



# Department of Municipal Licenses and Inspections

## Zoning Board of Appeals

90 Pond Street – Braintree, Massachusetts 02184

Joseph C. Sullivan  
Mayor

### Meeting Minutes

July 27, 2010

**IN ATTENDANCE:** Stephen Karll, Chairman  
John Gauthier, Member  
Michael Calder, Member  
Jay Nuss, 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 10-13  
T-Mobile Northeast, LLC  
RE: 197 Quincy Avenue**

Present: Jennifer Lougee, representative for petitioner

Mr. Karll advised the Board that the petitioner is requesting a 30-day deferral regarding this appeal.

Clarification was made by Ms. Lougee indicating that her request for deferral in June only reflected a 30-day request, when in fact a 60-day deferral was being sought.

On a motion made by Mr. Gauthier and seconded by Mr. Calder, the Board voted unanimously to approve a 30-day deferral until the Zoning Board of Appeals meeting on August 24, 2010.

- 2) Petition Number 10-17  
Jeff and Amy McKenna  
RE: 60 Edgehill Road**

Present: Jeff McKenna, petitioner

This is a petition filed by Jeff and Amy McKenna of 60 Edgehill Road, Braintree, MA regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-402,

Section 407, and 701, to build a 15ft. x 36 ft. single floor addition to the rear of the existing dwelling, all in accordance with the plans of record. The property is located in a Residential B Zoning District, as shown on Assessors Plan No. 3042, Plot 79 and contains +/- 5,170 Sq. Ft. 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 July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier, and Jay Nuss, with alternate, Michael Calder.

### **Evidence**

The petitioner, Jeff McKenna, representing himself, advised the Board that the 15 ft. x 36 ft. one-story addition will consist of a family room and mudroom to be located to the rear of the existing dwelling. Mr. McKenna stated that the lot and current structure do not meet the dimensional and density standards under the Zoning By-laws, Section 135-701, as both are pre-existing nonconforming. Pursuant to Section 135-701 of the Zoning By-laws, the minimum lot area is 15,000 SF, yet this lot only has 5,170 SF. The minimum lot width for this zoning district is 100 ft., yet this lot offers only 47 feet of width. The minimum frontage required for this zoning district is 50 feet, yet this lot contains only 47 feet. The minimum side yard setback is 10 ft., yet the existing dwelling is located 2.7 feet from the easterly side lot line, at its closet point. The proposed addition would further encroach into the side yard setback, as the addition would be located 1.7 feet from the easterly side lot line and 7.1 feet from the westerly side lot line. Therefore, the petitioners require a finding under G.L. c. 40A, Section 6, as well as variances from the side yard setbacks.

As grounds for the variance, Mr. McKenna submitted photos of his yard revealing ledge outcroppings, making it difficult to place an addition elsewhere on the property. Mr. McKenna also submitted a photo of the property on the easterly side, which is Town-owned land containing a large rock. Mr. McKenna also noted that the existing dwelling is situated at an angle to the easterly lot line, and while the proposed addition will further encroach into this side lot line, Mr. McKenna noted that the addition will continue the line of the existing dwelling.

The petitioner submitted a plan entitled "Plot Plan of Land, 60 Edgehill Road, Braintree, MA", dated May 18, 2010, prepared by Michael A. Coleman, PLS.

The Board inquired as to whether the petitioner would be amenable to reducing the addition on the westerly side by 2 ft. 11 in. so that there would be no encroachment into the westerly side lot line. Mr. McKenna indicated that he would have no objection to reducing this side of the addition.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 4-0-0 in opposition to the requested relief, as the Planning Board asked the petitioner to consider an alternative design with fewer encroachments.

### **Findings**

The Board found that the petitioner had proven a hardship based on shape and topography of the lot to warrant the variance. Specifically, the Board noted the presence of visible ledge outcroppings and found that the undersized lot and the placement of the existing structure at an angle on the lot made it difficult for the petitioner to construct the addition in compliance with the By-laws. The Board noted that the proposed

addition will be in line with the existing house, so that any further encroachment into the easterly side yard setback is de minimus. However, the Board was not inclined to grant the requested relief relative to creating a new encroachment into the westerly side lot line setback. 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. Gauthier and seconded by Mr. Nuss, it was unanimously voted to grant the requested relief relative to the easterly side lot line setback, subject to the plan presented, but the Board conditioned its approval on the petitioner amending the plan to reduce the size of the addition on the westerly side so that the addition on the westerly side will comply with the 10 foot side yard setback requirement. The petitioner is requested to submit a revised plan reflecting this amendment.

#### **3) Petition Number 10-18**

**Wen Fang Zheng**

**RE: 910 Washington Street**

Present: Wei Jia, Attorney representing the petitioner and Wen Fang Zheng, petitioner

After a lengthy discussion between Attorney Jia and the Appeals Board members, concerning existing parking conditions at 910 Washington Street and the impact that the proposed business, Sake Japanese Restaurant would have, it was decided that a deferral of this case for a period of thirty days would be in the best interests of the petitioner.

On a motion made by Mr. Gauthier and seconded by Mr. Calder, the Board voted unanimously to approve a 30-day deferral until the Zoning Board of Appeals meeting on August 24, 2010, to allow the petitioner to seek and propose satellite parking to supplement the on-site parking..

#### **4) Petition Number 10-19**

**Stewart Rosen of Norfolk Kitchen and Bath**

**RE: 265 Wood Road**

Present: David Rosen, representing Norfolk Kitchen and Bath

This is a petition filed by Norfolk Kitchen and Bath of 265 Wood Road, Braintree, MA, regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-407, 135-904.2.1, and 135-905 to install a double-faced internally illuminated ground sign, all in accordance with the plans of record. The property is located in a Highway Business Zoning District, as shown on Assessors Plan No. 2053(c), Plot 1D and contains +/- 6.64 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 scheduled before the Zoning Board of Appeals on June 22, 2010 and continued by mutual agreement to July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier and Michael Calder. No alternates were appointed.

### **Evidence**

David Rosen of Norfolk Kitchen and Bath presented the petition. Mr. Rosen explained that Norfolk Kitchen and Bath has re-located to Wood Road, in the former Ryder Truck building, and would like to install a 60 SF double-faced internally illuminated ground sign with a manual changeable message display track underneath. The sign will state: "Lowest Prices In-Stock Kitchen Cabinets & Countertops" above the Norfolk Kitchens & Bath logo alongside a listing of various store locations. Underneath the text is a three line manually changeable track to allow for additional messages. The sign measures 6 ft. high x 10 ft. wide x 20 inches deep and will be installed 24 inches from the ground on a grass area adjacent to the entrance to the site off Wood Road. The petitioner currently has one 30 SF wall sign and a temporary ground sign, which will be removed if this petition is granted.

The petition requires relief under Zoning By-law Section 135-904.2(A)(1)(e) which states: "A sign visible to the major artery shall contain the name and address of the user of the property and contain no other advertising material or any commercial message unless specifically authorized by the Zoning Board of Appeals." As noted above and on the plans submitted, the proposed sign will contain other advertising messages beyond the name and address of the business at the site. In addition, Section 135-905 of the Zoning By-law prohibits "manually continuous changing message signs". As grounds for the requested relief, the petitioner noted that the business is located on Wood Road, a long and somewhat isolated dead end road filled with commercial properties. The petitioner explained that the sign was necessary to identify the business and to alert the traveling public as to the location of the business. The petitioner also noted that this sign will only be visible to those traveling down Wood Road, but the sign is needed to direct the public to the site. The petitioner also explained that the changeable track will be used to advertise sales at the store.

The Chairman questioned the hours the business is open and the hours that the sign will be illuminated. The petitioner responded that the business is currently open 8 am to 5pm, but the sign will be illuminated until 9pm. The Chairman asked if the petitioner would be opposed to shutting the light off at 8:30 pm, to which the petitioner had no objection.

No one else spoke in favor of or opposition to the petition. By a vote of 4-0-0, the Planning Board recommended favorable action of the petition, provided the changeable display area is eliminated.

The petitioner submitted a plan entitled "As-Built Plan in Braintree, Mass., New Ryder Facility at #265-287 Wood Road, Braintree, Massachusetts," dated 12/4/98 and revised through 12/18/98, prepared by Peter J. Ogren, Civil Engineer, along with an untitled and undated sheet depicted the dimensions and message of the sign.

### **Findings**

The Board found that the petitioner had proven a hardship as a basis for the relief for the ground sign, as the Board found that the ground sign was reasonable and necessary to identify and safely direct the public to the business. The Board also found that this ground sign with changeable track area was not excessive and served the public need in terms of directing them to or informing them of the location of the store on the site, particularly in this exclusively commercial area.

### **Decision**

On a motion made by Mr. Gauthier and seconded by Mr. Calder, it was unanimously voted to approve the relief as requested, on the condition that the temporary sign be removed and on the condition that the illuminated sign be shut off at 8:30 pm.

**NEW BUSINESS:**

**5) Petition Number 10-21  
Barlo Signs for the 99 Restaurant  
RE: 250 Granite Street**

Present: Tim Sullivan of Barlo Signs and Ken Donovan, Manager of the 99 Restaurant

This is a petition filed by Jenn Robichaud of Barlo Signs of 158 Greeley Street, Hudson, NH, on behalf of the 99 restaurant, located at 250 Granite Street, Braintree, MA, regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-904.2(A) and 135-905 to install one 9 SF non-illuminated projecting sign and two 32.6 SF internally illuminated wall signs, all in accordance with the plans of record. The property is located in a Highway Business Zoning District, as shown on Assessors Plan No. 20898, Plot 22 and contains +/- 111.645 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 scheduled before the Zoning Board of Appeals on July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier and Jay Nuss, with alternate, Michael Calder.

**Evidence**

Tim Sullivan of Barlo Signs and Ken Donovan, Manager of the 99 Restaurant, presented the petition. Mr. Sullivan explained that the 99 Restaurant has undergone a change in image, which included updating their brand. The proposed signs reflect the new brand for all 99 Restaurants nationwide. The petitioner proposes to remove two existing wall signs, which measure 30 inches x 30 feet and replacing them with two new wall signs measuring 42 inches x 122.5 inches, or 32.6 SF. The signs state: "Ninety Nine" with the newly branded figure "99" within a horseshoe in between the two words. Underneath, the sign states: "great food, great drink". Both signs are internally illuminated. One wall sign will be located over the main entrance to the restaurant facing the parking lot, while the other sign will be located on the side of the restaurant facing the South Shore Plaza south parking garage. The petitioner also proposes to erect a 9 SF double-sided, non-illuminated circular sign to be mounted on the front corner of the building so as to project from the corner of the restaurant and be visible to traffic turning towards the parking garage. This projecting sign will depict the figure "99" within a horseshoe.

According to Section 135-904.2(A)(4), projecting signs which extend over a public way are prohibited, and pursuant to Section 135-904.2(A)(5), only one wall sign is permitted for each store or business occupying the building. In addition, Section 135-905 prohibits illumination of signs by neon tubes.

The petitioner explained that, overall, the 99 Restaurant was reducing its overall signage at the site, from 2 wall signs at 75 SF to two wall signs at 32.6 SF, but claimed the signage was still needed to identify the restaurant and to safely direct the traveling public to the restaurant, which is detached from and nestled within the larger South Shore Plaza. The petitioner also noted that the restaurant is set back and not visible from Granite Street,

and therefore, additional wall signs are needed to identify the site and to direct the traveling public safely to the site. Originally, the petitioner proposed that the signs be illuminated by neon, but the petitioner changed this to white, internal lights, per the landlord's requirements, and in compliance with the Zoning By-law.

By a vote of 4-0-0, the Planning Board recommended favorable action, provided the signs were not illuminated by neon and on the condition that the phrase "great drink" be eliminated. No one else spoke in favor of or opposition to the petition.

Upon reviewing the Planning Board's recommendation, the Mr. Gauthier noted that additional advertising material such as "great food, great drink" was discouraged by the Board, recalling conditions the Board imposed on a similar petition by a nationwide chain that was updating its brand. Mr. Gauthier also questioned the necessity of the projecting sign and noted that the Zoning By-law prohibits a projecting sign from extending

over a public way. While the proposed sign may not project over a public way, Mr. Gauthier noted that the proposed sign does project over a public walkway, which could pose a safety hazard. Mr. Gauthier also indicated that the projecting sign was excessive and unnecessary, as the traveling public accessing the parking garage will clearly see the other signs identifying this building as the 99 Restaurant.

The petitioner submitted three sheets for Job Name: Ninety Nine, at South Shore Plaza in Braintree, MA, dated March 10, 2010 and revised through July 13, 2010, prepared by Barlo Signs of Hudson, NH, depicting the three proposed signs.

### **Findings**

The Board found that the petitioner had proven a hardship as a basis for a variance for the new 99 Restaurant logo, finding that the size of the building, its distance from Granite Street and the location of this building within but detached from the South Shore Plaza, warranted two wall signs. The Board also found that the dimensions of the wall signs were reasonable and necessary to direct the public to the restaurant. However, the Board did not find that the petitioner had demonstrated any hardship or need for the "great food, great drink" tag line, and found this additional advertising material to be unnecessary and excessive. The Board also found that these tag lines did not serve the public need in terms of directing them to or informing them of the location of the restaurant on the site. Further, the Board found that the projecting sign posed a potential threat to public safety, as it projected out over a walkway, and was unnecessary and excessive, as the traveling public accessing the parking garage would clearly identify the building as the 99 Restaurant upon seeing the other two wall signs. 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. Gauthier and seconded by Mr. Karll, it was unanimously voted:

- a) to grant the requested relief with respect to the two 32.6 SF internally illuminated wall signs stating "Ninety Nine" with the horseshoe logo in between the two words, subject to the plan submitted and subject to the condition that the tag line "great food, great drink" be deleted from both signs; and
- b) to deny the requested relief relative to the 9 SF projecting wall sign.

### **6) Petition Number 10-22**

**Jack Ngan**

**RE: 435 Commercial Street**

Present: Jack Ngan, petitioner and Edwina Wong, wife of petitioner

This is a petition filed by Jack Ngan of 435 Commercial Street, Braintree, MA regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-403, 407, 701 and 702 to raze an existing one-story enclosed porch and to construct a 14 ft. x 24 ft. two-story addition with portico and stairs, all in accordance with the plans of record. The property is located in a Residential B Zoning District, as shown on Assessors Plan No. 3013, Plot 32 and contains +/- 7,727 Sq. Ft. 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 July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street,

Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier, and Michael Calder, with alternate, Jay Nuss.

### **Evidence**

Jack Ngan appeared with his wife, Edwina Wong, to present the petition. Currently, the single family dwelling contains a one-story enclosed porch measuring approximately 288 GSF at the front of the house. The petitioners wish to remove this porch and replace it with a two-story addition measuring 14 ft. x 24 ft. and containing 672 GSF. The lot and existing house are pre-existing non-conforming. The minimum lot size for a Residence B Zoning District is 15,000 SF, but this lot contains only 7,727 SF. The Zoning By-law requires the lot to have a minimum width of 100 feet, but this lot measures only 50.1 feet. The Zoning By-law requires a side yard setback of 10 feet, yet on the southerly lot line, this lot offers a setback ranging from 1.5 feet from the deck to 6.9 feet from the existing dwelling.

The proposed addition will create a new nonconformity with respect to the side yard setback on the southerly lot line, as the addition will be located 8.6 feet off the side lot line. However, the existing structure is located 6.9 feet from this same side lot line, and therefore, the addition will not encroach more than the existing dwelling. The addition will increase the overall building coverage, lot coverage and will decrease the open space, but will still comply with the Zoning By-law requirements in these categories.

As grounds for the requested relief, the petitioners noted the long and narrow shape of the lot and the placement of the existing structures on the lot, making it difficult to locate an addition to the house elsewhere. The petitioners also stated that the proposed addition would not further encroach into the side yard setback any more than the existing structure.

The petitioner submitted a plan entitled "PLAN OF LAND IN BRAINTREE, MASSACHUSETTS, 435 Commercial Street," dated April 28, 2010, prepared by C. S. Kelley, Land Surveyors, Pembroke, MA.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 4-0-0 in favor of the requested relief.

### **Findings**

The Board found that the petitioner had established sufficient hardship based on the shape of the lot. Specifically, the Board noted the extremely narrow width of the lot and the placement of the existing dwelling closer to the southerly lot line, making it difficult for the petitioners to construct an addition to their house

elsewhere. The Board also noted that the proposed addition, while encroaching into the southerly lot line, will not encroach more than the existing side yard setback of 1.5 feet and 6.9 feet from this same lot line. The Board found that the requested relief would not 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. Gauthier and seconded by Mr. Calder, it was unanimously voted to grant the requested relief, subject to the plan presented.

#### **7. Petition Number 10-23 Naseem Khan RE: 86 Alfred Road**

Present: Naseem Khan, petitioner

This is a petition filed by Naseem Khan of 86 Alfred Road, Braintree, MA regarding the same property. The applicant is seeking relief from the Town of Braintree Zoning By-laws Sections 135-402, 403, 407, and 701 to construct a second story addition over the footprint of the existing dwelling, all in accordance with the plans of record. The property is located in a Residential B Zoning District, as shown on Assessors Plan No. 2088, Plot 33 and contains +/- 9,890 Sq. Ft. 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 July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier, and Jay Nuss, with alternate, Michael Calder.

### **Evidence**

Naseem Khan representing himself explained that he is seeking permission to construct a second story addition over the existing dwelling and within the footprint of the dwelling. The addition will contain three bedrooms and a bathroom. The existing dwelling was constructed in 1953, and the lot and dwelling are pre-existing nonconforming. The Zoning By-law requires a minimum lot size of 15,000 SF, but this lot contains only 9,890 SF of area. The existing dwelling on the lot complies with all setback requirements with the exception of the rear yard setback; the Zoning By-law requires a rear yard setback of 30 feet, but the existing structure is 13.1 feet from the rear lot line at its closest point. Since the second story addition will be contained within the footprint of the existing structure, no new nonconformities will be created. Therefore, this petition only requires a finding under G.L. c. 40A, §6.

The petitioner submitted a plan entitled "PLOT PLAN IN BRAINTREE, MASSACHUSETTS, 86 Alfred Road," dated June 7, 2010, prepared by Borderland Engineering, Inc. of West Bridgewater, MA.

No one else spoke in favor of or opposition to the petition. The Planning Board voted 4-0-0 in favor of the requested relief.

### **Findings**

The Board found that the proposed addition will be contained within the footprint of the existing dwelling, and therefore, the addition will not create any new non-conformity under the Zoning By-laws. The Board also found that the requested relief would not 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. Gauthier and seconded by Mr. Nuss, it was unanimously voted to grant the requested relief, subject to the plan presented.

#### **8) Petition Number 10-24**

**Robert Gabriel, President of Liberty Realty Development, Inc.**

**RE: 16 Myrtle Street**

Present: Attorney Carl Johnson representing the petitioner, and Robert Gabriel, petitioner

This is a petition filed by Robert Gabriel as President of Liberty realty Development, Inc., P.O. Box 850546, Braintree, MA concerning the property located at 16 Myrtle Street in Braintree. The applicant appeals the decision of the Building Inspector denying a building permit to construct a 2.5 story single family dwelling on this lot. The property is located in a Residential B Zoning District, as shown on Assessors Plan No. 2001, Plot 8B and contains +/- 9,177 Sq. Ft. 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 July 27, 2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier, and Jay Nuss, with alternate, Michael Calder.

### **Evidence**

Attorney Carl Johnson appeared along with Robert Gabriel and explained that the petitioner is appealing the Building Inspector's denial of a building permit to construct a 2.5 story single family dwelling on what is currently a vacant lot. By way of background, Attorney Johnson submitted a memorandum and packet of materials to the Board, explaining that in 2008, the Board granted a variance to the former property owner, Eloise Papile to subdivide her property into two undersized lots. (See Application to the Board dated March 13, 2008 and Board Decision No. 08-18.) In the course of that proceeding, Ms. Papile's attorney verbally represented to the Board that the purpose for requesting the subdivision of the lot was to allow Ms. Papile to sell her larger house and to build a more modest house on the newly created lot. (See Board Decision No. 08-18.) Ms. Papile's attorney verbally suggested to the Board that a 1.5 story house would likely be built on the new lot. However, the plan submitted to the Board in 2008 that accompanied the request to subdivide and create two undersized lots reflected a "proposed 2-story dwelling" on the new lot. The Board granted the requested relief, and on December 17, 2008, an Approval Under the Subdivision Control Law Not Required plan ("ANR plan"), endorsed by the Planning Board representative, was filed with the Registry of Deeds.

Subsequently, Ms. Papile sold her house and the vacant lot. Liberty Realty Development, Inc. purchased the vacant lot and filed an application to construct a 30 ft. x 24 ft. 2.5 story Colonial style home on the lot. In a letter dated June 24, 2010, the Building Inspector denied the building permit, claiming that the Board's 2008 decision on the subdivision of the property limited the single family dwelling to be constructed on this lot to a 1.5 story structure. Thereafter, Mr. Gabriel, as President of Liberty Realty Development, Inc. filed this appeal.

In support of this appeal, Attorney Johnson provided the Board with a copy of a Land Court decision, Spear v. Board of Appeals of Danvers, Case No. 09-P-400, issued July 8, 2010, which held that, in order for a condition to be imposed via a variance decision, the condition must be clearly set forth in the decision itself. Applying this case to ZBA Decision 08-18, Attorney Johnson asserted that the alleged condition limiting the height of the dwelling to 1.5 stories was little more than a passing reference of a non-binding suggestion made by the

petitioner's attorney at the time but was not a condition imposed by the Board as part of its decision. Further, Attorney Johnson argued that had it been the Board's intention to impose such a condition, the Board would have incorporated this condition into their motion. Finally, Attorney Johnson stated that Mr. Gabriel relied upon the language in the variance decision when he purchased the property.

Included in the packet of materials, the petitioner submitted a plan entitled "Plot Plan of 16 Myrtle Street in Braintree, Mass.," dated June 8, 2010 and prepared by Neponset Valley Survey Assoc., Inc.

Russell Forsberg, the Building Inspector who denied the building permit under appeal, explained that he denied the permit initially because he thought the variance had lapsed and secondarily because he interpreted the Board's decision in Case No. 08-18 as imposing a limit of 1.5 stories on the dwelling that could be built on the lot. With respect to the issue of whether the variance had lapsed, the Town Solicitor reviewed the chronology as to the date of the Board's decision and the date of filing the ANR plan and advised that the variance had not lapsed. Rather, the Town Solicitor opined that the filing of the ANR plan was a sufficient exercise of the variance and relied upon the precedent established by the Appeals Court in Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985)(holding that the subdivision of a single lot into two lots was a sufficient exercise of the variance).

Joseph Beshard III, who purchased Mrs. Papile's house, spoke in opposition to the appeal, claiming that when he purchased Mrs. Papile's house, he was shown a plan for a 1.5 story house to be built on the other lot.

Matt and Christine McIntyre of 2 Spruce Street spoke in opposition to the appeal. Mr. McIntyre advised the Board that he is an attorney and he challenges the ruling that the variance lapsed. Mr. McIntyre also stated that the Board cannot grant a permit or variance for a new use of the property. Mrs. McIntyre commented that the neighborhood in question is of a historical nature and that the subdivision of this property ruins the historical integrity of the neighborhood. Mrs. McIntyre is opposed to the construction of a house on this lot, as she feels the values of the surrounding properties will decline.

Chairman Karll advised that the ruling of the Town Solicitor as to whether the variance was properly exercised, which is based on an Appeals Court decision with a similar fact pattern, stands. Chairman Karll also reminded the audience that the time to appeal the Board's decision granting the variance to Mrs. Papile has lapsed and that the matter currently before the Board is whether to uphold or overturn the Building Inspector's denial of a building permit for a house to be built on the lot created by the prior variance decision.

Jane Taubner Barney and Christopher Barney of 30 Myrtle Street also spoke in opposition to the appeal. Mrs. Barney stated that the construction of a 1.5 or 2.5 dwelling on this lot will be detrimental to the neighborhood. Mrs. Barney also questioned the advertised notice of this hearing which referred to the petitioner seeking a permit and/or variance. Chairman Karll clarified that the purpose of this hearing is to determine whether or not

the Building Inspector's denial of a building permit for this lot should be upheld or overturned; no further variances are being considered at this time.

George Johansson of 7 Myrtle Street advised the Board that he was in favor of this petition when filed by Mrs. Papile because he was led to believe that Mrs. Papile would live in the house to be constructed on the new lot. Mr. Johansson claims he was duped and would not have supported the petition two years ago.

Sean Hastings of 28 Vine Street noted that Mrs. Papile was committed to building a house in the style of the neighborhood and questioned whether the neighbors have any right to review the style of the house that is now being proposed. Chairman Karll advised that if the proposed dwelling complies with the requirements of the Zoning By-laws, a building permit can be issued, regardless of the style of the house.

Cynthia and James Hoover of 6 Myrtle Street read prepared statements that were submitted to the Board. James Hoover stated that he supported the petition in 2008, in part because Mrs. Papile had distributed a drawing of the proposed house that she planned to build if the variance was approved. Mr. Hoover emphasized that the style of the house was important to those neighbors that supported Mrs. Papile's petition. Now, Mr. Hoover is opposed to a 2.5 story dwelling that will "tower over" his property and impact the local microcosm. Cynthia Hoover stated that the style and size of the house that Mr. Gabriel intends to build will be detrimental to the neighborhood and out of place, impacting neighbors' privacy and property values. Mrs. Hoover is concerned that the proposed dwelling will negatively impact the charm and appeal of this historic neighborhood.

Peggy Joyce of 11 Spruce Street echoed previous statements offered by her neighbors and expressed her hope that Mr. Gabriel would build a house in keeping with the neighborhood.

Chairman Karll commented that he vividly recalled the hearing when the variance was granted to Mrs. Papile and noted how the room was filled with neighbors, all of whom were in support of the requested relief when they believed Mrs. Papile was going to live in the house to be built on the new lot. However, Chairman Karll reminded the public that the Board cannot condition the grant of a variance on who will live in the house.

No one else spoke in favor of or opposition to the appeal. By a vote of 4-0-0 the Planning Board recommended favorable action on the petitioner's appeal.

### **Findings**

Chairman Karll and Mr. Gauthier stated that they clearly recalled the hearings on Mrs. Papile's variance request and the representations made by all parties who spoke at those hearings. The Board reviewed their 2008 decision and found that their vote did not impose any limit as to the size of the house that could be constructed on the newly created lot. Further, the Board found that the property owner is free to construct any house on this lot in accordance with the Zoning By-laws.

### **Decision**

On a motion made by Mr. Karll and seconded by Mr. Nuss, it was unanimously voted to overturn the Building Inspector's denial of the building permit.

**OLD BUSINESS:**

**9) Petition Number 10-20  
John Barrett and Emily Hoard  
RE: 206 Allen Street**

This is a petition filed by John Barrett and Emily Hoard of 206 Allen Street, Braintree, MA regarding the same property. The applicants are seeking relief from the Town of Braintree Zoning By-laws Sections 135-

402 and 407 to build a 3 ft. x 28.5 ft. addition to the easterly side of the existing dwelling, all in accordance with the plans of record. The property is located in a Residential C Zoning District, as shown on Assessors Plan No. 3008, Plot 14D and contains +/- 5,645 Sq. Ft. 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 on June 22, 2010, but at the request of the applicant, was continued to July 27,

2010 at 7 p.m. at the DPW Administration Building at 90 Pond Street, Braintree, MA. Sitting on this petition was Chairman, Stephen Karll, and members, John Gauthier, and Michael Calder, with alternate, Jay Nuss.

**Evidence**

The petition was called in its order earlier in the meeting, and no one responded. The Board heard all other petitions on the agenda and again called this petition at 9:45 pm, but again no one appeared on behalf of the petition. The Building Inspector advised the Board that he had not received any message from the petitioners requesting a further continuance.

The Planning Board noted that the applicant requested to be placed on the July agenda because they were not available for the June 8, 2010 Planning Board meeting. In their July 21, 2010 report, the Planning Board tabled the matter to their August meeting to further analyze the existing bump-out and the requested relief.

No one else spoke in favor of or opposition to the petition.

**Findings**

There being no one in attendance at the hearing to present this matter, the Board made no findings as to the merits of the petition.

**Decision**

On a motion made by Mr. Karll and seconded by Mr. Gauthier, the Board unanimously voted to deny the requested relief for failure of the applicants to appear and present this petition.

**APPROVAL OF MINUTES:**

On a motion made by Mr. Calder and seconded by Mr. Gauthier, the Board voted unanimously to accept the meeting minutes of June 22, 2010.

The meeting adjourned at 9:47 pm