



Jesse Geller, Chair  
Christopher Hussey  
Jonathan Book

# *Town of Brookline*

## *Massachusetts*

Town Hall, 1<sup>st</sup> Floor  
333 Washington Street  
Brookline, MA 02445-6899  
(617) 730-2010 Fax (617) 730-2043  
Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2013-0072  
**Owner: HAMILTON PARK TOWERS LLC**

Petitioner, New Cingular Wireless PCS, LLC, acting by and through its manager, AT&T Mobility Corporation, applied to the Building Commissioner for permission to install telecommunications facility and equipment on the roof at 175-185 Freeman Street (Dexter Park Apartments). The application was denied and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed at 7:30 PM December 19, 2013, in the Selectmen's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, 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 November 28 and December 5, 2013, in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

**NOTICE OF HEARING**

**Pursuant to M.G.L. C. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:**

Petitioner: **NEW CINGULAR WIRELESS PCS, LLC**  
Owner: **HAMILTON PARK TOWERS LLC**  
Location of Premises **175 FREEMAN STREET**  
Date of Hearing: **DECEMBER 19, 2013**  
Time of Hearing: **7:30 PM**  
Place of Hearing: **SELECTMEN'S HEARING ROOM, 6<sup>TH</sup> FLOOR**

A public hearing will be held for a variance and/or a special permit from

**Section 4.07: Table of Use Regulations – Use #40c**  
**Section 4.09: Wireless Telecommunications Services**  
**Section 4.09.6.a.1: Wireless Telecommunications Services**  
**Section 8.02.2: Alteration and Extension**

of the Zoning By-Law to **INSTALL TELECOMMUNICATIONS FACILITY AND EQUIPMENT ON THE ROOF** at **175 FREEMAN STREET**.

Said Premises located in an **M-2.0 (Multi-Family) residence district**.

*Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.*

*The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. ~Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to Robert Sneirson, Town of Brookline, 11 Pierce Street, Brookline, MA ~02445. ~Telephone (617) 730-2328; TDD (617) 730-2327; or e-mail [atrsneirson@brooklinema.gov](mailto:atrsneirson@brooklinema.gov)*

**Jesse Geller**  
**Jonathan Book**  
**Christopher Hussey**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Jonathan Book, and members Johanna Schneider and Avi Liss. Attorney

Michael R. Dolan, Brown Rudnick LLP, 10 Memorial Boulevard, Providence, RI presented the case on behalf of the Petitioner as follows:

Petitioner is proposing to install 12 new panel antennas on the existing penthouse of the existing residential structure (the "Building"). There will be four panel antennas on each of two sides of the penthouse and the remaining four antennas mounted inside a stealth enclosure on the south side of the Building. Petitioner is proposing to construct an equipment shelter to house the required electronic equipment. There will also be remote radio heads, and global positioning system antennas installed on the roof with surge arrestors, coaxial cables, and cable trays. Petitioner's proposed antennas, equipment, cables, shelters and enclosures are collectively referred to as the "Facility".

Attorney Dolan indicated that Petitioner is licensed by the FCC to provide wireless telecommunications services to the Town of Brookline and all of the Commonwealth of Massachusetts and proposes to install its Facility on the Building for the purpose of filling a significant gap in its network. The main roofline of the Building is 84' 7" above ground level ("AGL") and the top height of the existing penthouse on the roof of the Building is 100' 3" AGL. The tops of the proposed antennas on the penthouse will not exceed the height of the penthouse, and will be painted to match the color of the penthouse facade. Petitioner's remaining antennas will be concealed within a stealth enclosure, designed to resemble a penthouse structure on the roof of the Building. The height of the stealth enclosure will not exceed the height of the existing penthouse. Petitioner's equipment will be located within a proposed shelter also placed upon the roof of the building and will be painted to match the color of the Building. The proposed equipment shelter will not exceed the height of the existing penthouse. Attorney Dolan

indicated that Petitioner has submitted Radiofrequency Coverage Maps illustrating a significant gap in its network coverage and the ability of the proposed facility to fill the significant gap.

Attorney Dolan stated that the proposed Facility will be designed to blend with the architectural features of the Building. Potential visual impacts are minimized and the aesthetic qualities of the Town of Brookline are preserved. The Facility will not be contrary to the public interest and welfare. The Facility will benefit those living and working in, and traveling through the area by providing enhanced wireless telecommunication services and by providing and improving wireless communications services to the residents, businesses, commuters, and emergency personnel utilizing wireless communications in the immediate vicinity and along the nearby roads. The Facility will not generate any objectionable noise, odor, fumes, glare, smoke, or dust or require additional lighting or signage. The Facility will have no negative impact on property values in the area. No significant increase in traffic or hindrance to pedestrian movements will result from the Facility because on average, only one or two round trip visits per month are required to service and maintain the Facility. Attorney Dolan stated that the Facility will be unmanned and will have no negative effect on the adjoining lots. The Facility does not require police or fire protection because the installation has its own monitoring equipment that can detect malfunction and/or tampering.

Board Member Johanna Schneider questioned Attorney Dolan about the process to identify sites in the area for locating the Facility. Attorney Dolan asked Jonathan Lawrence of Centerline Communications, 95 Ryan Drive, Raynham, MA to address Petitioner's process to identify sites for locating the Facility. Mr. Lawrence testified that he investigated ten other locations in the area, and that 175 Freeman was the best location to close the gap in network coverage. Board Member Avi Liss noted that a number of the locations were one and two buildings, and asked

about the minimum height that the antennas need to be placed to close the coverage gap. Attorney Dolan asked M. Sohail Usmani, a radio frequency engineer, of 10 Kestrel Lane, Westford, MA to address Board Member Liss's question regarding height for placement of antennas. Mr. Usmani indicated that antennas must be placed at a minimum height of 80 feet, and that 175 Freeman was the only potential site with sufficient height. Finally, Attorney Dolan asked Damian Schmalz of Dewbury Engineers, Inc., 280 Summer Street, Boston, MA to address questions from Board Member Avi Liss regarding noise generated from the Facility, and questions from Chairman Jonathan Book regarding placement of the Facility on the Building including the enclosures of the roof of the Building.

Attorney Dolan then addressed the requirements under the Brookline Zoning Bylaw for the issuance of a use variance. He noted that the parcel is located in the M-2.0 Apartment House zoning district and the Facility is proposed upon an existing apartment building. Pursuant to Article IV, Section 4.09(6) (a) of the Bylaw, a wireless telecommunications facility at the Site is not allowed. Article IX, Section 9.09 empowers the Board to grant variances for use in very limited circumstances in addition to the findings required by statute in Massachusetts General Laws, Chapter 40A, to wit:

**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 §5.09 shall be required in conjunction with every variance request pursuant to this subparagraph.**

Attorney Dolan noted that none of the conditions enumerated in Section 9.09 (1) of the Bylaw applies to the Site. He indicated that relief could be granted under the Federal Telecommunications Act of 1996, 47 U.S.C. 332(c) *et seq.* ("TCA"). Federal courts interpreting the TCA have held that where an applicant for the installation of wireless communications facilities to provide communications services seeks zoning relief as required by the municipal zoning bylaw, federal law imposes substantial restrictions affecting the standard for granting the requested relief. The TCA provides that: no laws or actions by any local government or planning or zoning board may prohibit, or have the effect of prohibiting, the placement, construction, or modification of communications towers, antennas, or other wireless facilities in any particular geographic area; local government or planning or zoning boards may not unreasonably discriminate among providers of functionally equivalent services; health concerns may not be considered so long as the emissions comply with the applicable standards of the FCC; and, decisions must be rendered within a reasonable period of time.

Attorney Dolan indicated that the courts have held that an effective prohibition occurs if a carrier demonstrates a significant gap in coverage and has investigated other viable alternatives. Also, a municipality must approve a wireless facility if denying the petition would result in a "significant gap" in wireless services within a municipality because such denial would amount to

an effective prohibition of wireless services. The courts have recognized that an effective prohibition can exist even where a town allows for the erection of wireless communications facilities but subject to criteria which would result in incomplete wireless services within the town. Therefore, if an applicant establishes that the proposed facility would fill a significant gap in its wireless service coverage and is the least intrusive and only means reasonably available to accomplish that end, then the municipality must approve the requested zoning relief.

Attorney Dolan further noted that courts have ordered certain municipalities to issue the necessary permits to allow the construction of a tower as described in the petition for zoning relief, foregoing an opportunity for the municipality to impose reasonable conditions on the wireless communications installation. Furthermore, courts have held that the need for closing a significant gap in coverage, to avoid an effective prohibition of wireless services, constitutes another unique circumstance when a zoning variance is required. He noted that in the case of Sprint Spectrum L.P. v. Town of Swansea, Civil Action No. 07-12110-PBS, June 26, 2008, the federal District Court for Massachusetts held that notwithstanding the town zoning bylaw or Massachusetts state law, towns have the authority and obligation to grant use variances to avoid violating the TCA. In a growing number of cases, the federal courts have found that variance denials violate the TCA, even if such denials would be valid under state law.

Attorney Dolan concluded that through the evidence submitted, Petitioner has demonstrated that significant gaps exist in Petitioner's network in this area of Brookline and the Facility is the only feasible means reasonably available to Petitioner to fill its significant gaps in coverage. Petitioner has further demonstrated compliance with the terms of Massachusetts General Laws Ch. 40A and Article IX, Section 9.09 of the Bylaw as follows:

- a. **A literal enforcement of the provisions of the By-Law would involve substantial hardship, financial or otherwise, to the petitioner.**

The existing Building is a uniquely tall structure in the subject area of the M-2.0 zoning district making this structure suitable for the installation of a wireless communications facility. Petitioner's hardship is a significant gap in coverage. The location of the Site relative to Petitioner's gap in network coverage renders the proposed location uniquely suited for the Facility to fill the existing significant gap in coverage thereby permitting Petitioner the ability to provide adequate coverage in this area of Brookline as part of its network pursuant to its FCC license. Radio frequency coverage maps and a Report of Radio Frequency Engineer, provided by the Applicant confirm that a communications facility located at the Site is required to remedy the existing gap in the Petitioner's network coverage in the area.

- b. **The hardship is owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land and structures but not affecting generally the zoning district in which it is located.**

The Site is unique because it contains the Building which is well suited for the Facility in light of Petitioner's existing significant gap in coverage. The intent of the TCA was to promote competition within the wireless communications industry and rapid deployment of adequate service. As demonstrated in the Report of a Radio Frequency Expert and radio frequency coverage plots included within the materials submitted by the Applicant, the proposed Facility and relief requested are necessary to remedy a significant gap in reliable service coverage within Petitioner's existing network infrastructure. The Building is of a sufficient height and is available to Petitioner. By installing its Facility on the Building, the need to construct a new tower in the immediate vicinity is eliminated.

- c. **Desirable relief may be granted without either substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of the Bylaw.**

Consistent with the intent and purpose of the Bylaw, the proposed Facility will be designed to blend with the architectural features of the Building. Potential visual impacts are minimized and the aesthetic qualities of the Town of Brookline are preserved. The Facility will not be contrary to the public interest and welfare. The Facility will benefit those living and working in, and traveling through the area by providing enhanced wireless telecommunication services and will aid in public safety by providing and improving wireless communications services to the residents, businesses, commuters, and emergency personnel utilizing wireless communications in

the immediate vicinity and along the nearby roads. The Facility will not generate any objectionable noise, odor, fumes, glare, smoke, or dust or require additional lighting or signage. The Facility will have no negative impact on property values in the area. No significant increase in traffic or hindrance to pedestrian movements will result from the Facility. On average, only one or two round trip visits per month are required to service and maintain the Facility. The Facility is unmanned and will have no negative effect on the adjoining lots. This Facility does not require police or fire protection because the installation has its own monitoring equipment that can detect malfunction and/or tampering.

Chairman Jonathan Book then asked if anyone in attendance wished to speak in support of or in opposition to Petitioner's proposal. Fred LeBow of 71 Colchester Street, Brookline, spoke in favor of the relief. Mr. LeBow noted that he represents the property owner, Hamilton Park Towers LLC. No one else spoke in support of or in opposition to Petitioner's proposal.

Polly Selkoe, Assistant Director for Regulatory Planning, delivered the findings of the Planning Board.

## **FINDINGS**

### **Section 4.07 – Table of Use Regulations; Use #40c**

Telecommunications facilities are not an allowed use on a residential structure and require a use variance.

### **Section 4.09 – Wireless Telecommunications Services**

**Section 4.09.6.a.1 – Wireless Telecommunications Services:** All wireless telecommunications antennas and mounts on a residential building, or any related equipment, fixtures, or enclosures, *require a use variance* from the Board of Appeals.

If an antenna is not on a residential building, they are subject to the design review standards under *Section 4.09.7.a (1, 2)*. The standards are as follows:

They shall be as unobtrusive as possible when viewed from the street and from upper floors of nearby residences. Every effort should be made to have them blend in with the style and color of the building they are located upon and with the surrounding environment and not negatively impact property values or environmentally sensitive areas, such as wetlands or historic sites. Where necessary, screening shall be provided to minimize visible impacts. Items for evaluation during the approval process include color, finish, size, location on building façade or roof, camouflaging, and screening. Greater setback from the edge of a building may be required, if it helps to minimize visual impacts and improves overall aesthetics.

**Section 8.02.2 – Alteration or Extension**

A special permit is required to alter this non-conforming use.

Ms. Selkoe indicated that the Planning Board is pleased that the Petitioner, as requested, has submitted additional information about noise impacts, alternative locations, and radio frequency data demonstrating that this site is needed to fill a gap in cell coverage. She indicated that the Planning Board is now satisfied that this location is necessary to provide adequate wireless coverage in the area.

From an aesthetic point of view, the rooftop antennas, which will match the existing exterior of the penthouse, will not be visually intrusive, nor will the remote radio heads and global positioning system antennas, which are not visible from the ground.

However, the placement of the equipment shed was more controversial, with the majority of the Planning Board members supporting the proposed new location on the roof of the other side of the building facing St. Paul Street, and a minority of two noting that the current By-Law prohibits cell related equipment on residential buildings, and therefore a different standard should be set for residential buildings requiring equipment sheds to be located in the interior of buildings, and this was acceptable to Petitioner.

**If the Board of Appeals finds that this proposal should be granted in conformance with mandated federal and state regulations, the Planning Board recommends the submitted plans, prepared by Dewberry Engineers Inc., last dated 10/3/13, be subject to the following conditions:**

- 1) Prior to issuance of a building permit, final plans and elevations of the wireless facility and all supporting and concealing structures shall be submitted to the Assistant Director for Regulatory Planning for review and approval.
- 2) The panel antennas shall match the structure to which they are affixed.
- 3) All antennas and related equipment shall be removed if abandoned or not in operation for a time period of twelve months or longer.

- 4) Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner a removal bond of \$5,000, and a letter with surety amount to cover the cost of removal.
- 5) Prior to issuance of a building permit, the applicant shall submit a \$1,500 monitoring/inventorying fee to the Building Commissioner.
- 6) Prior to a final sign-off, review and approval of the installation shall be made by the Assistant Director for Regulatory Planning.
- 7) Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor; 2) final plans and elevations of the wireless facility and all supporting equipment; and 3) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.

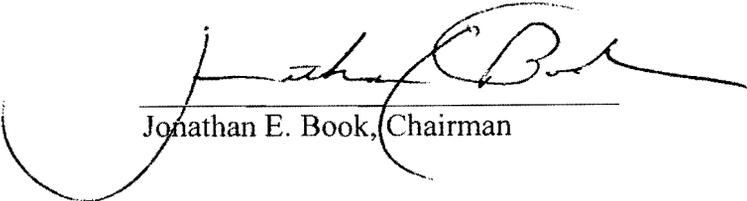
The Chairman then called upon Polly Selkoe, Assistant Director for Regulatory Planning to deliver written comments from Michael Yanovitch, Chief Building Inspector, on behalf of the Building Department. Mr. Yanovitch said the Building Department has no objection to the requested relief.

The Board, having deliberated on this matter and having considered the foregoing testimony, concluded that, while Petitioner likely met the requirements for a variance under M.G.L. c. 40A, it did not meet the requirements for a use variance under Section 9.09(1) of the Brookline Zoning By-law. However, the Board found that Petitioner had demonstrated that significant gaps exist in Petitioner's network in this area of Brookline and that locating the Facility at the premises is the only feasible means reasonably available to Petitioner to fill its significant gaps in coverage. Without the relief requested, Petitioner would be unable to provide adequate coverage, thereby creating a hardship recognized by federal and state courts interpreting the Federal Telecommunications Act (TCA), and that relief must be granted pursuant to the TCA.

Accordingly, the Board voted unanimously to grant the requested relief in accordance with the plans prepared by Dewberry Engineers Inc., last dated 10/3/13, subject to the following conditions:

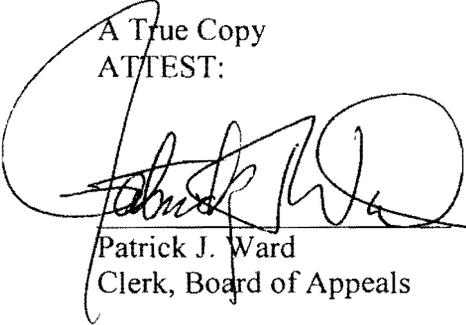
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- 7) Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor; 2) final plans and elevations of the wireless facility and all supporting equipment; and 3) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of  
The Board of Appeals

  
Jonathan E. Book, Chairman

Filing Date: January 15, 2014

A True Copy  
ATTEST:

  
Patrick J. Ward  
Clerk, Board of Appeals

2014 JAN 15 A 11:38

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