

**BOARD OF ZONING APPEALS
RECORD OF MINUTES AND PROCEEDINGS
March 17, 2010**

The Board of Zoning Appeals of the Town of Weymouth held a public hearing on Wednesday, March 17, 2010, at 7:00pm at McCullough Building, Whipple Center Conference Room, 182 Green Street, Weymouth, MA for the purpose of passing on the applications of certain persons whose petitions were properly before the Board. Notice of the public hearing had been given by mail to the parties in interest of the subject locus and by publication in the Weymouth News.

BZA CASE #3055 approx. 188 Idlewell Blvd. (cont.)

Application of Cannon Construction Corp., for approximately 188 Idlewell Blvd., adjacent to 182 Idlewell Blvd., also shown on the Weymouth Town Atlas Sheet 9, Block 136, Lot 18 in R-1 zoning district, seeking a special permit and/or variance Chapter 120-38(3)(D)(3), 120-38.4, 120-51 Table 1, & 120-52 to construct a single family home on a lot within the Floodplain District Zone A4 with a variance of the side yard setback.

Present:	Richard McLeod, Chairman Edward Foley, Vice-Chair Mary McElroy, Clerk Francis Kenneally Charles Golden
Staff:	Rod Fuqua, Principal Planner
Recording Secretary:	Janet Murray

A MOTION was made by Mrs. McElroy to CONTINUE the public hearing until April 7, 2010 and was seconded by Mr. Golden and UNANIMOUSLY VOTED.

HEARING CONTINUED TO APRIL 7, 2010.

BZA CASE #3081 132 Union Street

Application of Mike and Cherylanne Harkin for property at 132 Union Street, also shown on the Weymouth Town Atlas Sheet 46, Block 529, Lot 6, located in an R-1 zoning district seeking a special permit and/or variance under Chapter 120-40 to extend a nonconforming building by creating a mud room/laundry from the existing porch.

Present:	Richard McLeod, Chairman Edward Foley, Vice-Chair Mary McElroy, Clerk Francis Kenneally Charles Golden
Staff:	Rod Fuqua, Principal Planner
Recording Secretary:	Janet Murray

At the request of the applicant, a MOTION was made by Mrs. McElroy and seconded by Mr. Foley to allow the applicant to WITHDRAW the application and was UNANIMOUSLY VOTED.

BZA CASE #3083 31 Woodbine Road

Application of Dong Doan Phan for property at 31 Woodbine Road, also shown on the Weymouth Town Atlas Sheet 30, Block 391, Lot 16, located in an R-1 zoning district seeking a special permit and/or variance under Chapter 120-40 to add a first floor and second floor addition to an existing non-conforming single family dwelling.

Present: Richard McLeod, Chairman
Edward Foley, Vice-Chair
Mary McElroy, Clerk
Francis Kenneally
Charles Golden
Staff: Rod Fuqua, Principal Planner
Recording Secretary: Janet Murray

The applicant was represented at the hearing by Mr. Starkey. Mr. Starkey stated that the house was built about 50 years ago. He stated that because of the size of the site, there needs to be a second floor. He noted that the addition does not further encroach on the property line setbacks.

Mr. McLeod asked if the addition will stay within the existing footprint of the building. Mr. Starkey stated that the footprint will remain the same.

Mr. Fuqua stated that the application was routed to various Town Departments and received the following comments.

- Conservation Commission noted that the property is within the 100 foot wetlands buffer zone and the applicant must file a Request for Determination or Notice of Intent with the Conservation Commission. Conservation Administrator has already met with the property owner to discuss their pending application.
- Fire Department had no comment.
- Health Department had no objections.
- Police Department had no issues.
- Department of Public Works
- Water, Sewer, Highway/C&M/DPW Director, Engineering
 - Water Department had no comments.
 - Sewer Department noted that water and sewer mitigation fees will be due; under the proposed first floor addition at the front of the house to 10 feet outside of the new foundation, replace existing 5" AC sewer with 4" CI pipe. Replace remaining 5" AC sewer to the main with 6" PVC.
- Schools noted no special concerns.
- Tax Department noted that taxes/utilities are current.

Mr. Fuqua noted that the proposed addition is maintaining the existing setback of 9.8 feet. He noted that Mr. Starkey has submitted documentation to show that there was a free standing garage in the past.

Mr. Fuqua noted that there is no flood plain involvement as the location is above flood plain elevation

A MOTION was made to close the public hearing and was seconded and UNANIMOUSLY VOTED.

A MOTION was made by Mrs. McElroy to APPROVE the request for a SPECIAL PERMIT to add a first floor and second floor addition to an existing non-conforming single family dwelling. The Board finds that, in its judgment; all of the following conditions are met:

- (1) The specific site is an appropriate location for such a use.
- (2) The use involved will not be detrimental to the established or future character of the neighborhood or town.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians.
- (4) Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- (5) The public convenience and welfare will be substantially served.

The MOTION was seconded by Mr. Golden and was UNANIMOUSLY VOTED.

FINDINGS:

The Board found that the SPECIAL PERMIT would not derogate from the intent and purpose of the Zoning Ordinance, and the requested relief could be granted without substantial detriment to the public good nullifying or substantially derogating from the intent and purpose of the Ordinance.

- (1) The specific site is an appropriate location for such a use.
- (2) The use involved will not be detrimental to the established or future character of the neighborhood or town.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians.
- (4) Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- (5) The public convenience and welfare will be substantially served.

DECISION OF THE BOARD:

The Board was familiar with the site and had the benefit of a plan. The majority of the members had viewed the site in question. Due to the above findings, it was UNANIMOUSLY VOTED to APPROVE the request for a SPECIAL PERMIT to add a first floor and second floor addition to an existing non-conforming single family dwelling. The Board finds that, in its judgment; all of the following conditions are met:

- (1) The specific site is an appropriate location for such a use.
- (2) The use involved will not be detrimental to the established or future character of the neighborhood or town.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians.

- (4) Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- (5) The public convenience and welfare will be substantially served.

BZA CASE #3052 84 Liberty Street (Discussion and/or Decision)

Application of T Mobile Northeast LLC for property at 84 Liberty Street, also shown on the Weymouth Town Atlas Sheet 55, Block 607, Lot 10, located in a PIP zoning district for a special permit for wireless communication, freestanding structure in PIP zoning district and variance from height limitations of Table 1, Schedule of District Regulations.

Present:	Richard McLeod, Chairman
	Francis Kenneally
	Kemal Denizkurt
	Robert Galewski
	Charles Golden
Staff:	Rod Fuqua, Principal Planner
Recording Secretary:	Janet Murray

Mr. McLeod summarized the application request. He noted that 5 public hearings had been held between 8/26/09 through 2/24/10. He listed the exhibits as follows:

1. Affidavit of radio frequency expert dated 4/10/09
2. Affidavit of site acquisition specialist dated 2/10/10
3. Appraisal by Valentine Associates dated 12/16/09
4. Drop call data submitted by applicant
5. T-Mobile supplemental data which includes a letter to South Shore Tri-Town; Health Memorandum; site plan aerial photograph; and drop call data
6. Various coverage maps and pictures of comparable poles
7. Petition of opposition signed by many of the abutters
8. Aerial photographs of proposed new site
9. Photo simulation report of what the proposed pole would look like at the site
10. Peer review by Turning Mills Consultants
11. Application for special permit and variance
12. Site plans
13. Court decision Omni Point vs. City of Cranston
14. Memorandum of law by Attorney Devin
15. T-Mobile's response memorandum of law to memorandum of law by Attorney Devin

Mr. McLeod stated that there are two issues: Whether or not there is a significant gap in coverage network as identified by the applicant and whether the proposed site is the only feasible site for the proposed cell tower that would to cover the gap in coverage. He noted that deciding these issues the Board must look at all facts submitted to the Board during the public hearings including the numerous submissions by the applicant, testimony by the applicant's experts, peer review and testimony of the abutters.

Mr. McLeod asked Mr. Fuqua that since the applicant has moved the proposed pole away from residential zone does the applicant still need a special permit? Mr. Fuqua stated that, yes, they do need a special permit because it is a free standing structure. Also a variance is needed due to the height of the proposed pole.

Issue #1 significant coverage gap network

Mr. McLeod stated that exhibits numbered 1, 4, and 5 support the applicant's position that there is a coverage problem in the identified area; however, it is problematic in that not one individual came forward to complain about dropped calls or lack coverage by T Mobile. He noted that this was a highly publicized matter. He also noted that abutters have come out in numbers to oppose this application.

Mr. McLeod stated that the peer review did not conduct independent testing of the site. Turning Mills simply reviewed the applicant's technical data and agreed with the T-Mobile's data that there was a gap in coverage in this location.

Mr. McLeod noted that there is was a possible issue of credibility of Turning Mill's report because it was asked if Turning Mills had done work for T Mobile prior to the peer review. Turning Mills initially denied that it had worked for T-Mobile. It was later revealed that Turning Mills had performed work for T Mobile in the past. Mr. McLeod acknowledged that Turning Mills indicated that most contractors had done work for the major telecommunications companies at some point in time. Whether a company could be found to conduct an independent peer review that had worked for T Mobile remains to be seen.

Mr. Galewski commented that all carriers have dropped calls in certain areas, at certain times, and in certain locations. He concurred with Mr. McLeod that no one came forward to complain about dropped calls. He noted that T Mobile's position was that people were dropping calls and that is why they had to locate the cell tower on this lot.

Mr. McLeod stated that it is the applicant's burden to show that there is a significant gap in coverage. He noted that T Mobile submitted a multi-colored map which depicted a gap in coverage in a certain area of Weymouth, Hingham and Rockland. He indicated that there were several maps which showed how a 120 foot cell tower, 100 foot cell tower and 80 foot cell tower would eliminate the gap in coverage for the identified area.

Mr. McLeod stated that when you compare the map of the Hanabury site and the map of the Tricor site with a 100 foot cell tower he noted that the gap in coverage in Rockland initially identified by T-Mobile was not reduced despite the pole being moved closer to Rockland. Also, the Hanabury site, although acceptable to T-Mobile, left a major roadway without coverage and the Tricor site, which was unacceptable to T-Mobile, provided coverage for the major roadway. The Tricor site map with a 100 foot cell tower seemed to provide coverage for the identified area. Neither map provided 100 percent coverage for the particular area. T-Mobile never provided a coverage map with a 120 foot cell tower at the Tricor site. There was no evidence submitted by T-Mobile that Tricor would not accept a 120 foot cell tower at its site. He stated that the maps are misleading.

Mr. McLeod noted that the case law relied upon by T-Mobile in Exhibit 15 stated that the relevant analysis in this jurisdiction is whether the applicant has a significant gap in its coverage network. Significant gap depends not only upon the gap's physical size but also more importantly the number of customers affected by that gap. According to the Town of Lincoln case, the Court held "a gap that straddles a heavily travelled commuter thoroughfare would be more significant than a gap that affects a residential cul de sac."

Mr. McLeod stated that according to the maps there appeared to be a major roadway that needed to be covered. The area surrounding Hanabury site is mostly residential cul de sacs and that a cell tower at either the Hanabury or Tricor site would provide acceptable coverage for the residential area.

Mr. McLeod stated that the maps are puzzling because the pole that is proposed on the Hanabury site, which was acceptable to T-Mobile, would not increase coverage in Rockland, which is one of the areas identified by the applicant as lacking coverage along with Hingham and Weymouth.

Mr. McLeod noted that the T-Mobile clearly stated that town boundaries would not preclude placing a pole in one town in order to provide coverage in another town if a significant gap in coverage exists. This was T-Mobile's response to a question about placing the pole in another town if the gap exists in that town.

Mr. McLeod stated that there would be more coverage if there was a 120 foot pole at the Tricor site.

Mr. Golden commented on the peer review. He stated that he is comfortable with the choice of peer reviewer. He pointed out that the Board got the name for the peer review company from another municipality. He noted that the conclusions and recommendations were towards the ideal circumstances as opposed to any hardship currently. He noted that they recommended a 120 foot structure at this location.

Mr. Kenneally noted that that he thinks that the application is prospective in nature; a need in the future.

Mr. McLeod stated that Mr. Devin requested the peer review. He noted that the Planning Department was responsible for selecting the company to conduct the review. The peer review did what they were asked to do which was to review the technical data concerning a gap in coverage network. The peer review ultimately determined that there is a gap in the coverage network.

Mr. McLeod pointed out that no one from the residential area near the Hanabury site had spoke in favor of the cell tower; there is in fact a petition from residents of this area against T-Mobile's request to place a cell tower in the area.

Issue #2 Is there another feasible site

Mr. McLeod stated that the grade in new location on Hanabury's site is 14 feet lower than the original site. However the grade at the Tricor site is much higher than the grade at the Hanabury

site. Once again we have no evidence that the owners of the Tricor site would prohibit 100 to 120 foot cell tower.

T-Mobile did not provide any information that the lease expense at the Tricor site was much more than the lease expense at the Hanabury site. He stated that there was no financial data submitted at all by T-Mobile.

Mr. McLeod stated that Weymouth's bylaws have a 100 foot height restriction. He pointed out that Hingham also has had a 100 foot height restriction but Hingham recently approved a variance to allow for a 130 foot cell tower to be installed in their town at the end of 2009. As a result, it would appear Hingham would be a less restrictive town in order to construct a cell tower at the Tricor site.

Mr. McLeod stated that the Board is not trying to eliminate competition; they are applying the facts to our ordinance and case law submitted by T-Mobile, and to make a determination as to whether the facts support the request for a variance and special permit.

Mr. Kenneally referenced the OMNI Point case from 5/09. He stated that the applicant has a heavy burden to show that no other site is feasible. They have not demonstrated that other sites were fruitless or a waste of time to even try. Mr. Kenneally stated that he is not persuaded that Tricor's site is fruitless to consider as there is no other information about Tricor; there is no information that a 120 foot pole at Tricor would not provide sufficient coverage for this area; especially since the Tricor site is only ½ mile from the Hanabury site.

Mr. Denizkurt noted that the Tricor site is in an industrial zone while the Hanabury site is a fringe site to a residential zone.

Mr. McLeod stated that there were three other sites identified by T-Mobile:

1. 1st site TRS Modern Realty site was covered with wetlands and very close to the Hanabury site. No major difference but more costly to place in this location
2. 2nd site Weymouth Naval Air Station was not practical because of all of the obstacles at that site
3. 3rd site Tricor (Hingham). T-Mobile claimed that business terms with the owner could not be agreed upon and that the majority of the needed coverage area proposed was located in Weymouth.

Mr. McLeod noted that all the evidence submitted by the T-Mobile seems to contradict that the Tricor site is not a feasible site. It would appear that this site has better topography than the Hanabury site; Hingham has previously allowed a variance for a 130 foot cell tower; stronger coverage of major roadways and residential areas; no financial information to support that the parties could not come to an agreement; and T-Mobile's admission that town boundaries do not preclude placing a cell tower in another town in order to provide coverage in surrounding towns.

Mr. Kenneally stated that the applicant must provide documentation of meaningful effort; the efforts may have been meaningful but there is no documentation.

Mr. Fuqua noted the higher topography of the Tricor. He asked if there were any other physical impediments based on land conditions.

Mr. McLeod stated that no physical impediments were identified; the applicant had indicated that they could not agree upon terms. He indicated that there was no comparison of those terms between the Tricor owners and the Hanabury owners.

Mr. Galewski stated that it seems that the applicant has still not proven the reason why they are going to this particular site; no one has come forward about dropped calls only T Mobile states that there is a gap.

Mr. McLeod stated that we need two motions, one for the variance and the other for a special permit.

A MOTION was made by Mr. Kenneally to DENY the request for a SPECIAL PERMIT for wireless communication, freestanding structure in PIP zoning district and variance from height limitations of Table 1, Schedule of District Regulations. The Board finds, in its judgment; the following:

- (1) The specific site is NOT an appropriate location for such a use. The applicant bears a heavy burden to show that no other site is appropriate. There is an alternate site that has not been documented as being inappropriate or fruitless to pursue. This alternate location is 14 feet higher in grade and would provide the substantially the same coverage in the identified area.
- (2) The use involved WILL BE detrimental to the established or future character of the neighborhood or town. The abutting residents have submitted a petition opposed to the application.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians as there would be no significant traffic or parking requirements.
- (4) Adequate and appropriate facilities will NOT be provided for the proper operation of the proposed use as there is a more appropriate site available at Tricor.
- (5) The public convenience and welfare will NOT be substantially served. The applicant has not demonstrated that this application will serve anything other than their own financial interest.

The MOTION was seconded by Mr. Golden and was UNANIMOUSLY VOTED.

Owing to circumstances relating to the soil conditions, shape, or topography of such 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 ordinance would NOT involve substantial hardship, financial or otherwise. The findings in opposition are that the applicant failed to show that a substantial hardship existed. It was noted that the application will

help the applicant's financial situation but they have not shown any hardship relating to the soil conditions, shape, or topography of the land.

FINDINGS:

The Board found that the SPECIAL PERMIT and VARIANCE WOULD derogate from the intent and purpose of the Zoning Ordinance, and the requested relief could be granted without substantial detriment to the public good nullifying or substantially derogating from the intent and purpose of the Ordinance.

- (1) The specific site is NOT an appropriate location for such a use. The applicant bears a heavy burden to show that no other site is appropriate. There is an alternate site that has not been documented as being inappropriate or is fruitless to pursue. This alternate location is 14 feet higher in grade and would provide substantially the same coverage in the identified area.
- (2) The use involved WILL BE detrimental to the established or future character of the neighborhood or town. The abutting residents have submitted a petition opposed to the application.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians as there would be no significant traffic or parking requirements.
- (4) Adequate and appropriate facilities will NOT be provided for the proper operation of the proposed use as there is a more appropriate site available at Tricor.
- (5) The public convenience and welfare will NOT be substantially served. The applicant has not demonstrated that this application will serve anything other than their own financial interest.

DECISION OF THE BOARD:

The Board was familiar with the site and had the benefit of a plan. The majority of the members had viewed the site in question. Due to the above findings, it was UNANIMOUSLY VOTED to DENY the request for a SPECIAL PERMIT and VARIANCE for wireless communication, freestanding structure in PIP zoning district and variance from height limitations of Table 1, Schedule of District Regulations. The Board finds, in its judgment; the following:

- (1) The specific site is NOT an appropriate location for such a use. The applicant bears a heavy burden to show that no other site is appropriate. There is an alternate site that has not been documented as being inappropriate or is fruitless to pursue. This alternate location is 14 feet higher in grade and would provide substantially the same coverage in the identified area.
- (2) The use involved WILL BE detrimental to the established or future character of the neighborhood or town. The abutting residents have submitted a petition opposed to the application.
- (3) There will be no nuisance or serious hazard to vehicles or pedestrians as there would be no significant traffic or parking requirements.
- (4) Adequate and appropriate facilities will NOT be provided for the proper operation of the proposed use as there is a more appropriate site available at Tricor.
- (5) The public convenience and welfare will NOT be substantially served. The applicant has not demonstrated that this application will serve anything other than their own financial interest.

OTHER BUSINESS

BZA CASE #2849 Weathervane Golf Club & Village at Weathervane

Present: Richard McLeod, Chairman
Francis Kenneally
Kemal Denizkurt
Robert Galewski
Charles Golden
Staff: Rod Fuqua, Principal Planner
Recording Secretary: Janet Murray

Mr. Fuqua stated that this is a request made in regards to Weathervane. There is a shed shown on the C-12 map. This one shed is currently used as a maintenance shed. It is located on what is to be one of the cul de sacs.

What they are looking to do is make a temporary relocation to move the shed off of the roadway. The applicant is reviewing their options. They are asking if the Board will consider this as a minor relocation so that they can start work on the roads. They will come back in at the time of the construction of the clubhouse.

Mr. Galewski asked when the applicant would come back in. Mr. Fuqua stated that it would likely be this summer.

Mr. Golden pointed out that the applicant will make this minor change and if there is a change from the original plans, they will be back before the Board.

A MOTION was made by Mr. Golden to APPROVE the request as a minor modification and was seconded by Mr. Galewski and was UNANIMOUSLY VOTED.

MINUTES – 3/3/10

A MOTION was made and seconded to APPORVE the Minutes of March 3, 2010 and was UNANIMOUSLY VOTED.

ADJOURNMENT

The meeting was adjourned at 7:30 p.m.

Richard McLeod, Chair

Date