



Town of Barnstable Zoning Board of Appeals



Board Members:

Alex Rodolakis – Chair David Hirsch – Vice Chair Herbert Bodensiek - Clerk
Jacob Dewey – Regular Member Paul Pinard – Associate Member
Todd Walantis – Associate Member Mark Hansen – Associate Member
James Tinsley – Town Council Liaison

Staff Support

Elizabeth Jenkins – Director - elizabeth.jenkins@town.barnstable.ma.us
Anna Brigham – Principal Planner – anna.brigham@town.barnstable.ma.us
Carol Puckett – Administrative Assistant – carol.puckett@town.barnstable.ma.us

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BARNSTABLE
TOWN CLERK

Minutes

Wednesday, March 27, 2019

Hearing Room – 2nd Floor – 367 Main Street, Hyannis, MA

Alex Rodolakis - Chair	Present
David Hirsch – Vice Chair	Absent
Herbert Bodensiek – Clerk	Present
Jacob Dewey – Regular Member	Present
Paul Pinard – Regular Member	Present
Todd Walantis – Associate Member	Present
Mark Hansen – Associate Member	Present
Vacant	
Vacant	

Also present were Elizabeth Jenkins – Director of Planning & Development, Anna Brigham – Principal Planner, Ruth Weil – Town Attorney, and Carol Puckett – Administrative Assistant.

Since a quorum has been met Alex opens the hearing at 7:05 PM.

Call to Order

Introduction of Board Members – *All members present introduce themselves*

Alex reads the following with no response:

Notice of Recording

Please note that this meeting is recorded and broadcast on Channel 18 and in accordance with MGL Chapter 30A §20. I must inquire whether anyone is taping this meeting and to please make their presence known.

Matters not Reasonably Anticipated

Alex announces that there are two vacancies on the Zoning Board of Appeals should anyone be interested.

Alex reads the following appeals into the record:

Old Business

7:01 PM

Appeal No. 2018-044

T-Mobile Northeast, LLC.

T-Mobile Northeast, LLC., as lessee, has applied for a Special Permit pursuant to Article XIV, Section 240-130.4.B (2) of the District of Critical Planning Concern Regulations: Continuation; Changes in Use; Damaged Structures. The applicant is proposing to install six (6) wireless communications antennas, together with Remote Radio Heads (RRH), within the existing steeple of the South Congregational Church at a centerline height of sixty (60) feet. Further, appurtenant base transceiver equipment consisting of equipment cabinets and ancillary equipment will be installed in the basement of the Church. The subject property is located at 565 Main Street, Centerville, MA as shown on Assessor's Map 207 as Parcel 053. It is located in the Centerville Village District (CVD).

7:02 PM

Appeal No. 2018-047

T-Mobile Northeast, LLC.

T-Mobile Northeast, LLC., as lessee, has petitioned for a Use Variance pursuant to Article XII Section 240-125.B(1)(e) - Administration and Enforcement, Zoning Board of Appeals. The Petitioner is proposing to install six (6) wireless communications antennas, together with Remote Radio Heads (RRH), within the existing steeple of the South Congregational Church at a centerline height of sixty (60) feet. Further, appurtenant base transceiver equipment consisting of equipment cabinets and ancillary equipment will be installed in the basement of the Church. The subject property is located at 565 Main Street, Centerville, MA as shown on Assessor's Map 207 as Parcel 053. It is located in the Centerville Village District (CVD).

Original Hearing Date: September 26, 2018. Continued to November 7, 2018; Continued to January 9, 2019, Continued from February 27, 2019.

Members assigned 09-26-18 and 11-07-18: Alex Rodolakis, David Hirsch, Herb Bodensiek, Paul Pinard, Todd Walantis

Members assigned tonight, March 27, 2019: Alex Rodolakis, Herb Bodensiek, Paul Pinard, Todd Walantis, Mark Hansen

Representative: Ricardo Sousa, Esq. from Prince Label Tye. Also with him is Brian Sullivan Site Acquisition Agent for J-Lee Consultants on behalf of T-Mobile and Ryan Montederamos who is Radio Frequency Engineer for T-Mobile. Attorney Sousa states that the last time he was here they were deferred on jurisdiction issue in order to give them the opportunity to give a presentation and application to the Planning Board for a regulatory agreement. Since then, the Planning Board held a hearing and denied T-Mobile's request for a regulatory agreement which they received today. They are now here for the original application for relief in either a special permit or a variance. The question before this board is if they will take jurisdiction over these applications.

Alex asks Attorney Sousa to go over the special permit application.

Attorney Sousa refers to Tab 2 of the application itself (Exhibit A) which he reads. He feels that this application satisfies the nature of that application and that this board has jurisdiction for both the building and use and thinks that their application satisfies that section. He states that the ordinance is not clearly drafted and feels that this board can grant this or a use variance under Section 240-125 or under Federal Communication Act of 1996 and if this is denied, it will be deemed a prohibition of telecommunications services by T-Mobile.

Alex wants to stick with special permit application and has concerns about the ordinance which doesn't provide the right for changes in use. Alex asks if the applicant thinks that this was a change in the use of the property. Attorney Sousa thinks it is an alteration of the use not only to the religious institution itself but also to include a wireless antennae installation and that use, if it were not for the DCPC, would be a permitted use by right in that church steeple. They discuss the heading of the ordinance. Alex states that if that doesn't provide for a change in the use, then a special permit doesn't apply and is asking if that is why they have also applied for a use variance in the alternative.

Attorney Sousa states: that is correct. However, you would have to ignore the town's own by-law.

Alex asks if anyone here wants to address just the special permit request as to whether or not the application provides this board under these regulations the right to modify or alter the use.

Paul Revere, Esq., is here representing the Centerville Concerned Citizens Group. He states that the bylaw designates dimensions, setbacks, and uses. The terms are clear here about alteration and expansion and nowhere is the term used in that section and therefore is clearly not included. This section does not refer to a new use. However, it does say use in the heading but the provision does not discuss uses at all, only in the heading. Attorney Revere says that there is a provision in the DCPC regulations which provides for a regulatory agreement to address use.

Board deliberates on the special permit. Alex doesn't think that ZBA has jurisdiction on the use.

Alex states that staff has provided some draft findings on the special permit and asks Attorney Souza if he has seen them. Attorney Souza states that he has not. Elizabeth Jenkins hands him a copy which he looks over (Exhibit B).

Alex reads #9 of the draft findings but is not prepared to make that finding and will eliminate it ending at Condition #8. Alex does not think that this board has jurisdiction and feels that this is not the right board to hear these applications and perhaps the applicant needs to raise this in another form.

Alex makes suggested findings:

Based on the forgoing, the Board may wish to consider the following findings of fact:

1. The Applicant T-Mobile Northeast, LLC, (hereinafter T-Mobile), seeks a Special Permit pursuant to Section 240-130.5(A) to allow the installation of six wireless telecommunications antennas, together with Remote Radio Heads, within the existing steeple of the South Congregational Church at a centerline height of 60 feet, along with appurtenant base transceiver equipment consisting of equipment cabinets and ancillary equipment in the basement at 565 Main Street, Centerville, MA, as shown on Assessor's Map 207 as Parcel 053.

2. The Cape Cod Commission Act defines a “district of critical planning concern,” or DCPC, as a “geographic area of Cape Cod identified by the commission as requiring special protection and designated by the assembly of delegates in accordance with the criteria procedures and requirements set forth in sections ten and eleven.” Chapter 716 of the Acts of 1989, as amended at Section 2(j). The Centerville Village District DCPC, comprising 7.4± acres and 13 parcels, was approved by the Barnstable County Assembly of Delegates in May 2008 pursuant to Section 10 of the Act. The DCPC implementing regulations were adopted by the Town Council on July 16, 2009, subsequently approved by the Cape Cod Commission and codified under Section 240-130 of the Code.
3. The regulations contained in Sections 240-130 through 240-130.8 are the adopted DCPC implementing regulations. These implementing regulations are the means by which all development is regulated within the district; grandfathering provisions and/or nonconforming rights conferred by M.G.L. Chapter 40A do not apply within a D.C.P.C. such as the Centerville Village District.
4. Section 240-130.3 *Permitted Uses* in the Centerville Village District establishes the permitted principal and accessory uses in the Centerville Village District. Personal wireless telecommunication facilities, including antenna co-locations, are not listed as a permitted use. Uses that are not listed as permitted are deemed prohibited. Thus, personal wireless telecommunications are deemed prohibited uses within the district.
5. Section 240-130.5(A) establishes the sections of the Barnstable Code that are incorporated into the Centerville Village District. Sections of the code that are not explicitly listed in this subsection are not considered applicable within the Centerville Village District.
6. Article X Personal Wireless Communication of the Zoning Ordinance (§§240-106 – 240-109) is not incorporated into the Centerville Village District. Thus, wireless telecommunication facilities are not a permitted use in the Centerville Village District, as Article X Personal Wireless Communication of the Zoning Ordinance (§§240-106 – 240-109) is not incorporated into the Centerville Village District.
7. The Applicant seeks a Special Permit pursuant to Section 240-130.4 (B)(2) *Change, expansion, or alteration of uses and structures – by special permit*, which states:

Alterations or expansions of a building or structure that do not qualify under as-of-right provisions shall be permitted only by a special permit from the Zoning Board of Appeals, the special permit granting authority (SPGA) for the CVD. In granting such special permit, the Board must find that the proposed alterations and/or expansion are not substantially more detrimental, by standards set out herein, to the surrounding neighborhood under this chapter, § 240-130.1A, Purposes and intent, § 240-130.3A, Use limitations, and, where applicable, § 240-130.2, Definitions.

This provision only allows alteration and expansion of a building and structure and by its terms does not allow a change of use to a use which is not allowed as a permitted use. Wireless telecommunications facilities are not a permitted use in the district. Section 240-130.4(B)(2) does not provide the Board authority to grant a special permit for the introduction of wireless communication antennas in the existing steeple and base transceiver equipment in the basement of the South Congregational Church, a proposed use which is not allowed in the Craigville Village District. T-Mobile’s request is not appropriately categorized as an alteration of a building or structure, but constitutes a change of use to a use not otherwise permitted.

8. Based on the forgoing, the Board finds that it lacks jurisdiction to grant the special permit relief requested by the applicant.

***Motion by Paul Pinard to approve the findings
Seconded by Todd Walantis***

***Vote:
AYE: Alex Rodolakis, Paul Pinard, Todd Walantis, Herb Bodensiek, Mark Hansen
NAY: None
All in favor of the findings***

Based on those findings, a motion is made by Alex Rodolakis that this board lacks jurisdiction to grant the special permit relief requested by T-Mobile in constituting change of use

***Vote:
AYE: Alex Rodolakis, Paul Pinard, Todd Walantis, Herb Bodensiek, Mark Hansen
NAY: None***

Attorney Sousa asks for clarification if this board is denying it or refusing to take jurisdiction. Alex states that it is because this board does not have jurisdiction.

SPECIAL PERMIT DENIED DUE TO LACK OF JURISDICTION

Alex now wants Attorney Sousa to address the use variance.

Attorney Sousa states that there was a four page letter to Town Counsel and to this board relative to jurisdiction dated October 12, 2018. There are a lot of seminal cases that talk about that if a board fails to consider the possibility that the enforcement of its own bylaws may violate the act by allowing an effective prohibition of wireless telecommunications services and that can be a violation of the Telecommunications Act. Under your zoning scheme there is a DCPC where this property is located and therefore is a mechanism in order to get zoning relief which is a regulatory agreement which they applied for and which was denied and feels that this board has the authority to either grant under its own bylaws or under the Telecommunications Act of 1996 if in fact if they find a significant gap in coverage and if a denial of their right to install this wireless installation, would be deemed an effective prohibition. If you fail to take on jurisdiction you will not be able to ask if there is a significant gap in coverage and whether or not a use variance is appropriate and a form of relief for this application. At the last hearing this board hired a consultant who reported that there is a gap in coverage.

Also, if you don't grant the relief that is being requested then your zoning scheme will have the effect of prohibiting wireless telecommunication services. Their goal is to get effective coverage in Centerville and to utilize the church steeple and to build a entirely concealed a wireless installation and to do that in order to fill a gap in coverage.

There has been a question about the cabling behind the church. However, they were told to stop construction by the town and they have designed an installation fully compliant with FCC regulations emissions. IN addition to that they submitted a site analysis of other sites they considered.

Alex states that under the DCPC the don't have the authority to grant a use variance. Attorney Sousa says that the board could still grant a variance not under the DCPC but under the general bylaw. He feels that prohibiting this violates a federal law and there has to be a supremacy that federal law has to go above the local and state law.

Alex asks for public comment.

Attorney Paul Revere for the Concerned Citizens' of Centerville speaks and states that T-Mobile is not at the right place for this relief and that the ZBA was created from the acts of 1984 and derives the power from state and local law. DCPC does not allow use variances and that the federal government doesn't have the authority to give powers that were not given by the state.

Alex asks if there is anyone who would like to speak on this limited issue. No one else speaks.

Attorney Sousa feels that they could take this to federal court and that they have to go through this process but that this board and the Planning Board collectively could be seen as a prohibition of wireless services.

Anca Vlasopolos of 580 Lumbert Mill Road, Centerville thinks that the case of prohibition rests upon the statement of non-coverage. Alex interrupts and apologizes to and asks that comments be directly associated to this limited issue.

Alex closes public comment.

Elizabeth Jenkins hands Attorney Sousa and Attorney Revere suggested findings on the use variance (Exhibit B).

Attorney Sousa states that he wants to hand in some materials that he had also sent to the town's planner. Alex does not want to receive them as of yet unless they were part of the application. Elizabeth Jenkins acknowledges that she had received some materials from Attorney Souza.

Alex makes findings:

Suggested Findings Addressing Jurisdiction – VARIANCE

1. The Applicant, T-Mobile Northeast, LLC, (hereinafter T-Mobile), seeks a Use Variance pursuant to pursuant to Article XII, Section 240-125.B(1)(e) - Administration and Enforcement, Zoning Board of Appeals to allow the installation of six wireless telecommunications antennas, together with Remote Radio Heads, within the existing steeple of the South Congregational Church at a centerline height of 60 feet, along with appurtenant base transceiver equipment consisting of equipment cabinets and ancillary equipment in the basement at 565 Main Street, Centerville, MA, as shown on Assessors Map 207 as Parcel 053.
2. The Cape Cod Commission Act defines a "district of critical planning concern," or DCPC, as a "geographic area of Cape Cod identified by the commission as requiring special protection and designated by the assembly of delegates in accordance with the criteria procedures and requirements set forth in sections ten and eleven." Chapter 716 of the Acts of 1989, as amended at Section 2(j). The Centerville Village District DCPC, comprising 7.4± acres and 13 parcels, was approved by the Barnstable County Assembly of Delegates in May 2008 pursuant to Section 10 of the Act. The DCPC implementing regulations were adopted by the Town Council on July 16, 2009, subsequently approved by the Cape Cod Commission and codified under Section 240-130 of the Code.

3. The regulations contained in Sections 240-130 through 240-130.8 are the adopted DCPC implementing regulations. These implementing regulations are the means by which all development is regulated within the district; grandfathering provisions and/or nonconforming rights and the power to grant variances conferred by M.G.L. Chapter 40A do not apply within a D.C.P.C. such as the Centerville Village District.
4. Section 240-130.3 *Permitted Uses* in the Centerville Village District establishes the permitted principal and accessory uses in the Centerville Village District. Personal wireless telecommunication facilities, including antenna co-locations, are not listed as a permitted use. Uses that are not listed as permitted are deemed prohibited. Thus, personal wireless telecommunications are deemed prohibited uses within the district.
5. Section 240-130.5(A) establishes the sections of the Barnstable Code that are incorporated into the Centerville Village District. Sections of the code that are not explicitly listed in this subsection are not considered applicable within the Centerville Village District.
6. Article X Personal Wireless Communication of the Zoning Ordinance (§§240-106 – 240-109) is not incorporated into the Centerville Village District. Thus, wireless telecommunication facilities are not a permitted use in the Centerville Village District, as Article X is not listed in Section 240-130.5(A).
7. As noted above, Section 240-130.5(A) establishes the sections of the Barnstable Code that are incorporated into the Centerville Village District and Sections of the code that are not explicitly listed in this subsection are not considered applicable within the District. Section 240-125(B)(1)(e) *Zoning Board of Appeals, General Powers, Use variances* of the Zoning Ordinance authorizes the Board to consider variances for uses. Section 240-125(B)(1)(e) is not incorporated into the Centerville Village District. Thus, the Board finds it is not authorized to grant T-Mobile a use variance for a wireless telecommunication installation as requested.
8. Based on the forgoing, the Board finds that it lacks jurisdiction to grant the variance relief requested.

Vote:
All in favor

Alex finds that this board lacks jurisdiction

Alex makes the following motion:
In consideration of the above findings of fact, the following motion has been drafted for the Board:

Based on the findings of fact, the Board finds it lacks jurisdiction to grant the variance relief requested by T-Mobile.

Vote:
All in favor

Use variance request is denied. Attorney Sousa confirms that it is because of lack of jurisdiction.

VARIANCE DENIED DUE TO LACK OF JURISDICTION

Alex asks for a two minute recess
Motion is made by Herb Bodensiek and seconded by Paul Pinard to take two minute recess

Vote:
All in favor

Back in session at 7:55 PM

Alex reads the correspondence:

Correspondence

Received 03-15-19 from Cape Cod Commission – Hearing Notice for March 28, 2019 at 3:00 pm on Chapter H: DRI Threshold Revisions – Hyannis Economic Center & Hyannis Industrial Service and Trade Area. Hearing to take place at the Cape Cod Commission offices, Ocean Conference Room, 3225 Main Street, Barnstable, MA.

Received 3-21-19 from the Cape Cod Commission – Hearing Notice for April 4, 2019 at 3:00 PM on DRI Exemption application for Harriet Taylor Conservation Area. Hearing will take place in the East Wing Conference Room, Barnstable County Complex, 3195 Main Street, Barnstable, MA.

Matters Not Reasonably Anticipated by the Chair

Upcoming Meetings

April 10, 2019, April 24, 2019, and May 8, 2019

Alex notes that he might not be here for the April 24th hearing. Elizabeth Jenkins states that there is also an AAAP (Affordable Accessory Apartment Program) hearing that night.

Adjournment

Motion to adjourn is made by Paul Pinard and seconded by Herb Bodensiek

Vote:

All in favor

Approved