



TOWN OF BROOKLINE

Massachusetts

BOARD OF APPEALS

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PATRICK J. WARD, Secretary

APPEAL NO. 060015

DECISION UPON APPLICATION FOR SPECIAL PERMIT AND/OR USE VARIANCE BY NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC TO INSTALL WIRELESS TELECOMMUNICATIONS ANTENNAS AND ASSOCIATED EQUIPMENT ON THE PROPERTY KNOWN AND NUMBERED AS 300 SOUTH STREET, BROOKLINE, MASSACHUSETTS

The Applicant, Nextel Communications of the Mid-Atlantic, Inc., (hereinafter, the "Applicant"), filed an application for a special permit and/or use variance with the Town Clerk on March 1, 2006, seeking to install wireless communications antennas and associated equipment on the building and property known as 300 South Street in Brookline (the "Property"). The Application and related Exhibits are attached hereto as Exhibit A.

Notice of a Public Hearing was duly posted and noticed as required by law. A copy of the notice is attached hereto as Exhibit B and made a part hereof. Notice of the hearing was mailed to the owner of the Property, the Applicant and its attorney, the owners of properties deemed by the Board to be affected by the Application as their names appear on the then most recent real estate tax list, the Planning Board, and all others entitled by law to such notice.

A Public Hearing was convened on May 4, 2006 at 7:30 p.m., at 333 Washington Street, Brookline, Massachusetts. Chairman Diane R. Gordon and Board of Appeals members Bailey S. Silbert and Murray Shocket were present on behalf of the Board of Appeals (the "Board"). Ricardo M. Sousa, Esq. appeared on behalf of the Applicant. Radio Frequency engineer David Stoll was also present and testified on behalf of the Applicant.

I. INTRODUCTION

The Applicant is a personal wireless service provider licensed by the FCC to construct and operate a wireless communications network. The Applicant is in the process of filling certain coverage gaps that it has in various municipalities, including South Brookline. The Applicant requested relief from the Board of Appeals, either in the form of a special permit for the alteration of a pre-existing, non-conforming structure and

use, or in the form of a use variance, with the intent of installing six panel antennas in a faux chimney on the roof of the Property.

II. TESTIMONY AND EVIDENCE PRESENTED AT THE HEARING

Mr. Sousa informed the Board that the Applicant is licensed by the FCC to construct and operate a wireless network throughout the Country. He stated that the Applicant is in the process of filling certain coverage gaps that it has in various municipalities, in particular South Brookline. He stated that the Applicant was seeking relief from the Board in the form of a special permit for the alteration of a pre-existing nonconforming structure and use, or in the form of a use variance to permit the Applicant to install six panel antennas on the rooftop of the property. The antennas would be housed within a faux chimney extending ten feet above the roof line. The Applicant believes that the proposal would achieve the Town's goals of (1) encouraging antennas on existing structures; (2) minimizing the number of towers within the Town to encourage mitigation of visual aspects; and (3) minimizing the visibility of antennas. The faux chimney would be manufactured from a radio frequency transparent fiberglass material. Mr. Sousa stated that the proposal met all of the requirements of Section 4.09 of the Town's Zoning By-law except one; the prohibition of wireless installations on hospitals.

Mr. Stoll was introduced and a discussion ensued about the radio frequency plots submitted by the Applicant, the coverage the proposed site was expected to provide, the Applicant's existing cell sites in the Town, and the alternative sites the Applicant has looked into, including the Brandegee Mansion on Allandale Road and the Shops at Putterham. He testified that the Allandale Road site was rejected because it is too close to an existing site at 850 Boylston Street in Brookline; and the Shops at Putterham site was rejected because two other carriers' contemporaneous applications there had been denied by this Board and the Applicant's equipment is larger than the equipment proposed by those carriers.

The Chairman asked whether the Applicant had considered the Town's proposed Distributed Antenna System ("DAS"). Mr. Sousa stated that the Applicant had considered the DAS, but rejected it on the basis that it would not provide the same coverage objective that the Applicant was proposing here, as shown by the blue and purple areas contained in the Applicant's radio frequency plots. In particular he stated that the DAS would not provide reliable indoor coverage to the Applicant's customers.

Associate Town Counsel Joslin Murphy appeared and stated that in order for a Special Permit to be granted, a determination would have to be made that the Bournewood Hospital is an appropriate location. Since the current Zoning By-law expressly prohibits installations on hospitals this criteria could not be met. She said that under the alternative use variance theory, the criteria set forth in Section 9.09 of the Zoning By-law did not appear to have been met.

In rebuttal, Mr. Sousa stated that the Board could issue a Special Permit. He stated that the proposal would not have a substantially more detrimental effect on the property than under its current use, and that the antennas would not be seen by the public. He then addressed the criteria established under G.L. c. 40A, s. 10 that are required for the issuance of a Use Variance.

Janice Khan of 63 Craftsland Road, a Town Meeting Member from Precinct 15, spoke in opposition to the Application and in favor of the DAS. She stated that she has been involved with the Town in telecommunications matters for a number of years, and that she participated in drafting the relevant section of the Town's Zoning By-law. She stated that during the past two years, the Town had engaged in a lengthy public process to determine a more integrated approach to solving the coverage needs for all carriers in South Brookline. The result of that process was to recommend the installation of a DAS in South Brookline. She disputed the assertions made by the Applicant concerning the DAS's capability to provide reliable indoor coverage and stated that because of the number and placement of nodes that will comprise the DAS network, the DAS was expected to provide reliable indoor and outdoor coverage for all of the carriers. She also stated that the DAS would accommodate newer cellular and data technology that is being developed for the future.

Alisa Jonas of 333 Russett Road, a Town Meeting Member from Precinct 16, spoke in opposition to the Application and in favor of the DAS.

Francine Jacobson, 11 Intervale Road, spoke in opposition to the Application. She distinguished Bournemouth Hospital, a private, residential hospital, from the larger Boston area hospitals that currently accommodate cell antennas.

Joyce Zak of 44 Intervale Road, President of the South Brookline Neighborhood Association, spoke in opposition to the Application and in favor of the DAS, which she believes is a good solution to the coverage issues in South Brookline. She stated that the South Brookline neighborhood supported the DAS proposal.

In rebuttal, Mr. Sousa stated that the DAS is not a panacea and will not solve the Applicant's coverage problem in South Brookline. Mr. Sousa then elicited testimony from Mr. Stoll indicating that in his view, the DAS system could not be expected to provide reliable indoor coverage in the area.

The Chairman recognized Tim Greenhill, from the Town's Planning Board. Mr. Greenhill stated that the Planning Board had met on April 27, 2006 and concluded that a Use Variance would be required. The Board felt that the Applicant did not meet the requirements for a use variance under Section 9.09, and he felt that the Applicant did not adequately demonstrate that they had investigated the alternatives; therefore, the Planning Board unanimously recommended a denial. The Planning Board's report dated April 27, 2006 is attached hereto as Exhibit C and incorporated herein by reference.

The Chairman recognized Frank Hitchcock from the Building Department. Mr. Hitchcock stated that he did not believe the non-conforming use of the Bournemouth Hospital was being increased at all as suggested by the Applicant's proposal; and that this was not an extension of the hospital, or anything to do with the hospital. He concluded by stating that the Building Department did not recommend favorable action on the Application.

The Board's deliberation of the matter followed. Mr. Shockett stated that he was sympathetic to the Applicant's needs and if the law allowed, he would grant relief. Mr. Silbert stated that Bournemouth Hospital represents a vulnerable population and this doesn't seem an appropriate place for a commercial venture. The Chairman voted to deny the petition on the grounds that the Zoning By-law excludes hospitals as locations for cell phone technology and the use variance criteria set forth in G.L. c. 40A, s. 10 have not been met. Mr. Silbert seconded the Chairman's vote. Based on a vote of 2 - 1, the Application was denied.

III. FINDINGS OF FACT

Based on the evidence submitted at hearing, the Board makes the following findings of fact:

1. The Petitioner is a licensed wireless service provider;
2. A "coverage gap" is an area within a wireless service provider's coverage network where there is insufficient signal strength to permit reliable cellular service;
3. The Applicant has an existing coverage gap in certain sections of South Brookline;
4. The Property is a building comprising a part of the Bournemouth Hospital, a private psychiatric hospital in South Brookline which, under the Town's Zoning By-law, is located in an S-7 Single Family Residential District;
5. The Petitioner proposes to install six cellular panel antennas within a faux chimney on the roof of the Property (the "proposed cell site");
6. The proposed cell site will not eliminate the Applicant's existing coverage gap in South Brookline;
7. The proposed cell site will not eliminate the coverage gaps in South Brookline that may exist for other licensed cell carriers;
8. By vote of a May 2005 Brookline Town Meeting, of which this Board takes judicial notice, under Article 10 in the Warrant for that Meeting, a copy of which is attached as Exhibit D, together with the official record for that

Article, the Town accepted the proposal of the Moderator's Committee on Wireless Services in South Brookline to install a Distributed Antenna System ("DAS") in South Brookline;

9. The Town's DAS proposal is expected to resolve the existing coverage gaps in South Brookline and is a feasible alternative to the proposed cell site;
10. The Town's DAS proposal has not been fully investigated by the Petitioner;
11. Under Section 4.09(6) of the Town's Zoning By-law, the Property is a prohibited location for the proposed cell site; and
12. If allowed, the proposed cell site would adversely affect the neighborhood.

IV. APPLICABLE LAW

A. The Board's Jurisdiction

Under G.L. c. 40A, the Zoning Board of Appeals (the "Board") is authorized to "hear and decide appeals in accordance with section eight" of the Zoning Act; to hear and decide certain applications for special permits; [and] to hear and decide petitions for variances. See, G.L. c. 40A, s. 14.

B. Authority to Grant a Special Permit

Special permits may be issued only for "uses which are in harmony with the general purpose and intent of the ordinance or by-law." *G.L. c. 40A, s. 9.*

The Town's Zoning By-law provides, in relevant part, as follows:

Section 9:05 – CONDITIONS FOR APPROVAL OF SPECIAL PERMIT

1. The Board of Appeals shall not approve any such application for a special permit unless it finds that in its judgment all of the following conditions are met:
 - a. The specific site is an appropriate location for such a use, structure, or condition;
 - b. The use as developed will not adversely affect the neighborhood.
 - c. There will be no nuisance or serious hazard to vehicles or pedestrians.
 - d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

- e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people.

C. Authority to Grant a Use Variance

A use variance may be granted only upon a specific finding that "owing to circumstances relating to the soil conditions, shape or topography of [the] land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the . . . bylaw would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public goods and without nullifying or substantially derogating from the intent or purpose of the . . . bylaw." *G.L. c. 40A, s. 10.*

The Town's Zoning By-law provides, in relevant part, as follows:

Section 9.09 – CONDITIONS FOR APPROVAL OF USE VARIANCE

1. The Board of Appeals may grant a use variance, provided statutory variance requirements are met, only on a lot that conforms to one or more of the following conditions:
 - a. Expiration of the time limit specified for a previously granted use variance.
 - b. Existence prior to January 1, 1977, of uses of the same general classification as the use variance applied for, on lots adjoining the lot in question on both sides, or, if the lot in question is a corner lot, on both the side and the rear.
 - c. Existence on an adjoining lot of a use of such nuisance characteristics as to render unreasonable any conforming use of the lot in question.
 - d. Existence on the lot in question of a structure(s) of appearance compatible with its vicinity which is either of historical or architectural significance which shall be preserved or restored in a manner sufficient to justify the relief granted herein; and/or contains gross floor area excessive for the use permitted in the district wherein the structure is located, and which can reasonably be maintained as a visual and taxable asset only if a nonconformity of use is permitted. A special permit under Section 5.09 shall be required in conjunction with every variance request pursuant to this subparagraph.
2. A use variance may be granted only if the Board of Appeals makes all of the findings required by statute for a variance, and further subject to all of the following limitations:

- a. The extent of the use nonconformity as to floor space, bulk, number of occupants or other relevant measure shall be no greater than the minimum necessary to provide relief from the statutory hardship.

D. The Town's Zoning By-law

Section 4.09 of the Town of Brookline Zoning By-Law (the "By-law"), establishes the procedure for installing wireless telecommunication antennas and towers in the Town. The stated purpose of the by-law is "to allow the adequate development of wireless communications services and at the same time regulate the design and location of wireless telecommunications facilities to ensure that demand is fulfilled in a manner which preserves the safety, character, appearance, property values, natural resources, and historic sites of the town . . . the standards . . . are intended to achieve the following goals: encourage location of antennas on existing commercial buildings and structures rather than on residential ones or new towers, mitigate any adverse visual effects through proper design, location and screening, encourage co-location where it will minimize visual and other impacts, and prohibit new towers in districts where they may be incompatible with existing residential uses." *Town of Brookline Zoning By-law, Section 4.09(1)*.

V. CONCLUSIONS

The Applicant seeks a special permit on the ground that the proposed installation constitutes an alteration of a pre-existing non-conforming structure and/or use. The Applicant's counsel suggests that because the existing height of the Property currently exceeds the height restriction that is permitted in an S-7 single family residential district under the Town's Zoning By-law, the proposed installation would simply amount to an alteration of a pre-existing non-conforming structure and/or use. However, as Mr. Hitchcock pointed out, the proposed installation cannot be construed as an alteration of the current use of the Property. The Property houses a residential psychiatric hospital, and telecommunication antennas and related equipment on the roof bear no relation to the existing use of the Property.

In addition, the conditions for approval of a special permit under G.L. c. 40A, s. 9 and Section 9.05 of the Town's Zoning By-law have not been met. The proposal is not in harmony with the purpose and intent of the by-law; it is not an appropriate location for the installation of telecommunications antennas; and the use as developed can be expected to adversely affect the neighborhood. The By-law expressly prohibits wireless communications antennas and facilities on or within 50 feet of a residence or hospital, and the Property comprises a part of a private, residential hospital. Ms. Kahn, who has worked extensively with the Town in telecommunications related matters, testified that the Town has engaged in a lengthy, deliberative process over the past two years to determine how to best meet the needs of both the carriers and the community, and the result of that process was to recommend the installation of a DAS in South Brookline. The DAS, which is supported by the neighborhood, is expected not only to resolve the coverage gaps in South Brookline for all carriers, but also to accommodate future

wireless technology. The cell nodes that would comprise the proposed DAS network are relatively visually insignificant in contrast to the more substantial macro sites that are routinely proposed by cell carriers. In addition, the Applicant's RF Engineer conceded that the proposed cell site would not solve the Applicant's entire coverage gap in South Brookline and that additional installations would likely be necessary in South Brookline. Therefore, if the Board were to allow the requested relief in derogation of the referenced by-law, the result would undermine the process described by Ms. Kahn and be likely to launch a proliferation of significantly larger cellular installations within the neighborhood.

Alternatively, the Applicant is seeking a use variance. In order for a use variance to be granted, there must be a specific finding that "owing to circumstances relating to the soil conditions, shape or topography of [the] land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the . . . bylaw would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the . . . bylaw." The Applicant's evidence does not support such a finding. Moreover, none of the criteria set forth in Section 9.09 of the Town's Zoning By-law appear to have been met, and, as this Board has found, the proposed cell site would adversely affect the neighborhood. Therefore, the Board is also proscribed from issuing a use variance in this matter.

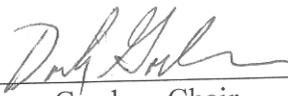
VI. DECISION AND VOTE

Based upon the foregoing findings of fact and conclusions, this Board has, by a split vote of 2 - 1, AFFIRMED the decision of the Building Commissioner, and DENIED the relief requested by the Applicant.

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Diane Gordon, Chair

A True Copy:

ATTEST:



Patrick J. Ward
Board of Appeals