



TOWN OF NORTHBOROUGH Zoning Board of Appeals

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Approved 5/25/10

Zoning Board of Appeals Meeting Minutes February 23, 2010

Members in attendance: Richard Rand, Chairman; Mark Rutan, Clerk; Gerry Benson; Chan Byun; Sandra Landau, Alternate

Members excused: Richard Kane; Dan Ginsberg, Alternate

Others in attendance: Bill Farnsworth, Building Inspector; Fred Litchfield, Town Engineer; Elaine Rowe, Board Secretary; Jeffrey Leland; Michael Durkin, Jeff Amberson; Steve Pflug; Justin Davidson; Al Guarino; Deb & Tom Blasko; Damon Amato; Jackie & Larry Cotter; Steven McClure; Jan & Dave Bisset; Evelyn LeBlanc; Marla Collins; Rebecca Hunt; Leslie Harrison; Anthony & Laura Ziton; Marybeth Ryan; Matthew Restenbaum; Glenn Burney; Jodie Chapin; Simon Brighenti; Holly Bisset

Chairman Rand called the meeting to order at 7:06PM.

Continued public hearing for consideration of the petition of Thomas H. Hays, II for a Variance/Special Permit to allow construction of a single-family home in Groundwater Protection Overlay District Area 2 that will exceed 50% of the gross floor area of the existing home on the property located at 117 Maple Lane, 7:10PM

Chairman Rand appointed Sandra Landau as a voting member for this hearing.

Attorney Jeff Leland explained that the applicant is seeking a variance from the minimum setback requirement and a modification of a 1992 variance to allow him to construct a larger home on the parcel. He noted that the proposal is for a split-entry home with a 30x50-foot footprint, with 1600 square feet of living space on the upper level and 700 square feet on the ground level.

Attorney Leland explained that the applicant appeared before the Groundwater Advisory Committee two weeks ago, who support approval of the project provided that the impervious cover of the existing driveway and cottage are removed, and recharging drains are installed to handle the roof runoff. The applicant is seeking a variance to allow the house to be no closer than 20 feet to the front property line and for the front porch to be no closer than 15 feet to the front property line and a modification to the 1992 variance to allow for a larger structure than what currently exists.

Ms. Landau commented that the board was unable to determine why the 1992 decision included the restriction limiting the size of the structure.

Chairman Rand asked how close the front stoop will be from the center line of the roadway. Mr. Leland noted that the steps will be 18 feet from the center line, with the house itself being 24 feet away.

Ms. Landau stated that the 1992 decision states that the existing dwelling cannot be expanded in size, without providing a basis or reason, but also contains no condition prohibiting construction of a new structure. Attorney Leland voiced his opinion that moving the house closer to the roadway and further away from the pond and the wetlands is beneficial.

Mr. Benson questioned why the proposed dwelling could not be located further back on the parcel. Attorney Leland explained that there is a 30-foot no build zone for the wetland that the Conservation Commission will not waive.

Chairman Rand asked if it is possible to place the structure further to the right. Attorney Leland stated that the location of the septic system, side line setback and 30-foot no build zone dictate the location that was chosen.

Fred Litchfield noted that the Groundwater Advisory Committee (GWAC) has reviewed the project and recommended approval of the modification as there did not seem to be any basis for the restriction. He also noted that the septic system was constructed in compliance with the bylaw and town code, and is sufficient for the size of the proposed dwelling. In addition, the applicant has agreed to eliminate the existing impervious cover and comply with the conditions as outlined in the GWAC comment letter.

Mr. Rutan asked about water service. Attorney Leland noted the existence of a well on the property, but stated that it has not yet been decided whether it will be used or if a new well will be constructed. Mr. Rutan questioned whether there is sufficient separation between the well and the septic system. Mr. Steve Pflug project engineer from Thompson Liston, confirmed that there is.

Mr. Litchfield explained that the Conservation Commission's bylaw prohibits a structure within 30 feet of a wetland. He noted that the applicant had sought relief from that restriction, but the Conservation Commission requested that they find a way to do the project without encroaching in the no build zone.

Sandra Landau made a motion to close the hearing. Mark Rutan seconded, vote unanimous.

Public hearing to consider the petition of T-Mobile Northeast LLC for a Variance/Special Permit to allow a Wireless Communication Facility to be located less than the required 1000-foot distance from a school and less than the required 500-foot distance from the nearest residential property line; and to allow the fence required to surround the proposed Wireless Communication Facility to be located less than the required distance from side and rear property lines on the property located at 265 Main Street, 7:19PM

Chairman Rand appointed Sandra Landau as a voting member for this hearing.

Simon Brighenti introduced Peter Fales, Site Acquisition Professional, and Urma Guino, Radio Frequency Engineer, and discussed plans for the installation of a wireless communication facility on the parcel. He explained that T-Mobile is looking to fill a gap in service in the area of Main Street and to the east. Mr. Brighenti also noted that, along with construction of this facility, the proposal includes linking to the e-911 service to allow for emergency calls to 911. He commented that, of all calls placed to 911, 60% or more are made from a wireless device.

Mr. Brighenti stated that, while the Town bylaw encourages the use of existing structures, a recent search of the area did not result in locating anything appropriate for T-Mobile's needs. He also explained that the bylaw encourages placement of these facilities within specific zoning areas, with preferences to placement as follows:

1. Industrial parcels. Mr. Brighenti explained that there is a small piece of industrial property on the grounds of the regional school.
2. Business district (Business West and Business East) – Mr. Brighenti indicated that they were able to find a parcel within the Business East district, and noted that this is one of the districts preferred in the bylaw.

Mr. Brighenti discussed the 125-foot height limit contained in the bylaw, and stated that the proposal is for a 120-foot tower. He explained that there is a great deal of tension created by such a restriction, primarily because towns require that these structures be made available for co-location by other carriers. He also noted that T-Mobile has already been contacted by Clear Wireless and MetroPCS, who have both expressed an interest in co-location.

Mr. Brighenti explained that co-location is a result of the Federal Telecommunications Act of 1996, which provided for a number of things including encouraging fair competition. He also stated that federal law prohibits any regulation that results in a prohibition of service, and commented that the town cannot structure a bylaw that limits any area of town from having coverage. In addition, federal law prohibits discrimination among any carriers.

Mr. Brighenti further explained that federal law also addresses the issue of radio frequency propagation from these facilities. He noted that the FCC has set guidelines for the propagation of radio waves up to a certain limit, and anything beyond that limit requires that the facility post appropriate signage. He stated that the facility that is being proposed will operate at 2% to 3% of the FCC limit, so the town cannot use the fact that radio waves are being transmitted as a basis for denying the request.

Mr. Brighenti stated that the tower is to be located at the back of the property at 265 Main Street, with an access road off of Main Street. The facility will be located within a 40' x 40' leased area, with a 15-foot wide utility and access easement along the westerly line of the property. He noted that the centerline of the antennas will be at a height of 117 feet, and equipment cabinets will be located at the base of the tower. The proposal also includes a stockade fence around the leased area, but Mr. Brighenti stated that the applicant is willing to work out this detail based on the town's preference.

Mr. Brighenti explained that approval for this application is a two step process. The first step is to obtain a dimensional variance. He stated that the bylaw requires a minimum 500 foot setback from a residential lot line, and noted that the Planning Board has the right to waive the 500 foot setback if they consider there to be exceptional circumstances. Mr. Brighenti also stated that the bylaw requires a minimum 1000-foot setback from any structure used as a school, and indicated that the project is 500 feet from the school at St Bernadette's. He voiced his opinion that meeting this setback would require an extremely large piece of property, in the area of an 80 acre parcel. Mr. Brighenti insisted that imposing the 1000 foot setback is not appropriate as it would exclude a very large number of properties in the town, and creates a hardship for the applicant.

Mr. Brighenti commented that, in accordance with the Planning Board bylaw, the applicant has requested a date for a balloon test. He explained that the test involves flying a balloon at the

proposed tower height so that people can actually see the location and appearance. He also reiterated his position that the Planning Board has the right to waive the setback from the residential property line, and noted that the applicant has submitted an affidavit and plots explaining why they need the tower to be located here to address a gap in service.

Mr. Rutan asked if the pole could be located at the Extra Space Storage facility, and suggested that it would also provide sufficient coverage. Mr. Fales stated that the location would not be adequate for the coverage that is needed.

Mr. Byun asked for clarification on the property line locations. The Applicant indicated the zone demarcation for the residential property lines to the north, and the homes located at 136, 142, and 156 East Main Street.

Mr. Farnsworth explained that when the zoning was redone in April 2009, the boundary line between the business and residential zones also changed with the intention being to eliminate split lots. He noted that the zoning line runs along the back of the lot at 265 Main Street.

Mr. Farnsworth stated that the plans indicate an 8-foot high fence around the compound, and asked about the distance between the fence and the property line. The Applicant indicated that there is a distance of 17 feet from the northeast corner of the fence. Mr. Farnsworth asked about the distance to the left property line, which the Applicant stated is 11 feet. Mr. Farnsworth explained that an 8-foot high fence is considered a structure, and therefore requires a 15 foot setback.

Mr. Rutan asked about the equipment pack, what it is housed in, and its proximity to the setback line. Mr. Brighenti explained that there are three base transmission stations arranged with a cabinet for battery backup and a booster cabinet, which are all placed upon a precast concrete pad. Mr. Farnsworth noted that the equipment cabinet is not considered a structure.

Chairman Rand stated that the applicant needs to decide if they wish to seek a variance for an 8 foot fence. Mr. Brighenti explained that an 8 foot fence is preferable for safety reasons, and indicated that the applicant will likely seek it as a separate variance request.

Mr. Brighenti reiterated that the applicant is seeking a variance from the 1000 foot setback from a school, and voiced his understanding that the Planning Board can waive the 500 foot setback from a residential property.

Mr. Byun asked if the applicant has done any diagrams of radiuses showing that they have exhausted all other options. Ms. Guino exhibited a diagram of the coverage areas. She noted that other sites were looked at for potential coverage, but indicated that if they were too close to another facility it would result in redundant coverage and they would lose some of the coverage from this proposed tower. She stated that the priority is to cover Route 20 and the residential areas and businesses in this area.

Jeff Amberson asked Chairman Rand to explain the criteria that must be met in order for the board to grant a variance. Chairman Rand explained the criteria found in MGL Chapter 40A Section 10 – variances may be granted based on circumstances relating to the shape, soil conditions, or topography of the land and that the desired relief does not cause substantial detriment to the public good.

Mr. Amberson asked the applicant to explain the hardship based on the criteria. Mr. Brighenti explained that, if the applicant can demonstrate that they have a lack of coverage in a specific

area, then they have the right to locate a facility that provides the most reasonable means to provide that coverage. He further explained that the topography on the property is such that they have the ability to provide the coverage that is needed. While they have tried to meet the bylaw, it is their opinion that the 1000 foot setback from a school is the most restrictive and results in an effective prohibition of service.

Mr. Amberson voiced his opinion that the applicant has created their own hardship by locking themselves into this particular parcel where they clearly do not meet the requirements of the bylaw instead of working to increase the size of other towers that already exist. Mr. Brighenti noted that, even with enhancing service from other facilities, there would still be a gap in service.

Mr. Amberson asked how other cell phone providers have coverage in the area in question. Mr. Brighenti voiced his assumption that those carriers may have a different type of technological service. Mr. Amberson questioned the applicant's assertion that an 80 acre parcel would be needed to meet the bylaw.

Mr. Benson asked about the types of calibration techniques that were used, and questioned whether any points within the model were validated. Ms. Guino indicated that she does have some dry test data that they compared with their model. Mr. Benson asked Ms. Guino to identify which buildings in the area did not have cell service. Ms. Guino stated that she did not personally go inside each building, but that the company has customer complaints detailing the lack of service. Mr. Benson asked for a list of those addresses, but Mr. Brighenti indicated that this information may be proprietary. Mr. Benson reiterated his desire to see some actual validated results.

Mr. Rutan asked Ms. Guino if she modeled based on a 120-foot tower or if they modeled for different tower heights on the same property. Ms. Guino indicated that valuations were done at various heights, and it was determined that the 120-foot height would allow for both the coverage that they need and for the co-location of other antennas.

Mr. Benson asked what the requirement is for providing space for co-location. He also asked for model predictions for both a 90-foot and a 60-foot tower. Mr. Rutan also requested the model if the tower was located at the Extra Space Storage facility.

Mr. Byun stated that the applicant had previously indicated that they had done a number of these projects in other towns. He asked if there are any other options that they might consider in lieu of seeking a setback variance for this site, and suggested that perhaps they could consider locating a higher tower further away from the residential properties. Mr. Brighenti stated that this is essentially the only option that works to provide the coverage that is needed.

Matthew Restenbaum, 9 Bluebell Road, Worcester, stated that his daughter attends St. Bernadette's school, and asked for the distance scale. He also noted that the applicant had previously indicated that power levels at the site are 3% of what is allowable under the FCC limits. Mr. Brighenti stated that they are at 3% at the antenna and noted that the power is lower the further away from the antenna and the site that you get. Mr. Restenbaum suggested that power levels are adaptable and dynamic. Ms. Guino commented that they are fixed. Mr. Restenbaum commented that the applicant could increase the power if they wanted to increase their coverage, potentially up to 100%, without having to notify anyone. Mr. Brighenti explained that this is simply not done, and explained that towns require an annual certification of the power operation. Mr. Restenbaum suggested that the children at the school would be subjected to four times the power level than they would have if the tower was at the regulated 1000 foot

minimum setback. Mr. Brighenti suggested that, as currently proposed, the power will be negligible at the school location. Ms. Guino ensured the audience that the power levels are safe and in compliance with FCC regulations. Mr. Restenbaum voiced his opinion that the applicant is creating their own hardship by insisting on the use of this site and he too would like to see other options investigated given the threats to the safety of the children at the school.

Glen Burney, 6 Torrey Lane, asked for the source of the 500-foot and 1000-foot setbacks. Mr. Farnsworth explained that they are contained within the town's bylaw, and noted that the Planning Board is currently investigating whether there is any justification to these setbacks. Mr. Farnsworth also stated that it is outside of this board's purview to consider the health effects of the radio frequencies. Mr. Rutan suggested that the setbacks may have come about due to the fragility of towers and a presumed safe distance in the event that the tower blew over or objects blew off. Mr. Farnsworth noted the existence of antenna complexes in other towns and in institutional buildings and suggested that they would not be there if there were any serious health concerns.

Al Guarino, 32 Little Pond Road, voiced his opinion that T-Mobile is more concerned about coverage and profits than the safety of the town's children. He noted that there have been studies done that contradict what the FCC deems as safe and suggested that it would be better to air on the side of safety. He noted that, while the public has the choice to turn a cell phone on or off, the children in the school have no choice about the environment they are being exposed to.

Dave Bissett, 136 East Main Street, noted that the proposed tower will be located in his back yard and suggested that the board has a 500 foot setback for a reason.

Jan Bissett, 136 East Main Street, commented that one of the alternate locations that was looked at was the Police Station, and questioned why that location was not pursued. She voiced her preference for an existing tower to be used instead of constructing a new one.

Mr. Brighenti explained that the tower at the Police Station would need to be rebuilt and increased in size by about 60-feet, and noted that as of today no RFP has been issued for construction of a tower on town property. He also stated that the applicant had approached the town numerous times about utilizing the Police Station as a site and was told that there was no interest. He stated that T-Mobile cannot consider the Police Station as an available property until an RFP has been issued. Ms. Bissett reiterated her desire to see this option further explored. She also suggested that the town needs to determine what is needed to ensure that we are not overrun with these requests year after year.

Mr. Amberson suggested that the applicant investigate the Police Station option again. He voiced his option that replacing an existing tower would be preferable to installing a new one on another parcel. He also questioned why it would not be possible to simply increase the power on a nearby tower. Ms. Guino stated that increasing the height and/or power of existing sites will still not reach the coverage area they are seeking. Mr. Amberson stated that an increase in power should result in a stronger signal.

Holly Bissett, 136 East Main Street, asked for clarification about the balloon test. Mr. Brighenti explained that the bylaw requires that the applicant fly a balloon at the site at the proposed tower height for a particular time period to demonstrate the visual impact of a tower at that height.

Tom Blasko, 18 Pondview Way, noted that the application packet indicates that the objective is to provide seamless coverage though the FCC regulations stipulate that they should have the ability to provide adequate coverage

Mr. Blasko also asked if the tower at the Extra Space Storage facility is considered a wireless communication facility and voiced his understanding that the bylaw contains a stipulation that prohibits a wireless communication facility from being constructed within 1 mile of another. He also stated that it must be assumed that more cell providers are going to be coming to the town to cite more poles and burden the town with these towers. Mr. Blasko referred to the three variances being sought in this application that will impact six residences and the children at the school. Given the issues, he cannot imagine why the board would ever consider approving this petition. He emphasized the importance of upholding the bylaw.

Jody Chapin, 8 Moore Lane, explained that her son is a student at St. Bernadette's. She noted that the guidelines for these wireless communication facilities were set by the FCC, not the CDC, and suggested that the potential health hazards to the citizens of the town should be the primary concern.

Mr. Brighenti stated that the FCC website demonstrates that this is an ongoing process and that the FCC is constantly modifying their guidelines to reflect the most updated data. Mr. Farnsworth reiterated that the town's legal counsel has indicated that consideration of any health concerns are not within this board's jurisdiction. Ms. Chapin questioned which town board would handle this particular issue.

Anthony Ziton, 1 Pondview Way, asked where in the bylaw it indicates that the board cannot consider the health effects of a wireless communication facility. Mr. Brighenti noted that federal law pre-empts the local authority, and as long as the facility meets the FCC guidelines then it cannot be denied for health reasons. Mr. Rutan reiterated that legal counsel has ruled that the board cannot consider it in rendering their decision.

Jackie Cotter, 164 East Main, asked why the town is expending the time and money to hold these meetings if the town is impotent to prevent this tower from being constructed. She also noted the concerns of the residential owners and stated that their feelings should be considered regardless of whether the FCC believes that they should.

Justin Davidson, 9 Gates Lane, stated that he has no issues with reception on his T-Mobile phone. He suggested that a co-location with another carrier would satisfy the needs of T-Mobile while keeping the tower away from the children at the school.

Al Guarino, 32 Little Pond Road, asked how the town can make sure that the police station site is considered. Chairman Rand suggested that Mr. Guarino contact the Board of Selectmen and encourage them to do so. Mr. Rutan commented that this application has been brought forward in conjunction with the property owner, so this board must consider that which is before them.

Steve McClure, 142 East Main Street, indicated that his house is not accurately represented on the maps provided by the applicant and suggested that the members of the board ensure that all structures shown are accurately reflected. Mr. Farnsworth commented that the location of the structure on the property is not critical as the bylaw refers to the property line.

A gentleman from Marlborough stated that his children attend St. Bernadette's School, and he is interested in knowing what percentage of T-Mobile's customer base is impacted and why this

tower is necessary. Mr. Brighenti stated that the customer base is monitored and when the monitoring indicates a certain level of dropped calls, T-Mobile pursues a resolution. He agreed to provide the board with data as to the numbers and percentages of dropped calls in this area.

Mr. Davidson asked what type of data the residents need to bring in order to oppose the tower. It was noted that the Planning Board process will be next, and it was suggested that the town seek the services of a professional who could give an opinion to the board as to whether what the applicant is presenting is accurate and viable information.

Ms. Landau explained that when an applicant seeks to construct a project that is prohibited in the bylaw, the board is here to consider whether they can grant relief from language of the bylaw.

Leslie Harrison, 28 Moore Lane, questioned the comment regarding whether or not the board can consider the health effects. As a member of the Planning Board, it is her understanding that local boards cannot consider alleged health effects of a cell tower. Mr. Farnsworth reiterated Town Counsel's ruling is that the federal regulations prohibit the board from taking into consideration alleged health effects. Ms. Harrison emphasized the need for the board to make defensible decisions.

Mr. Restenbaum suggested that there are other viable options that would meet the town's bylaws, but that the applicant is not pursuing them because they are not as optimal as the one being presented here this evening.

Mr. Amberson commented that the decision must be based on hardships caused by topography, soil conditions, or the shape of the lot but he has yet to hear anything about any of these. He suggested that, if those are literally the ground rules, he does not think that the applicant has proven any of them. Ms. Landau stated that the board has found the criteria to be so restrictive that it is nearly impossible to meet them. Therefore, the board needs to be flexible when there is a less obvious correlation between what the applicant is seeking and what hardship exists. Mr. Amberson commented that the applicant bears the burden to prove the hardship. Mr. Blasko voiced his opinion that the applicant has not proven that they actually have a hardship. Mr. Brighenti noted that, under the requirements of a variance as stated, the applicant only need to show one hardship. He stated that, by applying the interpretation of federal law, one can argue that the strict application of the bylaw means that coverage cannot be provided and thus the topography hardship provides the criteria under which the variance can be granted.

It was noted that the next meeting of the Zoning Board of Appeals will be held on March 23, 2010 and the Planning Board will meet on March 30th. Chairman Rand asked that all materials be submitted at least five days before the meeting to allow the board members adequate time to review the information.

Mark Rutan made a motion to continue the hearing to March 23, 2010 at 7:00PM. Sandra Landau seconded, vote unanimous.

DECISIONS:

117 Maple Lane – Mark Rutan voiced his opinion that it would be better to remove the existing house than to try to restore it. Mr. Farnsworth noted that there is no documentation and no recollection as to a definitive reason for the restriction contained in the 1992 decision. Ms.

Landau voiced support for the proposal. Mr. Rutan commented that moving the house further away from the pond would be beneficial.

Ms. Landau voiced her opinion that the board should grant the variance. Members of the board agreed.

Sandra Landau made a motion to grant a variance as requested to reduce the front setback to allow the building to be no closer than 20 feet and the front porch to be no closer than 15 feet to the front property line, which is considered to be the center line of the right of way with the following conditions:

1. The existing impervious cover shall be removed and replaced with grass to the maximum extent possible.
2. The roof runoff from the proposed house shall be recharged through a properly designed infiltration chamber or other similar unit.
3. An as-built site plan shall be submitted to the Town Engineer for approval prior to the issuance of a certificate of occupancy. The as-built shall include, at a minimum, and as applicable to the project, elevation of all pipe inverts and outlets, pipe sizes, materials, slopes; all other drainage structures; limits of clearing, grading, and fill; all structures, pavement; contours, impervious cover calculations and all dates of fieldwork. Upon approval by the Town Engineer one (1) mylar and three (3) paper copies of the as-built plan shall be submitted in addition to an electronic copy compatible with the Town's GIS system and the Town's vertical datum.

Mark Rutan seconded, vote unanimous (4 in favor and 0 opposed with Gerry Benson abstaining).

Sandra Landau made a motion to modify the decision, CASE # 92-02, by removing condition #. Mark Rutan seconded, vote unanimous (4 in favor and 0 opposed with Gerry Benson abstaining).

Review of Meeting Minutes – Mark Rutan made a motion to accept the Minutes of the Meetings of October 27, 2009; November 24, 2009; December 22, 2009; and January 26, 2010 as submitted. Sandra Landau seconded, vote unanimous.

Signing of decisions - Sandra Landau made a motion to authorize the Chairman to sign all decisions on behalf of the board and to authorize the Clerk to sign in the absence of the Chairman. Mark Rutan seconded, vote unanimous.

Adjourned at 10:00PM.

Respectfully submitted,

Elaine Rowe, Board Secretary