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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2022-000065
1550 BEACON STREET

Petitioner DISH Wireless L.L.C. applied to the Building Commissioner for permission to install antennas with support equipment in faux chimney concealments on the roof w/ additional equipment on the roof at 1550 Beacon Street. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed December 15, 2022, at 7:00 p.m., virtually as the date, time, and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney (if any) of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board, and to all others required by law. Notice of the hearing was published on December 1, 2022, & December 8, 2022, in the Boston Globe, a newspaper in general circulation in Brookline. A copy of said notice is as follows:

TOWN OF BROOKLINE - Zoning Board of Appeals
NOTICE OF HEARING

The Brookline Zoning Board of Appeals will hold a public hearing

on

Date/Time: Thursday, December 15, 2022

Location: Virtual Hearing

Virtual Registration Link: <https://bit.ly/3u3LMCR>

Petitioner: DISH Wireless L.L.C.

Address: 1550 Beacon Street

Subject: Antennas with support equipment in faux chimney concealments on the roof w/ additional equipment on the roof.

Nature of Action/Relief:

\$4.07 - TABLE OF USE REGULATIONS, USE #40C; \$4.09 - WIRELESS TELECOMMUNICATIONS SERVICES; \$5.09.2.A - DESIGN REVIEW; \$8.02 - ALTERATION OR EXTENSION

Plans and submissions may be viewed online at

<https://www.brooklinema.gov/DocumentCenter/Index/3379>

Interested persons may provide comments at the public hearing or by submitting written comments by email to manthony@brooklinema.gov.

Assistive Listening Devices are available upon request:

<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>

Publish: 12/1/2022 & 12/8/2022

At the time and place specified in the notice, this Board held a virtual public hearing. Present at the hearing was Chairman, Jesse Geller and Board Members Neil Wishinsky and Randolph Meiklejohn. Also in attendance was Attorney Michael R. Dolan, Brown Rudnick, 10 Memorial Blvd, Providence, RI 02903.

Zoning Board of Appeals Chair Geller called the virtual hearing to order at 7:00 pm. Chair Geller reviewed the standard hearing procedure for virtual hearings and confirmed that all Board Members and staff could visually and auditorily engage in the hearing. Attorney Dolan waived a reading of the published notice.

Attorney Dolan presented the case for the petitioners, stating that his client, DISH Wireless L.L.C., is a new entrant into the wireless services telecommunications landscape and has FCC licenses to operate a telecommunications network throughout the country. He continued, stating that as a part of the buildout for their new wireless network, DISH is seeking to install a wireless antenna facility on the roof of the 116'8" building located at 1550 Beacon Street. He explained that DISH currently has no antenna facilities anywhere in Brookline and the new facility will help a coverage gap in the surrounding area of the town.

Attorney Dolan explained his client's proposal, stating DISH is proposing to install six panel antennas, two per sector, on the building rooftop at an antenna top height of 126'8", together with related amplifiers, cables, and fibers. The antennas will be camouflaged behind three faux chimney concealments, painted and blended to match the color and architectural features of the building. He continued, stating the proposal also entails installing an equipment cabinet and appurtenances, all of which will be out of view to the public, behind the rooftop penthouse. The photo simulations, included in the application, demonstrate the appearance of this proposed camouflage facility. Attorney Dolan stated that, from a land use planning perspective, DISH was pleased to find this very high and tall structure, upon which it could have its out of sight antennas installed without having to construct a new structure to locate these antennas or some other type of visually intrusive facility.

Attorney Dolan explained that this proposal constitutes an eligible facilities request, pursuant to **Section 6409(A)** of the Middle Class Tax Relief and Job Creation Act of 2012, otherwise known as the Spectrum Act. Specifically, the Spectrum Act mandates that state and local governments may not deny and shall approve any eligible facilities request for a modification of an existing structure with an existing wireless tower or base station that does not

substantially change the physical dimensions of such a tower or base station. In this case, the 1550 Beacon Street building constitutes a base station under the terms of the Spectrum Act, because it is a structure that already houses the rooftop antennas of another FCC licensed carrier, in this case T-Mobile. Attorney Dolan stated, that based on the forgoing, as well as the analysis included in their application, DISH's proposal constitutes an eligible facilities request for modification of an existing base station and does not substantially change the dimensions of the building, which is supported by the Planning Staff and Planning Board.

Attorney Dolan then stated he had some requests for modifications of the proposed conditions listed on the Planning Board Report. He continued that condition number one should be modified to require the plans be stamped and signed by a registered engineer, rather than an architect. He then also requested that the monitoring and inventory fee mentioned in condition three be reduced from \$1,500 to \$500 and stated that The Assistant Director of Regulatory Planning agreed to this modification of the conditions.

At the request of Chair Geller, Zoning Coordinator/Planner Madison Anthony digitally displayed the Planning Board Report for the proposal. Chair Geller noted that the proposed conditions on the Report are consistent with other telecommunication equipment cases that have previously been approved. Board Member Wishinsky asked if the Board thought there might be any problems with changing the first condition to require the final plans be stamped and signed by a registered engineer, rather than a registered architect. Chair Geller stated that this modification sounds reasonable and asked Ms. Anthony if the Planning Department would approve of this change. Ms. Anthony confirmed that the Planning Department was aware of this requested modification and approves of the change.

Chair Geller then made note of the second proposed condition that reads, “The faux chimneys and equipment shall match the color of the surrounding rooftop appurtenances.” He explained that the purpose of this condition is to disguise everything on the roof relating to the antennas and, therefore, previous cases have required that all supporting equipment on the roof must be disguised in this manner as well. For consistency, all equipment related to the proposal will need to be disguised in this manner as well.

Board Member Micklejohn responded to Chair Geller, suggesting that the Board avoided language like “hidden” and he stated that he likes the language of the condition whether the term chimney is included or not, but here the word chimney should be understood to mean enclosure, and he appreciates the conditions about them matching the color of the rooftop. He continued, stating that tall buildings tend to be visible from great distances, so while these structures might be invisible from the side walk in front of the building, they would be visible from other further away areas of Brookline. He stated that he thinks matching the color of the rooftop is a good condition, but we should not expect them to be any more hidden than the appurtenances are.

Mr. Geller stated that, in the prior case, panel antennas were required to be painted and textured to match the structures to which they are affixed, so in that case they were just painting them out. Attorney Dolan responded that in this case, they are planning on placing the antennas behind an enclosed structure, which would make them appear as a roof structure, but they are open to either method of camouflaging the antennas.

Chair Geller inquired the height of the chimneys. Attorney Dolan responded that it was 10’ off the rooftop. He added that there is an existing penthouse that is higher than the 10’, to which the T-Mobile antennas are affixed. The top of their proposed antennas would measure

126'8", while the top of the penthouse is 135'6". Chair Geller asked for clarification on if penthouse meant mechanicals in this circumstance. Attorney Dolan responded affirmatively.

Chair Geller noted that in the previous decision, there was a final review and approval of the site by the Assistant Director of Regulatory Planning and said it was not included in the proposed conditions in the Planning Board Report. Ms. Anthony stated that the Planning Department would be agree to adding the condition.

Board Member Wishinsky inquired if there was a monitoring/inventory fee on the previous decision. Chair Geller responded that the previous decision had a \$1,500 monitoring and inventory fee.

Chair Geller asked Attorney Dolan if the applicant had considered any alternative sites. Attorney Dolan responded that the applicant looked at other buildings, but prefers utilizing buildings that already FCC license wireless antennas on them based on the fact that they have already previously been recognized as a good site by the respective municipality. Chair Geller then asked if a denial would prevent the applicant's ability to provide wireless service. Attorney Dolan responded affirmatively.

Board Member Meiklejohn noted that the language of **Section 4.09** required the applicant to demonstrate that the additional height above 10' is necessary for proper functioning. Attorney Dolan responded that in this case they are not going 10' above the roof height and the applicant submitted materials that demonstrated the need for these materials from a radiofrequency perspective. He added that a maximum permissible exposure study was also included with the submission, evidencing that with this site online, the facility would be well below all state, local, and federal regulations regarding radiofrequency emissions.

Board Member Meiklejohn stated that under Section 40.9.6.B, the Planning Board has been given the authority to approve antenna facilities less than 10' above the roof, and it is only when they are 10' above that the Board of Appeals needs to grant relief. He added that looking at the language of Section 4.09, the only mention of the need for the Board of Appeal's approval is in cases where the antenna height exceeds 10' from the rooftop and where it lists the approval standards in that situation. Mr. Meiklejohn asked if Ms. Anthony could display the page of the Planning Board report that lists the relief requested. Ms. Anthony did so, displaying that Section 4.07 – Table of Use Regulations, Use #40C, Section 4.09 - Wireless Telecommunication Services, Section 5.09.2.A – Design Review, and Section 8.02 – Alteration or Extension were all cited. Attorney Dolan added that the Spectrum Act preempts all these other local regulatory requirements for relief and they comply with the criteria for the issuance of approval under that Act, but the applicant is open to whatever means of approval the Board deems appropriate.

Board Member Wishinsky asked Chair Geller if the relief could be granted without the use of a use variance because of the preemption. Chair Geller responded that this has been an ongoing issue, because the Town's Zoning By-Law is currently inconsistent with federal telecommunications laws. The argument that the By-Law is preempted and, therefore, a use variance is not required has always been the case and it would present an issue if the Board denied an application for this type of relief. Chair Geller continued, stating that the preferred way to grant the relief here (from the Town's perspective) seems to be through the Town's By-Law so that the conditions can be applied. Attorney Dolan asked if the relief could be granted with a special permit, since they are intensifying an already non-conforming use, as it is how some other municipalities have previously handled this issue. Chair Geller responded that he is not sure the fact that there is an existing use can be extended to a second user in this case, and he

believes the notion is that the applicant, and all future users, would need to obtain a use variance. He continued, stating that the argument is aided by the fact that there is a previous decision, but the process needs to be observed. Attorney Dolan added that under local law the applicant may still need a use variance, but under federal law this is preempted.

Chair Geller noted the description of a memo received by the Board of Appeals mentions a “collocation of wireless communications facilities and asked for clarification on if the term “collocation” is intended to mean that DISH wireless alone is going up on a roof where other users already exist, rather than meaning that DISH is proposing a traditional collocation center where it takes on other participants/users that will access their equipment. Attorney Dolan replied that the facilities and equipment would be only for use by the applicant, DISH wireless.

Chair Geller asked if any members of the public wished to speak in favor of or in opposition to the requested relief. No one in attendee indicated they wished to do so.

Ms. Anthony delivered the findings of the Planning Department.

FINDINGS

§4.07 – TABLE OF USE REGULATIONS, USE #40C

Wireless facilities are prohibited from residential buildings. A Use Variance is required.

§4.09 - WIRELESS TELECOMMUNICATIONS SERVICES

Wireless telecommunications antennas are not allowed on a building containing any dwelling units. Since this is on a residential building, a **use variance** is required.

§5.09.2.A – DESIGN REVIEW

Structures on Beacon Street require a special permit under design review. Since this is located on a rooftop, no landscaping or trees would be removed and there is no impact on nearby buildings or the streetscape because the antennas are concealed in faux chimneys.

§8.02 - ALTERATION OR EXTENSION

A **special permit** is required for the alteration of a non-conforming structure.

PLANNING STAFF COMMENTS

Planning Staff, from a planning perspective, does not find this proposal for collocation of wireless facilities on a rooftop of a 15 story building objectionable. The antennas are concealed

in faux chimneys and the radio cabinet, which contains much of the ancillary equipment, is located in a radio box behind a rooftop penthouse. Because of the height of the building, visibility of the new equipment is limited. Staff believes that the criteria for a use variance cannot be met, but that approval could be based on Federal Law which allows non-significant modification of existing wireless facilities.

PLANNING BOARD COMMENTS

The Planning Board, after viewing the photo simulations of the roof of the building, agreed with the Planning Staff that there appears to be no significant negative visual impact to the surrounding neighborhood. The faux chimneys, which will house the antennas, are unobtrusive, especially considering they will be painted the same color as the roof, and the radio box has been sensitively located behind an existing penthouse. It would seem to the Planning Board that the criteria for a use variance cannot be met, but that the wireless facility could be allowed under the "Spectrum Act", which permits collocation and modification of existing facilities if no new impactful changes are proposed.

Therefore, the Planning Board recommends approval of the plans NB+C, dated, 5/27/22, the Planning Staff suggests the following conditions:

- 1. Prior to the issuance of a building permit, the applicant shall electronically submit final plans and elevations, stamped and signed by a registered architect, to the Assistant Director for Regulatory Planning for review and approval.**
- 2. The faux chimneys and equipment shall match the color of the surrounding rooftop appurtenances.**
- 3. Prior to the issuance of a building permit, the applicant shall submit a removal bond of \$5,000 to insure removal of abandoned or inoperable equipment, and a monitoring /inventorying fee of \$1,500 to the Building Commissioner.**
- 4. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) final plans and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.**

The Chairman then called upon Paul Campbell to provide the Building Department report.

Mr. Campbell stated that the Building Department has no objections to the request for relief and stated if the Board grants relief the Building Department will ensure compliance with the Building Code.

In deliberation, Board Member Wishinsky stated that in order to approve this, they must decide which conditions are appropriate. He continued, stating that the Planning Board conditions seem appropriate, subject to the changes that would require the site plans be stamped by an engineer, rather than an architect, and the additional review by the Assistant Director of Regulatory Planning, suggested by the Chair. However, he stated he was still unclear on if the relief should be approved under a use variance or the Spectrum Act.

Board Member Meiklejohn stated that if the Board need to grant the requested relief under **Section 5.09.2.A** and **Section 8.02**, he believes these criteria have been met under the previous case and, because the appearance of the antenna and supporting structures have been camouflaged, he would be in favor of granting the requested relief on those two sections. He added, however, that he would also unclear on if the remaining relief should be granted under a use variance or the Spectrum Act.

Chair Geller stated that if the conditions are to be included, the relief should be granted under Brookline's Zoning By-Law and noted the Spectrum Act prevents the relief from being denied. He continued, stating that the circumstances here do not seem to fit a use variance, so in this situation the use should be granted under the Spectrum Act and the design aspects, which would include relief from **Section 5.09.2.A** and **Section 8.02**, should be granted via special permit through **Section 9.05** of the Zoning By-Law. Chair Geller added that while he agrees with all other modifications to the conditions discussed, the \$1,500 monitoring/inventory fee should remain in order to be constituent with previous cases.

The Board then determined, by unanimous vote, that it is desirable to grant the requested relief under the Spectrum Act and the Special Permits and that the petitioner has satisfied the requirements necessary for relief under **Sections 5.09.2.A** and **8.02**. In addition, the Board made

the following specific findings under **Section 9.05** based on the evidence submitted at the hearing and the Board's deliberation:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will no 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. Development will not have any effect on the supply of housing available for low- and moderate-income people.

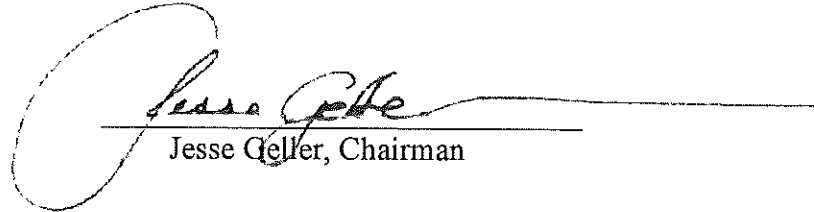
Accordingly, the Board voted unanimously to grant the requested relief subject to the following conditions:

- 1. Prior to the issuance of a building permit, the applicant shall electronically submit final plans and elevations, stamped and signed by a registered engineer, to the Assistant Director for Regulatory Planning for review and approval.**
- 2. The faux chimneys and equipment shall match the color of the surrounding rooftop appurtenances.**
- 3. Prior to the issuance of a building permit, the applicant shall submit a removal bond of \$5,000 to insure removal of abandoned or inoperable equipment, and a monitoring /inventorying fee of \$1,500 to the Building Commissioner.**
- 4. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) final plans and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.**

Unanimous Decision of

The Board of Appeals

Filing Date: 1/26/2023



Jesse Geller, Chairman

A True Copy
ATTEST:



Benjamin Kaufman
Clerk, Board of Appeals