posture of the case that came before the Court in *Chedester v. Town of Whately.* Franklin Super. Ct., No. 03-00002, slip op. (Nov. 24, 2004); Plaintiff's Land Court Rule 4 Appendix Exh. C. .

[4] *Compare with Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 297 (1981), which states:

> A holding that a board of appeals erred in its interpretation of a zoning by-law or ordinance, standing alone, will not ordinarily suffice to support an order that a permit issue. The burden is on the applicant to demonstrate in the Superior Court an entitlement to a building permit. Upon such a showing, the issuance of a permit is a matter of duty, not discretion, and relief in the form of an order that a permit issue is appropriate. We have repeatedly approved of such relief in appropriate cases. These cases usually arise when the (board of appeals) has misinterpreted the relevant by-law or ordinance.

(internal citations and quotations omitted). The burden of proving entitlement to the permit does not fall on the plaintiff here, because the permit has already issued, and will be reinstated if the Decision is annulled.

A. The Amateur Radio Tower is a Residential Accessory Use Permitted As of Right.

The applicability of the Bylaw to the Amateur Radio tower is not as complicated as the ZBA would have it appear. It is simple, and historically well understood by the City. While the ZBA ignored him, the Building Commissioner told the ZBA that Amateur Radio towers had a history of being routinely approved as of right in the City in the past. Joint App. Exh. 8, ¶ 7.7.

Section II.B of the Bylaw is a "Table of Uses" which defines the various uses in each zoning district that are permitted by right, are prohibited, or require a special permit. Joint. App. Exh. 4, pp. 27-28. Pursuant to § II.B.2.G, an "Amateur radio tower" is a "residential accessory" use which is "permitted as of right" in all residential zoning districts in the City. It requires no other or further review. The Property is situated in the Residential (R-3) zoning district where the Amateur Radio tower is allowed by right. One must ask this question: Could the Department of Inspectional Services have rejected this "as of right" project because the height was "unreasonable"?

Section IV.E.2 of the Bylaw is a "Table of Dimensional Regulations." Joint App. Exh. 4, pp. 116-117. Pursuant to § IV.E.2, the required side yard setback in the R-3 zoning district is 15 feet. The Amateur Radio tower will be situated at least 37 feet from the nearest lot line, well outside of the required 15-foot setback. As a use which is allowed by right, the Amateur Radio tower is subject only to dimensional requirements generally applicable to the Property's zoning district. The issuance of the Building Permit was therefore "a matter of duty, not discretion." *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 297 (1981).

To the extent that the City and the Intervenor may argue that the Amateur Radio tower fails to comply with the maximum height requirements applicable to uses in the R-3 zoning district, this argument is unavailing. Section IV.E.2 of the Bylaw provides for a maximum height

of 35 feet which, pursuant to § IV.E.7.b.1, may be increased by fifteen percent for accessory structures resulting in a fixed maximum height of 40.25 feet. Joint App. Exh. 8, pp. 117, 121.

Title 47 of the United States Code of Federal Regulations provides at § 97.15(b):

> Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB–1, 101 FCC 2d 952 (1985) for details.)

47 C.F.R. § 97.15(b). These concepts were first created by the FCC ruling by its (then) Private Radio Bureau (PRB) as FCC Order PRB-1, 101 FCC 2d 952, 50 Fed. Reg. 38813 (September 25, 1985). See Plaintiffs Land Court Rule 4 Appendix ("Pl's. App.") Exhs. D, E.

Plaintiff is aware of no appellate level cases in Massachusetts that address the applicability of 47 C.F.R. § 97.15(b) and PRB-1 to local zoning regulations in the Commonwealth. However, Federal courts around the country have routinely concluded that 47 C.F.R. § 97.15(b) preempts and thereby voids the application of fixed maximum height regulations to Amateur Radio towers. *Pentel v. City of Mendota Heights*, 13 F.3d 1261, 1263 (8th Cir. 1994) ("Courts applying PRB-1 . . . may preempt a local ordinance . . . [that] bans []or imposes an unvarying height restriction on amateur radio antennas."); *Evans v. Board of County Comm'rs*, 994 F.2d 755, 760-761 (10th Cir. 1993) ("[since 1986] Courts have subsequently held that any local ordinance which absolutely prohibits antennas over a certain height is necessarily preempted."); *Howard v. Burlingame*, 937 F.2d 1376, 1380 n.5 (9th Cir. 1991) ("ordinance[s] . . . which establish absolute limitations on antenna height . . . are . . . facially inconsistent with PRB-1."); *see also Palmer v. City of Saratoga Springs*, 180 F.Supp.2d 379, 384 (N.D.N.Y. 2003) (adopting the preemption standard discussed in *Palmer* and *Evans*); *Bodony v.*

Incorporated Village of Sands Point, 681 F.Supp. 1009, 1013 (E.D.N.Y.1987). Pl's. App. Exhs. F-J.

The Court need not reach for Federal interpretations of the FCC regulations. It may find guidance in the persuasive, although non-binding, precedent of the Franklin County Superior Court in *Chedester v. Town of Whately* – a case that faced almost identical questions. *Chedester v. Town of Whately*, Franklin Super. Ct., No. 03-00002, slip op. (Nov. 24, 2004); Pl's. App. Exh. C. In *Chedester*, the Superior Court (Hillman, J.), citing *Pentel*, *Evans*, and *Palmer, supra,* accepted the proposition that "local ordinances would be facially preempted by PRB-1 if they set absolute and unvarying height restrictions on amateur radio antennas without providing for a special use provision." *Id.* at 5-6. The Superior Court went on to state:

> [T]he Legislature, in drafting G.L. c. 40A, § 3, ¶ 10, adopted much of the critical regulatory language of PRB-1 so as to ensure that local zoning ordinances and by-laws complied with federal law. Accordingly, the preemption of absolute and unvarying height restrictions under PRB-1, necessitates that such restrictions are also violative of G.L. c. 40A, §3, ¶ 10.

Id. at 6. Section IV.E of the Bylaw establishes exactly the sort of absolute and unvarying height restriction which has been widely understood to be facially preempted by State and Federal law.

With the fixed maximum height requirement, represented by §§ IV.E.2 (35') and IV.E.7.b.1 (+15%), preempted, Filippova is entitled to a building permit for this Amateur Radio tower without further review. "The board has no discretion to deny a building permit on zoning grounds when an applicant has complied with all the applicable zoning by-laws or ordinances. These cases usually arise when the board has misinterpreted the relevant by-law or ordinance." *Ferrante v. Bd. of Appeals of Northampton*, 345 Mass. 158, 162 (1962).

B. Section V.E., Wireless Communications Facilities, Does Not Apply

Section V.E. of the Bylaw, the WCF section, begins with the basic requirement that "[n]o wireless communications facility…shall be erected or installed except in compliance with this Section, and shall require a special permit with review and approval as set forth herein." § V.E.3.a.(1); Joint App. Exh. 4, p. 132. With extraordinary breadth, the WCF section defines "wireless communications facility" or "WCF" as follows:

> Any structure or device that is used for the express purpose of conducting wireless communication including antennas, towers, satellite dishes,[5] or equipment for transferring wireless transmissions with or without a building to house and/or maintain such equipment.[6]

The WCF section goes on to establish conditions (§ V.E.3.b), maintenance requirements (§ V.E.3.c), removal requirements (§ V.E.3.d), exemptions (§ V.E.3.e), dimensional requirements (§ V.E.4), a special permit application procedure (§ V.E.5), and design requirements (§ V.E.6).

The only reasonable reading of the WCF section is that it applies to commercial, and not Amateur Radio, uses. "There is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand, J. concurring); Pl's. App. Exh. K. Unless exempt, the WCF provisions apply to those uses subject to a special permit pursuant to §V.E.3.a. Even if the dimensional requirements of the WCF section could be read to

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[5] Does a satellite TV dish require a special permit in Framingham? Though not at issue here, despite the WCF section, with respect to satellite TV dishes, this clause is also preempted (not exempted) by 47 C.F.R. § 1.4000(a)(1)(i)(A and B). *See* Pl's. App, Exh. D.

[6] As written, if it means what it says ("any . . . device . . . used for . . . wireless communication"), the following would not be exempt under § V.E.3.e. from the requirement for a Special Permit, and could not be installed or permitted within 300 feet of a residential district: a baby monitor, wireless internet, garage door openers, wireless printers, a wireless mouse, a cell phone, a TV remote control, a Blue Tooth watch, a pager, and so forth. Really? As that is an absurd result, the better reasoning is to understand that, in 1997, *see* Pl's. App. Exh. A, the (then) town was reacting to the *Telecommunications Act of 1996* ("the TCA"), Pub. L. 104-104 (Feb. 8, 1996), and intended to control facilities described in G.L. c. 6A, § 18A, such as "'[w]ireless carrier,' a commercial mobile radio service, as defined in 47 USC 332(d)."

apply to the Amateur Radio tower, they would be preempted as those requirements create both a fixed maximum height, and forbid Amateur Radio in residential zoning districts.

1. The WCF Section Applies Only to Commercial Uses

In its Decision, the ZBA took the liberty of concluding that regardless of whether or not the Amateur Radio tower was subject to the broader special permit requirements of the WCF section, it was nonetheless subject to *one* of its setback requirements. For the reasons discussed above, it was clearly erroneous for the ZBA to apply only a portion of the WCF section to the tower. More than that, it is obvious on its face that the WCF section was not intended to, and cannot, apply to Amateur Radio. Regardless of whether the Bylaw's definition of WCF could be read to include Amateur Radio, the use of the term WCF throughout § V.E. produces the absurd result that compliance with the WCF section forbids Amateur Radio in residential zoning districts.

Zoning bylaws are "to be construed in accordance with ordinary principles of statutory construction." *APT Asset Mgmt., Inc. v. Bd. of Appeals of Melrose*, 50 Mass. App. Ct. 133, 138, (2000). "The object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose." *Lehan v. N. Main St. Garage*, 312 Mass. 547, 550 (1942).

Here, history is a guide. The federal *Telecommunications Act of 1996* ("the TCA"), Pub. L. 104-104 (Feb. 8, 1996), created a new world of cellular telephones and wireless internet, which the TCA calls "personal wireless services," – provided by "personal wireless service facilities." 47 U.S.C. § 332 (c)(7)(C)(i) and (ii); Pl's. App. Exh. L. The WCF section was

adopted by Framingham's Annual Town Meeting on April 24, 1997. Plaintiff's Statement of Material Facts ("Pl's. SOF") ¶ 1; Pl's. App. Exh. A. It was a response to the TCA. In Massachusetts, it is common to refer to these as "wireless communications facilities." But they are one and the same, and commercial. Amateur Radio is different from WCFs in federal law (*see* 47 USC § 153 (3), "solely with a personal aim and without pecuniary interest"; Pl's. App. Exh. L), state law (*see* G.L. c. 40A, § 3, ¶ 10), and local regulation (*see* Bylaw § II.B.2.G, and § V.E.3.e). Here, the ZBA (but not the rest of the world) has decided to call an Amateur Radio tower, a Wireless Communications Facility. But you cannot call an eagle a duck, just because they both have wings.

Usage throughout the WCF section tells us that that the legislative intent of the bylaw was to regulate commercial wireless communications facilities. To apply the WCF section to non-commercial or residential uses, such as Amateur Radio, creates internal conflict within the bylaw which either yields absurd results or renders significant portions superfluous. A more reasonable construction finds that the WCF section applies only to commercial uses.

The ZBA concluded that a tower, even if not subject to the special permit requirements of the WCF section, could still be required to comply with the dimensional requirements of the WCF section. One of those dimensional requirements, § V.E.4.d, provides that "[e]xcept for the replacement of an existing WCF, the SPGA shall not grant a special permit for a WCF in a residential zone." To give any meaning to this provision at all requires the conclusion that no Amateur Radio tower, which is elsewhere defined as a residential accessory use, is subject to the special permit requirements of the WCF section. Further, as already discussed, § V.E.4.b.2 also requires a setback of 300 feet from a residential zoning district or a residential use. Even if viewing the dimensional requirements of the WCF section in isolation, they cannot be applied to

Amateur Radio without ignoring significant portions of the text. "We are not to look at provisions of a by-law in isolation." *Livoli*, 42 Mass. App. Ct. at 922.

When viewing other provisions of the WCF section, in the table below, it is equally plain that the provisions throughout were not intended to be applied to a residential accessory use.

Bylaw Section	**Requirement**	**Comment**
V.E.3.a.1	All WCFs require a special permit.	If applied, a SP required.
V.E.3.b.1	All service provides shall collocate on a single tower.	Must a Radio Amateur accept commercial carriers?
V.E.3.b.2	The SPGA must find that existing or approved facilities cannot accommodate the wireless communications equipment planned for any proposed facility, before a new wireless communications facility may be approved by the SPGA.	May the Radio Amateur be forced to rent an existing tower elsewhere?
V.E.3.b.6	"Traffic . . . shall not adversely affect abutting ways."	What traffic develops in connection with a Radio Amateur's accessory use?
V.E.3.b.8	"Only free-standing monopoles"	This describes a commercial cell tower.
V.E.4.b.2	"Shall not exceed eighty feet AG."	An illegal fixed maximum height.
V.E.4.c.2	1:1+20' setback	An even lower than 80', firm, fixed maximum height for this applicant, with no hint of accommodation required by PRB-1 or Ch. 40 A, § 3, ¶ 10.
V.E.4.c.2	"minimum of three hundred feet from a residential zoning district or residential use"	This "as of right" use is forbidden in a residential zone.
V.E.5.a.	Requires a SP for a WCF	Conflicts with § V.E.a.1.(2)
V.E.5.f.	Requires Commercial General Liability insurance	Commercial liability insurance required for a non-commercial accessory use, routinely covered by homeowners insurance?
V.E.6.a.	Must build to accommodate the "maximum number of users technologically feasible."	Why would a Radio Amateur be required to accommodate other users at his home?
V.E.6.g.	Minimum of one parking space for each WCF.	Why is additional parking required for a residential accessory use?

Section V.E. was intended, on its face, to apply only to commercial WCFs. That the WCF section includes two exemptions from its special permit requirement for Amateur Radio does nothing more than reinforce the facial intent of the Bylaw: It does not apply in any part to Amateur Radio. *See* §§ V.E.3.e(1)-(2). It is not a sensible reading to conclude, as the ZBA did, that even if a special permit is not required, a special permit condition still applies. A more reasoned construction concludes that all of the provisions of the WCF section are applicable where a special permit is required, but not otherwise. Together, they dictate when a special permit may issue, and design guidelines to condition the issuance of such a permit. The ZBA's reliance on any portion of the WCF section, let alone a selectively chosen portion, is unreasonable. The Decision must be annulled.

2. The WCF Section Cannot Be Applied Without Violating State and Federal Law

There are other problems with applying the WCF section to an Amateur Radio tower. As an initial matter, Amateur Radio is exempted from the special permit requirement in two ways. The WCF section exempts Amateur Radio towers that cost less than $10,000[7], and also WCFs that are used for the purposes set forth in G.L. c. 40A, § 3. Bylaw §§ V.E.3.e(1)-(2). General Laws chapter 40A, § 3 relates to "amateur radio communications by federally licensed amateur radio operators." *Id.* Mikhail Filippov is a federally licensed amateur radio operator. Joint App. Exh. 7. On the undisputed facts, at least one of the two independent criteria for exemption from the WCF section's special permit requirement is satisfied.

To thereafter require compliance with the dimensional requirements of the WCF section—as the ZBA suggests—ignores the specific instruction of § V.E.3.e, that Amateur Radio

[7] Mikhail Filippov submitted evidence of the cost of the proposed tower to the ZBA, and the ZBA found it unnecessary to make a finding on this basis. See Joint App. Exh. 8, ¶ 7.6.

towers "may be constructed, erected, installed, placed and/or used within the Town subject to the issuance of a building permit by the Building Commissioner." In other words, the ZBA has grafted terms and conditions for a WCF Special Permit onto as of right construction.

Accepting, for the sake of argument, the ZBA's abstruse conclusion that the dimensional WCF requirements apply has the concomitant effect of rendering them illegal. *But see Trustees of Tufts Coll. v. City of Medford*, 415 Mass. 753, 761 (1993) ("A court should construe a local zoning requirement in a manner which sustains its validity.") (internal quotation and citation omitted). The 80-foot height limitation, and the 1:1+20' setback requirement found at §§ V.E.4.b-c of the Bylaw, establish firm fixed maximum heights that are preempted by Federal law. *See Howard, Evans,* and *Pentel, supra.*

Even more egregious is the requirement of a 300-foot setback from residential uses and residential zoning districts, found at § V.E.4.c.(2). This forbids Amateur Radio in residential zoning districts – in violation of Federal law and G.L. c. 40A, §3 ¶ 10. The WCF section was never intended to apply to Amateur Radio where the WCF section dead ends with the conclusion that portions of it are preempted. Alternatively, if the WCF section applies, the preempted dimensional requirements are inapplicable. Either way, the Decision must be annulled.

III. To the Extent that the ZBA Attempted to Comply with G.L. C. 40A, § 3, ¶ 10, it Failed.

Even if the Court is inclined to read the Decision as an attempt at reasonable regulation consistent with G.L. c. 40A, § 3, ¶ 10, that the Decision must be annulled is inescapable. As discussed, FCC PRB-1 (1985), and later 47 C.F.R. § 97.15(b), were the impetus for the enaction of G.L. c. 40A, § 3, ¶ 10, which provides:

> No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator. Zoning ordinances and by-laws

> may reasonably regulate the location and height of such antenna structures for the purposes of health, safety, or aesthetics; provided, however, that such ordinances and by-laws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.

Id. Pursuant to State and Federal law, a fixed maximum height regulation applied to an Amateur Radio tower is facially preempted. Accepting, for the sake of argument only, that the ZBA's Decision was an attempt to comply with the State and Federal law protections for Amateur Radio, the ZBA misunderstood its burden.

While the height necessary to accommodate the needs of the plaintiff is a factual matter that cannot be resolved at summary judgment, it is undisputed that the ZBA made no effort to consider Mikhail Filippov's communications needs.[8] The result is legally untenable, and the Court must annul the Decision.

Conclusion

The ZBA relied on the wrong by-law. As an ordinary accessory use, permitted as of right, § II.B.2.G, the relevant setback is stated in § IV.E. 2. "The board has no discretion to deny a building permit on zoning grounds when an applicant has complied with all the applicable zoning by-laws or ordinances. These cases usually arise when the board has misinterpreted the relevant by-law or ordinance." *Ferrante v. Bd. of Appeals of Northampton*, 345 Mass. 158, 162 (1962). Accordingly, Filippova requests that this Court allow her Motion for Summary Judgment, and enter a final judgment annulling the Decision and declaring that the Building Permit must be reinstated.

[8] Filippova submitted materials to the Framingham Zoning Board of Appeals, including an expert report, which Filippova asserts demonstrated the necessity of a tower height of 80 feet. Pl's. SOF ¶ 2. The ZBA did not consider them.

Respectfully submitted,

Galina Filippova, Trustee of the
Prospect Street Realty Trust

By her attorneys,

Ethan Dively (BBO# 703372)
Miyares and Harrington, LLP
40 Grove Street, Suite 190
Wellesley, MA 02482
Tel: (617) 489-1600
Fax: (617) 489-1630
edively@miyares-harrington.com

Fred Hopengarten
(Maine Bar # 1660, DC Bar # 114124)
Six Willarch Road
Lincoln, MA 01773
Tel: (781) 259-0088
Fax: (419) 858-2421
Hopengarten.law@bc.edu

Dated: July 24, 2020

CERTIFICATE OF SERVICE

I, Ethan Dively, attorney for the plaintiff, hereby certify that on this 24th day of July 2020, I caused a copy of the foregoing Plaintiff's Memorandum in Support of its Motion for Summary Judgment to be served by email, upon the following counsel of record:

Michael K. Terry, Esq.
Christopher J. Pretini, Esq.
Amanda Zuretti, Esq.
Pretrini & Associates, P.C.
372 Union Avenue
Framingham, MA 01702

William C. Henchy, Esq.
165 Cranberry Highway
Orleans, MA 02653

Ethan Dively