



Joseph C. Sullivan
Mayor

Department of Municipal Licenses and Inspections

Zoning Board of Appeals

90 Pond Street – Braintree, Massachusetts 02184

Meeting Minutes

August 25, 2009

IN ATTENDANCE: Stephen Karll, Chairman
Jay Nuss, Member
Michelle Lauria, Member

ALSO PRESENT: Russell Forsberg, Inspector of Buildings
Carolyn Murray, Town Solicitor

Mr. Karll called the meeting to order at 7:00pm.

OLD BUSINESS:

- 1) Petition Number 08-39**
William Alter and Kate Tangey
RE: 71 Hobart Street

Mr. Karll advised the Board that the petitioners have submitted a letter requesting a six month extension of relief granted on August 26, 2008.

On a motion by Ms. Lauria and seconded by Mr. Nuss, the Board voted unanimously to approve a six month extension on relief granted on August 26, 2008.

- 2) Petition 09-03**
OMNI Point Communications
RE: 25 Hayward Street

Mr. Karll noted that no one was present at this meeting to represent OMNI Point Communications.

On a motion made by Ms. Lauria and seconded by Mr. Nuss, the Board voted unanimously to grant a 30-day extension of the petition until September 22, 2009.

- 3) Petition Number 09-24**
Carol Walsh
RE: 98 Storrs Avenue

Present: Attorney Mark Bobrowski of Blatman, Bobrowski & Mead, LLC representing petitioner; Carol Walsh, petitioner and Irma Walsh, mother-in-law.
Marybeth McGrath, Director of Municipal Licenses and Inspections, and Michael McGourty, Local Building Inspector.

This is a petition filed by Carol Walsh of 98 Storrs Avenue, Braintree, MA regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws under Section 1350202(A) and requests that the Zoning Board of Appeals reverse a Cease and Desist Order issued by the Building Inspector, in which the Building Inspector determined that the applicant was using an accessory structure as an apartment, in violation of provisions of the Zoning By-laws and State Building Code. The property is located in a Residence B Zoning District, as shown on Assessors Plan No. 2033, Plot 33A and contains 16,392 +/- SF of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was scheduled before the Zoning Board of Appeals for July 28, 2009, and at the applicant's request, the hearing was continued to August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

The petitioner, represented by Attorney Mark Bobrowski of Blatman, Bobrowski & Mead, LLC of Concord, MA, appeared with Carol Walsh and her 91 year-old mother-in-law, Irma. Attorney Bobrowski explained that the applicant is appealing the Cease and Desist Order issued by the Building Inspector on April 28, 2009. Following an inspection of the accessory structure, pursuant to an administrative search warrant issued by the Quincy District Court, the Building Inspector determined that the accessory structure, which was permitted as a "Two car garage w[ith] Artist Loft Above (Not to be used for business or Apartment)", is being used as a dwelling unit. The Building Inspector advised that the use of the structure for dwelling purposes violates Zoning By-law Section 135-201(D), which notes that no building permit or occupancy permit shall be issued until the building and its uses comply with the Zoning By-law, and Zoning By-law Section 135-603, which limits permitted accessory uses in residential districts. While a garage is allowed as an accessory structure in a residential zoning district, Section 135-603, an apartment is not explicitly allowed but requires a special permit from the Special Permit Granting Authority. The Cease and Desist Order also enumerates various provisions of the State Building Code, which the Building Inspector claims were violated, but the applicant has not filed an appeal under the State Building Code.

Attorney Bobrowski advised that the applicant is not conceding that the accessory structure is being used as an illegal dwelling unit; however, for purposes of resolving the situation, Attorney Bobrowski proposed two alternatives:

1. The applicant is prepared to file an application for a special permit with the Planning Board pursuant to Section 135-710 of the Zoning By-laws for permission to allow the use of a second dwelling on one lot. Attorney Bobrowski provided a copy of the decision rendered by Land Court Judge Kilborn in the matter of Schey v. Town of Marblehead, et al., Misc. Case. No. 221634, in which the Court found that the plaintiffs had constructed an illegal structure on a lot which was required to be removed, but the Court stayed an order for removal of the structure, pending the plaintiff's pursuit of zoning relief which could bring the structure into compliance. By analogy, Attorney Bobrowski asked that

the Board allow the applicant to pursue the special permit with the Planning Board, which, if granted, would render the use compliant with the Zoning By-laws.

2. Alternatively, Attorney Bobrowski introduced Irma Walsh, the 91 year-old resident of the loft, whom he claims is disabled and therefore afforded protection under the Americans with Disabilities Act. As such, the Board could grant her a reasonable accommodation to continue to reside in the loft for the foreseeable future, with such relief being personal to Irma Walsh.

The Chairman asked how Irma Walsh accesses the apartment in the loft if she is disabled, and Attorney Bobrowski advised that she accesses the apartment with a great deal of assistance. The Board commented that they are not in favor of granting personalized relief, as it presents problems with subsequent owners. Further, the Board questioned whether the Americans with Disabilities Act would allow the Board to legalize a structure after it was illegally constructed.

Marybeth McGrath, the Director of Municipal Licenses and Inspections, and Michael McGourty, Local Building Inspector, appeared before the Board and spoke in support of the Cease and Desist Order. Mr. McGourty reviewed the history of applications for building permits relative to this property. Initially, the owners applied for a saltbox shaped two-car garage, but the project morphed into a Colonial-style, which was a substantial change from the original permit. Mr. McGourty advised that he inspected the garage, at which time he observed walls and informed the owners that the walls would have to be removed. Mr. McGourty also stated that the plot plan submitted with the permit application did not accurately reflect the setbacks, noting that a 20 foot setback is required. At some point, Mr. McGourty observed the number "100" had been attached to the garage, as if to denote the garage had a separate address of 100 Storrs Avenue. Mr. McGourty noted that this street address had not been issued by the Town Engineer, as is the practice. Eventually, the Building Department received complaints as to the use of the premises as a dwelling. He stated that the illegal apartment has never been inspected as a dwelling unit, and therefore, the apartment has not been inspected for compliance with certain life safety requirements, such as carbon monoxide detectors. Mr. McGourty also noted that the apartment would probably not be considered handicapped accessible, as it is located on the second story, accessible only by stairs, and the handrails are not compliant with the Americans with Disabilities Act.

Ms. McGrath advised that she and Mr. McGourty conducted the search and photographed the loft and distributed the photos of the interior to the Board. Ms. McGrath stated that they observed a fully-applianced kitchen, bathroom with shower, laundry, as well as fully-furnished living and dining spaces. The photos also depict clothing in closets, framed photographs on furniture, prescription drug bottles, a bedroom, and another room containing a day bed. The photos were also shown to Attorney Bobrowski.

Building Inspector, Russ Forsberg, advised that if the applicant seeks a special permit of the Planning Board to legitimize the apartment, the Building Department would not seek enforcement of its Cease and Desist Order at this time, as the Court would likely halt the process. The Chairman agreed that the Court would likely issue an injunction, pending the decision of the Planning Board.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 3-0 to recommend that the Cease and Desist Order be enforced and that penalties be applied.

Findings

Based upon the testimony and evidence presented, the Board found that the applicant had flagrantly disregarded the Zoning By-laws and the limitation on the certificate of occupancy that the artist loft and garage was not to be used as a business or dwelling. The Board also found that the photographs and description of the interior of the garage clearly supported a finding that the structure was being used as a dwelling unit. The Board found that the applicant had been advised on more than one occasion as to the use of the structure, yet the applicant disregarded those instructions. The Board also stated that they did not support legitimizing an illegal use when the applicant had been advised that the structure was not to be used for dwelling purposes and chose to ignore those instructions. With respect to the request for a reasonable accommodation under the Americans with Disabilities Act, the Board found no merit to this request in light of the fact that the disabled occupant of the apartment would have to climb to the second story of a garage, which does not promote the goals of accessibility under the ADA. Finally, the Board was not in favor of granting relief that would be personal to the current occupant, as this would create problems with future owners.

Decision

Mr. Karll made a motion to uphold the determination of the Building Inspector with respect to the Cease and Desist Order issued, which was seconded by Ms. Lauria. Attorney Bobrowski requested a stay of enforcement proceedings by the Building Department, pending a decision by the Planning Board relative to the request for a special permit. The Building Inspector reiterated his commitment to not pursue enforcement while the application is pending before the Planning Board. However, Ms. McGrath requested that the Board condition their vote so that the applicant is to file an application for a special permit with the Planning Board within thirty (30) days of this decision. Mr. Karll amended his motion to uphold the action of the Building Inspector and to require the applicant to file a request for a special permit with the planning Board within thirty (30) days of this decision. The amended motion was seconded and unanimously voted.

4) Petition Number 09-25 AMB Property L.P. and AMB Corporation RE: 175 Campanelli Drive

Present: Attorney Frank Marinelli, representing the petitioner; Greydon Sargent, vice president of AMB; and Steve Horsfall of Kelly Engineering Group.

AMB Property LP and AMB Property Corporation c/o Greydon Sargent, Suite 100, 60 State Street, Boston, MA 02109 seek relief from Zoning By-laws Chapter 135, Article 4, Sections 403A and 407, Article 6, Section 135-609 and 609, Article 7, Section 701 and 702, Article 8, Sections 135-804, 806, 809, 812, and 814 to reconfigure lot lines and existing parking areas at 175 Campanelli Drive in Braintree. The property is located in a Commercial/Watershed Zoning District as shown on Assessors Plan No. 1034, Plots 1 and 2.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was scheduled before the Zoning Board of Appeals for July 28, 2009, and at the applicant's request, the hearing was continued to August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

Attorney Frank Marinelli appeared on behalf of the petitioner, along with Greydon Sargent, vice president of AMB, and Steve Horsfall of Kelly Engineering Group. Attorney Marinelli explained that the subject property is the site of the former Bradlees' campus. Due to the current economic climate, the single-user campus model is not longer feasible, and therefore, the petitioner seeks to reconfigure the lots to allow for separate owners and to facilitate financing.

Currently, the site consists of two separate lots, one of which has a land area of 20.8 acres and houses a 438,140 gross SF warehouse and office building, and the second has a land area of 3.56 acres and houses a 119,904 gross SF four-story office building. The office building and warehouse are connected by a second story bridge. The boundary line dividing the lots is currently a diagonal along the northerly lot line of the four-story office building, which is slanted in such a way as to deprive this site of frontage on Campanelli Drive. The petitioner proposes to move this lot line in a northeasterly direction to create a more square lot for the four-story office building with frontage on Campanelli Drive. As a result, the lot containing the four-story office building will increase in size while the lot containing the warehouse will decrease. The new Lot A, containing the four-story office building will have a land area of 4.4 acres, while the new Lot B containing the warehouse building will have a land area of 19.9 acres. If approved by this Board, the petitioner will file an Approval Not Required under the Subdivision Law plan with the Planning Board.

Both of the new lots will require relief from the Density and Dimensional requirements of the Zoning By-law. The new Lot A will exceed the 60% maximum lot coverage allowed, as 82.7% of the lot will be covered. Correspondingly, the new Lot A will exceed the 40% minimum open space requirement, by offering only 17.3% open space. The new lot provides no side yard setback, whereas 20 feet is required. The site will be deficient with respect to parking, offering only 429 spaces where the Zoning By-law requires 479. The parking also encroaches into the 10 foot front setback, by offering no setback. The parking is also located on the property line, while 5 feet is required, and the parking is proposed at 1.3 feet from the building, whereas the Zoning By-law requires a minimum of 5 feet. Finally, the parking configuration will provide less than the 5% required interior landscaping. Therefore, the new Lot A will require several variances.

The new Lot B will also exceed the 60 % maximum lot coverage by covering 91.6% of the lot and will likewise exceed the 40% minimum open space requirement by offering only 8.4% open space. The building coverage will be 50.6%, whereas the Zoning By-law limits building coverage to 25%. The building will encroach into the required 35 foot front yard setback by being located 26 feet off the lot line. As with Lot A, the new Lot B will also provide no side yard setback where the two lots meet, yet the Zoning By-law requires a setback of 20 feet. Parking for the new Lot B is also deficient, offering only 350 spaces, where the Zoning By-law requires 715. Parking will encroach into the front yard, offering a setback of 1 foot, while 10 feet is required. The parking is also located on the property line, while a 5 foot setback is required, and the parking is proposed at 1.7 feet from the building, whereas the Zoning By-law requires a minimum of 5 feet. Finally, the parking configuration will provide less than the 5% required interior landscaping. Therefore, the new Lot B will require several variances.

As grounds for the variances, Attorney Marinelli asserted a hardship owing to the size of the structures on the lots, noting that the building mass is too large to remove in order to comply with building lot coverage and open space requirements. Attorney Marinelli also noted pre-existing nonconforming conditions on the site, such as the large warehouse structure that pre-dated the Watershed Protection District and the associated dimensional requirements. In addition, Attorney Marinelli stated that the reconfigured lots will improve some existing nonconformities on the site, such as Lot A's lack of frontage. Variances were granted for this site in 1985 for the office building with the second story connector to the warehouse to be constructed.

With respect to the parking deficiencies, Attorney Marinelli stated that parking for the office building was calculated at 1 space per 250 SF; however, the office space includes cafeteria space. Since the employees who

occupy the office space are the same employees who avail themselves of the cafeteria, the petitioner should not need to count the cafeteria space towards the parking calculation. Moreover, the petitioner has occupied this site for several years and has had ample parking.

The petitioner submitted a plan entitled "United Liquors, 175 Campanelli Drive, Braintree, MA, Plan to Accompany Variance Application," dated August 4, 2009, prepared by Kelly Engineering Group, Inc. of Braintree, MA.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 3-0 in favor of the requested relief.

Findings

The Board found that the petitioner's proposed reconfiguration of the lot lines for this site would not be substantially more detrimental to the neighborhood than the existing buildings on the currently-configured sites. In fact, the Board noted that the reconfigured lot lines would improve conditions at the site by providing frontage to the four-story office building. The Board also found that the petitioner had presented proof of hardship based on the unusually large size of the lots, the irregular shape of the lots in relation to the access road, and the location of existing buildings on the lots. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to the plan presented.

**5) Petition Number 09-26
Sprint Spectrum, L.P. and its affiliate Clear Wireless, LLC
RE: 639 Granite Street**

Present: Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, representing the petitioner;
and Raymond Samora, a radio frequency engineer

This is a petition filed by Sprint Spectrum, L.P. and its affiliate Clear Wireless, LLC of 9 Crosby Drive, Bedford, MA regarding the property located at 639 Granite Street in Braintree, MA. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-407 and Article XVI, Section 1603.B, as well as G.L. c. 40A, Section 6, to install two wireless communications dishes to the existing wireless antenna on the rooftop of the building, all in accordance with the plans of record. The property is located in a Residence B/Commercial Watershed Zoning District, as shown on Assessors Plan No. 2048, Plot 15A and contains 3.57 +/- acres of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held before the Zoning Board of Appeals on August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

The petitioner, represented by Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, appeared with Raymond Samora, a radio frequency engineer. Attorney Sousa explained to the Board that the petitioner is seeking permission to add two wireless backhaul dish antennas with one GPS antenna to the existing wireless tower on the rooftop of the building. A supporting equipment cabinet will also be located in the equipment room in the basement of the building. In Case No. 08-06, the applicant previously received approval from the Board to install antennas and equipment shed at this site. Attorney Sousa explained that Sprint and Nextel merged in 2005, and subsequently, Sprint Nextel have been developing and deploying its 4th generation nationwide broadband mobile network in partnership with its affiliate, Clear Wireless, LLC. As a result, the applicant seeks to add two dishes to the antenna installation to improve the high speed wireless network to accommodate Worldwide Interoperability for Microwave Access or “WiMAX” technology, which allows high speed internet access on-the-go and allows the transmission of large quantities of data over a longer distance at faster speed. One dish measures 2.5 feet in diameter, while the other dish is 2 feet in diameter. Both dishes would be located within 10 feet of the height of the building, in compliance with the Zoning By-law. Attorney Sousa presented a map showing other installations in the Town and how this proposed installation will assist with transmissions to accommodate 4th generation technology and speed.

This petition is governed by the Federal Telecommunications Acts (“TCA”), which allows a municipality to reasonably regulate the placement of wireless communications installation, provided, such regulations do not have the effect of prohibiting wireless communications facilities. The TCA also encourages co-location on existing towers, and this petition promotes this goal. The Town’s Zoning By-law also encourages that wireless installations be able to accommodate other carriers. Attorney Sousa noted that this site currently does accommodate multiple wireless carries, and therefore promotes the goal of the Zoning By-law.

However, Section 1603.C(2)(h) of the Zoning By-law a wireless tower must be set back 500 feet from a school, hospital, convalescent and nursing home or residential lot line. Since the proposed installation will be located less than 500 feet from a residential lot line, a variance is required. As grounds for the variance, Attorney Sousa noted that a literal enforcement of the Zoning By-law would present a substantial hardship, as the applicant has a significant gap in coverage in the area surrounding the site. Attorney Sousa also noted that the Zoning By-law encourages location of wireless facilities on existing structures, such as this existing tower, which the applicant maintains is the best available option from a radio frequency perspective, and since it would be located on the rooftop of an existing building, this location is the least visually intrusive option in the area. Attorney Sousa also noted the unique location of the site as a basis for granting the variance. Specifically, Attorney Sousa explained that wireless communications facilities require a clear line of site in order to transmit voice or data, and therefore, the facilities must operate above the tree line. This particular site, on the rooftop of a building with existing wireless facilities, provides the needed height to accommodate the applicant’s transmissions. Further, Attorney Sousa stated that the proposed installation will be designed in a way to minimize any visual impact, and since the building is located in a commercial zoning district, amidst similar uses, this proposed installation will not be substantially more detrimental to the public.

Finally, Attorney Sousa alluded to a request made by the Planning Board to hire an independent radio frequency engineer to measure pre- and post-installation radio frequency emissions to insure that emissions are below the limits set by federal regulations. The applicant has committed to retaining Dr. Don Hayes of MIT to conduct this study.

The petitioner submitted a title sheet entitled “Clearwire, Five Corners, MA-BOS5250A/MA0627, 639 Granite Street, Braintree, MA 02184”, dated May 21, 2009, revised May 28, 2009, prepared by Bay State Design, Inc., of Marlborough, MA, along with Sheet Z-1 entitled “Roof Top Plan and Equipment Room Layout” and Sheet Z-2 entitled “Elevation & Specifications”. The applicant also submitted a package entitled “Clearwire Wireless

Broadband proposed Wireless Telecommunications Installation, MA-BOS5250/MA0627, Five Corners” prepared by bay State Design, Inc., which included a visibility map, views of the existing conditions and views from the southwest and northwest with the proposed new installations.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 2-0-1 in favor of the requested relief.

Findings

The Board found that the petitioner had satisfied the goals of co-location as promoted under the Telecommunications Act and that the petitioner had proven a hardship as a basis for a variance, as the new dishes were needed to provide service to the area and upgrade the WiMAX capability. The Board also concluded that the proposed alteration of the site by the addition of two dishes would not visually impact the neighborhood or be more intrusive than the existing installations on the rooftop. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to the plan presented.

NEW BUSINESS:

- 6) **Petition Number 09-33**
Kimberly Payne
RE: 34 Dewey Avenue

Present: Kimberly Payne, petitioner

Kimberly Payne of 34 Dewey Avenue in Braintree, MA seeks relief from Zoning By-laws Chapter 135, Article 4, Sections 403 and 407, and Article 7, Section 701 to build a 12 ft. x 21 ft. shed dormer to the rear roof of the existing dwelling. The lot and existing structure are pre-existing nonconforming, and therefore, the petitioner also seeks relief pursuant to Chapter 40A, Section 6. The property is located in a Residence B Watershed Zoning District as shown on Assessors Plan No. 1064, Plot 79 and contains 16,800 SF +/- of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held before the Zoning Board of Appeals on August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

The petitioner, representing herself, explained to the Board that she is seeking permission to build a 12 ft. x 21 ft. shed dormer to the rear roof of the existing dwelling in order to expand living space. The addition would fall within the existing footprint of the dwelling. The petitioner’s lot is pre-existing nonconforming as to lot size and depth. The property offers 16,800 SF of land, whereas the Zoning By-law requires a minimum lot size

of one acre for the Watershed Protection District. In addition, the petitioner's lot is only 70 feet wide, whereas the Zoning By-law requires a minimum lot depth of 100 feet. The dwelling is also pre-existing nonconforming, as the dwelling is located 15.3 feet off the front yard lot line, while the Zoning By-law requires a 20 foot setback. The dwelling also encroaches into the rear yard setback, as the structure's deck is located 7.4 feet off the rear lot line, while the Zoning By-law requires a rear yard setback of 30 feet. The petitioner obtained a variance from the Board in 1996 to allow the dwelling to be located 21.5 feet off the rear yard lot line. Since the proposed addition will not create a new nonconformity, the petitioner seeks a modification of the previously granted variance to allow the addition on top of the encroaching structure.

To the extent that a new variance is required, the petitioner noted the irregular shape of her lot, measuring 240 feet long by 70 feet deep. The existing dwelling, deck, and pool are located on the northerly half of the lot, leaving nearly half of the lot undeveloped. Since the petitioner is seeking to add living space to the existing dwelling, she has no other option to locate the addition. The petitioner also noted that Braintree Rehabilitation Hospital is located to the rear of her lot, and therefore, no residents will be impacted by the further encroachment.

The petitioner submitted a plan entitled "Plan of Land in Braintree, Massachusetts, 34 Dewey Avenue", dated May 20, 2009, prepared by C.S. Kelley, PLS of Pembroke, MA.

Sam and Angela Geso of 5 Cedar Avenue submitted a letter in support of the petition. Robert Ellis, an abutter on Pond Street, also spoke in favor of the petition. No one else spoke in favor of or opposition to the petition. The Planning Board voted 3-0 to recommend favorably on the requested relief.

Findings

In light of the fact that the petitioner previously obtained a variance from the Board to encroach into the rear yard setback and this proposed addition, while intensifying the encroachment will not create any new nonconformities, the Board found that the petitioner's proposed alteration to her pre-existing nonconforming dwelling would not be substantially more detrimental to the neighborhood than the existing nonconforming dwelling. The Board also found that the petitioner had presented proof of hardship based on the irregularly long and narrow shape of the lot and the present location of the structures on the lot, which limit the available placement of the addition. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to the plan presented.

**7) Petition Number 09-34
Sprint Spectrum, L.P. and Clear Wireless, LLC
RE: 400 Washington Street**

Present: Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, representing the petitioner; and Raymond Samora, a radio frequency engineer

This is a petition filed by Sprint Spectrum, L.P. and its affiliate Clear Wireless, LLC of 9 Crosby Drive, Bedford, MA regarding the property located at 400 Washington Street in Braintree, MA. The applicant is seeking relief from the Town of Braintree Zoning By-laws, Chapter 135, Section 407 and Article XVI, Section

1603.B to install three wireless communications dishes to the existing wireless antenna on the rooftop of the building, all in accordance with the plans of record. The property is located in a General Business Zoning District, as shown on Assessors Plan No. 2024, Plot 62 and contains 58,629 +/- SF of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held before the Zoning Board of Appeals on August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

The petitioner, represented by Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, appeared with Raymond Samora, a radio frequency engineer. Attorney Sousa explained to the Board that the petitioner is seeking permission to add three wireless backhaul dish antennas to be located just above the petitioner's existing antennas on the rooftop of the building. In Case Nos. 04-84 and 08-03, the applicant previously received approval from the Board to install antennas and related equipment at this site. According to Section 135-1603.B of the Zoning By-law, building-mounted wireless facilities are allowed in certain zoning districts and on certain structures, but not within a General business Zoning District. In addition, the Zoning By-law prohibits a building-mounted wireless communication facility from being located within 500 feet of a residential dwelling. Therefore, the petitioner seeks a modification of those previously granted variances to alter the wireless communications equipment on this site.

Attorney Sousa explained that Sprint and Nextel merged in 2005, and subsequently, Sprint Nextel have been developing and deploying its 4th generation nationwide broadband mobile network in partnership with its affiliate, Clear Wireless, LLC. As a result, the applicant seeks to add three dishes to the existing antenna installation to improve the high speed wireless network to accommodate Worldwide Interoperability for Microwave Access or "WiMAX" technology, which allows high speed internet access on-the-go and allows the transmission of large quantities of data over a longer distance at faster speed.

One dish measures 2 feet in diameter, while the other two dishes are 1 feet in diameter. Two dishes would be located at an elevation of 59 feet from the ground, while the third would be located at an elevation of 64 feet. The building height is 46 feet 8 inches. The Zoning By-law Section 135-1603.B(4) prohibits a building-mounted wireless communication link from extending more than 10 feet above the height of the building, and therefore, a variance is needed as all three dishes will exceed this height limit. Attorney Sousa explained that the backhaul dishes are different from the typical antennas in that the dishes must communicate with other sites so the height is needed for clear communication.

This petition is governed by the Federal Telecommunications Acts ("TCA"), which allows a municipality to reasonably regulate the placement of wireless communications installation, provided, such regulations do not have the effect of prohibiting wireless communications facilities. The TCA also encourages co-location on existing towers, and this petition promotes this goal. The Town's Zoning By-law also encourages that wireless installations be able to accommodate other carriers. Attorney Sousa noted that this site currently does accommodate multiple wireless carries, and therefore promotes the goal of the Zoning By-law.

However, Section 1603.C(2)(h) of the Zoning By-law a wireless tower must be set back 500 feet from a school, hospital, convalescent and nursing home or residential lot line. Since the proposed installation will be located less than 500 feet from a residential lot line, a variance is required. As grounds for the variance, Attorney

Sousa noted that a literal enforcement of the Zoning By-law would present a substantial hardship, as the applicant has a significant gap in coverage in the area surrounding the site. Attorney Sousa also noted that the Zoning By-law encourages location of wireless facilities on existing structures, such as this existing tower, which the applicant maintains is the best available option from a radio frequency perspective, and since it would be located on the rooftop of an existing building, this location is the least visually intrusive option in the area. Attorney Sousa also noted the unique location of the site as a basis for granting the variance. Specifically, Attorney Sousa explained that wireless communications facilities require a clear line of site in order to transmit voice or data, and therefore, the facilities must operate above the tree line. This particular site, on the rooftop of a building with existing wireless facilities, provides the needed height to accommodate the applicant's transmissions and is strategically located in an area that addresses the carrier's gap in service. Further, Attorney Sousa stated that the proposed installation will be designed in a way to minimize any visual impact.

Finally, Attorney Sousa alluded to a request made by the Planning Board to hire an independent radio frequency engineer to measure pre- and post-installation radio frequency emissions to insure that emissions are below the limits set by federal regulations. The applicant has committed to retaining Dr. Don Hayes of MIT to conduct this study.

The petitioner submitted a packet of sheets entitled "Clearwire, Braintree Split, MA-BOS5252/MA1829, 400 Washington Street, Braintree, MA 02184", dated April 29, 2009 and revised May 21, 2009, prepared by Morrison Hershfield of Plantation, FL, along with Sheets numbered T-1, T-2, A-1 through A-6, E-1 through E-5.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 2-0-1 in favor of the requested relief.

Findings

The Board found that the petitioner had satisfied the goals of co-location as promoted under the Telecommunications Act and that the petitioner had proven a hardship as a basis for a variance, as the new dishes were needed to provide service to the area and upgrade the WiMAX capability. The hardship was also found to be owing to the unique location of the site, in that it satisfies the applicant's need to improve gaps in coverage. The Board also concluded that the proposed alteration of the site by the addition of three dishes would not visually impact the neighborhood or be more intrusive than the existing installations on the rooftop. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to the plan presented.

- 8) Petition Number 09-35
Valquiros S. Medonca and Maria J. Medonca
RE: 54 Edgemont Road**

Mr. Karll advised the Board that the petitioner has submitted a letter requesting a withdrawal of this petition..

On a motion made by Ms. Lauria, and seconded by Mr. Nuss, the Board voted unanimously to approve a request for withdrawal of the petition.

**9) Petition Number 09-36
Sprint Spectrum, L.P. and its affiliate Clear Wireless, LLC
RE: 10-40 Plain Street**

Present: Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, representing the petitioner; and Raymond Samora, a radio frequency engineer.

This is a petition filed by Sprint Spectrum, L.P. and its affiliate Clear Wireless, LLC of 9 Crosby Drive, Bedford, MA regarding the property located at 10-40 Plain Street in Braintree, MA. The applicant is seeking relief from the Town of Braintree Zoning By-laws, Chapter 135, Section 407 and Article XVI, Section 1603.B, as well as Chapter 40A, Section 6, to install two wireless communications dishes to the façade of the existing rooftop penthouse, all in accordance with the plans of record. The property is located in a Commercial Zoning District, as shown on Assessors Plan No. 1031, Plot 5 and contains 26,640 +/- SF of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held before the Zoning Board of Appeals on August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

The petitioner, represented by Attorney Ricardo Sousa of Prince, Lobel, Glovsky and Tye of Boston, appeared with Raymond Samora, a radio frequency engineer. Attorney Sousa explained to the Board that the petitioner is seeking permission to add two wireless backhaul dish antennas with an equipment cabinet to the face of the penthouse of the building. One dish measures 2 feet in diameter, while the other dish is 6 inches in diameter. In Case No. 08-04, the applicant previously received approval from the Board to install antennas and related equipment at this site. According to Section 135-1603.B of the Zoning By-law, building-mounted wireless facilities are allowed in certain zoning districts and on certain structures, such as the Commercial Zoning District, where this will be located. In addition, the Zoning By-law prohibits a building-mounted wireless communication facility from being located within 500 feet of a residential dwelling. Therefore, the petitioner seeks a modification of those previously granted variances to alter the wireless communications equipment on this site.

The Zoning By-law Section 135-1603.B (4) prohibits a building-mounted wireless communication link from extending more than 10 feet above the height of the building. The structure at issue is pre-existing nonconforming, as the building height is 54 feet, where the Zoning By-law limits the height to 50 feet, and the penthouse height is 72 feet, where the Zoning By-law limits this structure to 66 feet in height. Attorney Sousa explained that the backhaul dishes are different from the typical antennas in that the dishes must communicate with other sites so the height is needed for clear communication. The proposed dishes will be façade mounted to the penthouse, at elevations of 63 feet and 66 feet, and therefore the dishes will not exceed the height of the penthouse. However, the dishes will alter a pre-existing nonconforming structure, which requires a finding under Chapter 40A, Section 6.

Attorney Sousa explained that Sprint and Nextel merged in 2005, and subsequently, Sprint Nextel have been developing and deploying its 4th generation nationwide broadband mobile network in partnership with its affiliate, Clear Wireless, LLC. As a result, the applicant seeks to add three dishes to the existing antenna installation to improve the high speed wireless network to accommodate Worldwide Interoperability for

Microwave Access or “WiMAX” technology, which allows high speed internet access on-the-go and allows the transmission of large quantities of data over a longer distance at faster speed.

This petition is governed by the Federal Telecommunications Acts (“TCA”), which allows a municipality to reasonably regulate the placement of wireless communications installation, provided, such regulations do not have the effect of prohibiting wireless communications facilities. The TCA also encourages co-location on existing towers, and this petition promotes this goal. The Town’s Zoning By-law also encourages that wireless installations be able to accommodate other carriers. Attorney Sousa noted that this site currently does accommodate multiple wireless carries, and therefore promotes the goal of the Zoning By-law.

However, Section 1603.C(2)(h) of the Zoning By-law a wireless tower must be set back 500 feet from a school, hospital, convalescent and nursing home or residential lot line. Since the proposed installation will be located less than 500 feet from a residential lot line, a variance is required. As grounds for the variance, Attorney Sousa noted that a literal enforcement of the Zoning By-law would present a substantial hardship, as the applicant has a significant gap in coverage in the area surrounding the site. Attorney Sousa also noted that the Zoning By-law encourages location of wireless facilities on existing structures, such as this existing tower, which the applicant maintains is the best available option from a radio frequency perspective, and since it would be located on the rooftop of an existing building, this location is the least visually intrusive option in the area. Attorney Sousa also noted the unique location of the site as a basis for granting the variance. Specifically, Attorney Sousa explained that wireless communications facilities require a clear line of site in order to transmit voice or data, and therefore, the facilities must operate above the tree line. This particular site, on the rooftop of a building with existing wireless facilities, provides the needed height to accommodate the applicant’s transmissions and is strategically located in an area that addresses the carrier’s gap in service. Further, Attorney Sousa stated that the proposed installation will be designed in a way to minimize any visual impact.

Finally, Attorney Sousa alluded to a request made by the Planning Board to hire an independent radio frequency engineer to measure pre- and post-installation radio frequency emissions to insure that emissions are below the limits set by federal regulations. The applicant has committed to retaining Dr. Don Hayes of MIT to conduct this study.

The petitioner submitted a packet of sheets entitled “Clearwire, Armstrong Park, MA-BOS5248/BS23XC481-B, 10- 40 Plain Street, Braintree, MA 02184”, dated July 8, 2009 and revised July 17, 2009, prepared by Bay State Design, Inc. of Marlborough, MA, along with Sheets numbered T-1, G-1, A-1 through A-3, E-1 through E-2.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 2-0-1 in favor of the requested relief.

Findings

The Board found that the petitioner had satisfied the goals of co-location as promoted under the Telecommunications Act and that the petitioner had proven a hardship as a basis for a variance, as the new dishes were needed to provide service to the area and upgrade the WiMAX capability. The hardship was also found to be owing to the unique location of the site, in that it satisfies the applicant’s need to improve gaps in coverage. The Board also concluded that the proposed alteration of the site by the addition of two dishes would not visually impact the neighborhood or be more intrusive than the existing installations on the rooftop, nor would the alteration of the pre-existing nonconforming structure be substantially more detrimental to the neighborhood than the existing structure. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to the plan presented.

**10) Petition Number 09-37
Philip J. Duong and Kimberly Khanh Duong
RE: 75 Proctor Road**

Present: Attorney Carl Johnson, representing the petitioners; Philip J. Duong and Kimberly Khanh Duong, petitioners; and Robert Gabriel, builder.

Philip and Kimberly Duong of 75 Proctor Road in Braintree, MA seeks relief from Zoning By-laws Chapter 135, Article 4, Sections 403 and 407, and Article 7, Section 701 to demolish an existing dwelling and build a 34 ft. x. 28 ft. house with a 24 ft. x 22 ft. attached garage. The lot and existing structure are pre-existing nonconforming, and therefore, the petitioner also seeks relief pursuant to Chapter 40A, Section 6. The property is located in a Residence B Zoning District as shown on Assessors Plan No. 1098, Plot 16 and contains 7,750 SF +/- of land.

Notice

Pursuant to notice duly published in a newspaper in general circulation in the Town, posted at Town Hall, and by written notice mailed to all parties of interest pursuant to G.L. Chapter 40A, a hearing was held before the Zoning Board of Appeals on August 25, 2009 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Steven Karll, and members, Jay Nuss and Michelle Lauria.

Evidence

Attorney Carl Johnson, representing the petitioners explained to the Board that the petitioners are seeking permission to remove a pre-existing nonconforming dwelling and shed from a nonconforming lot in order to construct a new dwelling in a Garrison style, measuring 34 ft. x. 28 ft. with a 4 ft. x 7 ft. deck and 24 ft. x 22 ft. attached garage. The petitioner's lot is located on the corner of Proctor Road and Portland Road, with the front of the existing dwelling facing Proctor Road. The lot is pre-existing nonconforming as to lot size and width. The property offers 7,750 SF of land, whereas the Zoning By-law requires a minimum lot size of 15,000 SF for the Residence B District. In addition, the petitioner's lot is only 72 feet wide, whereas the Zoning By-law requires a minimum lot width of 100 feet. The dwelling is also pre-existing nonconforming, as the existing dwelling is located 15 feet off the front yard lot line at its closest point, while the Zoning By-law requires a 20 foot setback.

The proposed new dwelling would re-align the house so as to face Portland Road. With this reorientation of the house, the presently nonconforming lot width would improve from its present width of 72 feet to 103 feet. In addition, this re-orientation of the house on the lot will cause the driveway to be moved on to Portland Road, set back at a distance of approximately 33 feet from the corner. Attorney Johnson submitted pictures reflecting that the current driveway is located extremely close to the existing crosswalk for the local school, thus creating a safety issue. The re-alignment of the house and nearly 33 foot setback of the driveway from the corner crosswalk will improve this safety concern. The proposed dwelling would also improve the current encroachment into the front yard setback, as the proposed dwelling would be located 33 ft. or 20 feet off the front lot line, while the existing dwelling is located 26 feet and 15 feet off the front lot line.

However, the proposed dwelling will encroach into the rear yard lot line, as the proposed structure's deck will offer a setback of 28.2 feet, while the Zoning By-law requires a rear yard setback of 30 feet. The re-orientation of the proposed dwelling on the lot will also result in a new nonconformity of lot depth, as the lot depth would be 76 feet, as opposed to the 100 feet required under the Zoning By-law.

The Chairman inquired as to whether the petitioners considered pushing the garage two feet back so that the garage would be flush with the existing house. Attorney Johnson noted that such a modification would likely save the petitioners money, as the builder would pour a monolithic foundation, so the petitioners accepted the Chairman's suggestion.

As grounds for the variance, Attorney Johnson noted the undersized area of the lot and irregular shape of the corner lot. Attorney Johnson stated that the size of the lot and its status as a corner lot make it difficult for any dwelling to comply with the required setbacks.

The petitioner submitted a plan entitled "Plot Plan Showing Proposed Residence at 75 Proctor Road, Braintree, Mass.," dated July 21, 2009 and revised August 17, 2009, prepared by Neponset Valley Survey Assoc., Inc. of Quincy, MA.

Joanne and Russ Clark, who live next door to this property, stated that they are not opposed to the petition but expressed concern about blasting, if required. The builder, Robert Gabriel, stated that a large tree located in the yard would not grow in the presence of ledge, and therefore, blasting may not be required. If blasting is required, the petitioners will comply with the pre- and post-blasting survey and other safety requirements. No one else spoke in favor of or opposition to the petition. The Planning Board voted 3-0 to recommend favorably on the requested relief.

Findings

The Board found that the petitioner's proposed demolition and construction of a new dwelling would improve some of the existing nonconformities and would not be substantially more detrimental to the neighborhood than the existing nonconforming dwelling. The Board also found that the petitioner had presented proof of hardship based on the size and irregular shape of the lot. Finally, the Board found that the requested relief could be granted without detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law.

Decision

On a motion made by Mr. Karll and seconded, it was unanimously voted to grant the requested relief, subject to receipt of a revised plan reflecting the changes discussed with the Board.

APPROVAL OF MINUTES:

On a motion was made by Ms. Lauria and seconded by Mr. Nuss, it was unanimously voted to approve the meeting minutes of July 28, 2009.

Executive Session:

A roll call vote was taken by the Board at 9:15pm to go into Executive Session for the purpose of discussing pending litigation.

Roll Call Vote: Michelle Lauria-Yes
Stephen Karll-Yes
Jay Nuss-Yes

The Board came out of Executive Session at 9:43pm.

The meeting adjourned at 9:45pm.