

ZBA 2001-13
Petition of Sprint Spectrum LP
80 Oak Street (Italo-American Club)

Sixty-one letters and a petition signed by 350 Wellesley residents in opposition to the petition were received and are on file in the office of the Board of Appeals. Copies of materials used in the Neighborhood Presentation at the May 10, 2001 Public Hearing were also submitted.

On January 11, 2001, the Design Review Board reviewed the Sprint Spectrum proposal pursuant to the guideline enumerated in Section XXIIC-D-1 of the Zoning Bylaw, and recommended approval subject to the following recommendations:

1. The applicant shall plant 17 balsam firs no less than 9 feet high to suitably screen the base facility.
2. The applicant shall clean up unkempt areas around the facility and commit to further maintenance of the site.
3. The applicant will designate one off-street parking space for service vehicles.
4. The total sign area shall not exceed 4 square feet.
5. Electronic and telephone wiring to and from the facility shall be placed in the ground.
6. The applicant shall confirm that the satellite dish on the roof of the building has received required approval and permitting from the Town.
7. The applicant will demonstrate that the noise generated by the fans will not be injurious to public health, or disturbing to the residential abutters.

On March 20, 2001, the Planning Board reviewed the petition and had no objection to the request, but supported the recommendations of the Design Review Board. Furthermore, it was recommended that all wires be relocated underground; that, if possible, the overall height of the pole be reduced; and that all fencing be maintained in good repair as long as the facility is in place.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the two Public Hearings. The subject 80 foot monopole will exceed the allowed height limitation of 45 feet pursuant to Section XXIIC of the Zoning Bylaw, and thus requires a Special Permit for installation.

Section XXIIC. Antennas Part 3. Special Permit Provisions of the Zoning Bylaw allows the Special Permit Granting Authority to issue a Special Permit under the provisions of Section XXV. Special Permit Granting Authority for a free-standing device provided this Authority finds:

- “1. That the requested installation is essential to the proper functioning of the telecommunications services to be provided by the device at that location and that an alternative installation meeting the By-Right limitations of Part D. 2. is not workable; and
2. that the requested installation will not adversely impact adjacent property materially; and
3. in the case of a free-standing device, that the center point of the base of the monopole shall be set back from the property lines of the lot on which such device is located by a distance equal to the overall vertical height of the monopole and mounted device plus five feet...
4. that the report of the Design Review Board has been received and the installation and the special permit are consistent with that report under the guidelines established in Part D.1.”

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ZBA 2001-13
Petition of Sprint Spectrum LP
80 Oak Street (Italo-American Club)

5. that the overall height does not exceed 45 feet unless the applicant demonstrates that a greater height is essential to the proper functioning of the telecommunications services to be provided by the device at that location and that an alternative installation meeting the requirements of this Section any less invasive is not workable; and

In regard to the aforesaid standards, the Special Permit Granting Authority (SPGA) makes the following findings:

1. Sprint has failed to prove that the requested installation of an 80 foot monopole is essential to the proper functioning of the telecommunications services to be provided by the device at that location, and that an alternative By-Right installation is not workable. The area Sprint is seeking to cover is a narrow corridor on Route 9, which is covered by other carriers without a monopole installation in a residential district. The Telecommunications Act does not mandate that a wireless service is entitled to "seamless and ubiquitous coverage".

Sprint has stated that a co-location at 60 feet on the proposed monopole would not provide adequate coverage for Sprint, although it might for other carriers, but Sprint has submitted no evidence as to why the height of the monopole must exceed the allowed 45 feet, nor has it submitted any evidence that viable by-right alternatives such as a roof top antenna on the Italo-American Club, or the use of repeater transformers would not supply adequate coverage.

Sprint currently has three antenna locations in Wellesley and is in negotiation with Wellesley Office Park, Wellesley Travel Inn and St. James Church, the latter two located in the Route 9 corridor.

2. The requested installation will adversely impact adjacent property materially.
 - a. The visual impact of the 80 foot monopole will be substantially detrimental to adjacent residential properties as it is taller and larger than any adjacent structure and aesthetically inconsistent with its surroundings. No house in Wellesley can exceed a height of 36 feet from average finished grade, which means that the monopole will be more than double the height of any structure in the neighborhood. There are several homes in the neighborhood which would have sight lines to both the monopole and the equipment yard, which will look like a small electrical substation, and which could expand should another carrier co-locate on the pole. At least 12 homes in the neighborhood will have direct view of the monopole. Furthermore, there is a negative visual impact from the Sprague School and its playing fields, which are an important public viewshed.

The Special Permit Granting Authority may make the distinction between residential and non-residential zoning when considering applications for telecommunications antennas. In the March 2000, Massachusetts Appeals Court decision, Building Commission of Franklin vs. Dispatch Communications (Nextel), the Court stated that the TCA "explicitly contemplates some discrimination among providers of functionally equivalent services is allowed. Any discrimination need only be reasonable. Local governments may reasonably take the location

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of the telecommunications tower into consideration in deciding whether...to approve an application for construction of wireless telecommunications facilities, even though this may result in discrimination between providers of functionally equivalent services. It is within the prerogatives of a local government to determine that a tower...is too imposing for a particular neighborhood.”

- b. The proposed monopole is in conflict with the following goals enumerated in the 1994 Wellesley Comprehensive Plan:
- II.2 Goal: Protect and enhance the aspects of Wellesley’s existing image and character...
 - II.3 Goal: Keep Wellesley a family-oriented town and a safe and attractive place to raise a family.
 - II.4 Goal: Retain the excellent qualities that the town now has while enhancing and improving its overall image and character.
 - II.5 Goal: Since Wellesley is primarily a residential town, safeguard residential neighborhoods from encroachment by incompatible uses and other potentially damaging environmental influences.
- c. The fenced area containing the monopole and 7 equipment cabinets will provide an attractive nuisance to the children attending the Sprague School across the street, many of whom will walk by the installation on their way to and from school.
- d. The noise impact on abutting residences will be adverse based on Mass. Department of Environmental guidelines, Policy No. 90-001, as outlined at the May 10, 2001 Public Hearing.
- e. There will be an adverse material impact on the real estates values of the homes within site of the monopole, which could extend to the entire area districted for attendance at the Sprague School.

Although the Shepherd report submitted by Sprint attempts to prove that there is no economic impact on homes within view of telecommunications installations, the report actually proves the opposite due to errors in calculations and out-of-date valuations. In Ashland, the difference in the selling price between comparable tower view homes and non-tower view homes was a negative 7.5%. In Wellesley, the current value of tower view homes is approximately 30% less than the non-tower view homes used in Shepherd’s report.

- f. Although the monopole will have a flagpole configuration, a real estate broker would have to disclose the actual use of the flagpole as a telecommunications facility. The common public perception that there is a possible danger in living or attending a school within a proximate distance of a telecommunications facility was supported by the neighborhood speakers at the hearings. This perception contributes to the negative material impact on real estate values within a single residence neighborhood in which a monopole is located.
3. Although Sprint claims that the center point of the base of the monopole is the required 85 feet from all property lines, neither the original nor revised site plans submitted show this measurement in feet and inches from the nearest property boundary.

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ZBA 2001-13
Petition of Sprint Spectrum LP
80 Oak Street (Italo-American Club)

4. Sprint has not demonstrated that an alternative installation meeting the requirements of this Section any less invasive is not workable.
- a. In Sprint's original submission, the statement was made that "TerraSearch investigated commercial properties within and immediately surrounding the designated area. This included properties on Linden Street as well as the Sprague School. Elevation, property setbacks, constructability, and overall blending with the surroundings made the Italo-American Club the desired location."

Sprint demonstrated no genuine effort or investigation regarding placement of its monopole in a less intrusive location with a less intrusive facility. Location on the properties on Linden Street would result in overlap with the existing 65 foot monopole at Wellesley College. Location on the Sprague School property would never be seriously entertained by the School Committee as evidenced by the Chairman's comments at the Public Hearing. There is no mention of investigation of potential sites or co-location possibilities in the commercially zoned areas along the Route 9 corridor, where the minimal coverage gap occurs.

In the second submission, Sprint lists the following sites as having been seriously investigated: the Mobil Station on Route 9, Newton Wellesley Alzheimer Clinic, and Diehl Lumber on Linden Street. Although there is currently at least one by-right antenna located on the roof of the Mobil Station, Sprint claims that it would require an 85 foot monopole to provide adequate coverage at this location, but does not give reasons why a by-right roof-top antenna would not suffice. The Alzheimer Clinic expressed no interest in Sprint's proposal, and the location at Diehl's, which Sprint claims would require an 115 foot monopole, is already covered by its Wellesley College monopole.

In its revised submission, Sprint makes no mention of negotiations being conducted with the Wellesley Office Park, St. James Church on Route 9 or the Wellesley Travel Inn on Route 9 with which they have a contract ready to be signed. This information was obtained at the May 10, 2001 Public Hearing through questions from the Board.

5. The report of the Design Review Board has been received and its recommendations included in the foregoing Statement of Facts.

Section XXV D. of the Zoning Bylaw states that

"The Special Permit Granting Authority may grant a special permit in accordance with this Section only if it finds that, in addition to all other conditions which may be required under this Zoning Bylaw, all of the following conditions are met: 1. Vehicular Circulation; 2. Driveways; Vehicle Queuing Lanes; 4. Compatibility with Surroundings; 5. Pedestrian Safety; 6. Noxious Uses; 7. Intensity of Use."

In regard to the Special Permit Standards, the Special Permit Granting Authority makes the following findings:

1. Vehicular Circulation – There will be no conditions that add to the traffic congestion or accident potential on the site, as there generally will be not more than one service vehicle per month entering the site.

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ZBA 2001-13
Petition of Sprint Spectrum LP
80 Oak Street (Italo-American Club)

2. Driveways – There are no new driveways involved with this petition; and the one vehicle per month will not create additional traffic congestion or accident potential on the site.
3. Vehicle Queuing Lanes – There will be no vehicle queuing lanes as a result of this project.
4. Compatibility with Surroundings – Although the Sprint submission states that “the installation of the facilities is particularly well suited, as it will be of stealth design and very unobtrusive to the public”, this Authority finds that the 80 foot flagpole for telecommunication purposes is not compatible with the existing natural and man-made features of the site or with the characteristics of the surrounding area. In an area of 36 foot high single family homes and a new elementary school for 350 children, an 80 foot flagpole and 7 equipment cabinets each measuring 5 feet by 2.5 feet by 2.5 feet within an eight foot white fenced area will be intrusive and incompatible with the characteristics of the neighborhood. The presence of a commercial installation of this nature is not compatible and cannot be made to be compatible with the characteristics of the surrounding area.
5. Pedestrian Safety – Pedestrian safety will not be compromised by the installation of a flagpole facility.
6. Noxious Uses – One of the noxious uses listed in Section XVI. Restrictions Affecting All Districts is “the causing of noise or vibrations”. Although the Sprint submission states that “there are no noxious uses”, noise calculations performed by the Board indicate that a significant noise impact could occur. Massachusetts Department of Environmental Protection Policy No. 90-001, dated February 1, 1990, states that a source will be considered to be violating the Department’s noise regulation (310 CMR 7.10) if the source:
 1. Increase the broadband sound level by more than 10 dBA above ambient, or
 2. Produces a “pure tone” condition – when any octave band center frequency sound pressure level exceeds the two adjacent center frequency sound pressure levels by 3 decibels or more.

These criteria are measured at the property line and at the nearest inhabited residence. Ambient is defined as the background A-weighted sound level that is exceeded 90% of the time measured during equipment operating hours. Sprint provided information showing that the lowest nighttime background sound level at the site is 33 dBA, and that each of the seven equipment cabinets is specified to emit no more than 75 dBA at a distance of five feet. Modeling performed by the Board, and in the record for this Decision, shows that resulting sound levels would be 49.9 dBA at the nearest property boundary and 46.6 dBA at the nearest inhabited residence. This would exceed Criterion No. 1, above, and be considered in violation of the State noise regulation.

7. Intensity of Use – The intensity of use relating to the number of vehicle trips, employees or visitors, parking spaces, amount of energy used or volume of liquid or solid waste produced is negligible.

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ZBA 2001-13
Petition of Sprint Spectrum LP
80 Oak Street (Italo-American Club)

The Telecommunications Act of 1996 expressly preserves local zoning authority over the placement, construction and modification of telecommunications antennas and towers. The Board has the power to consider the appropriateness of the location of a proposed tower or antenna based upon traditional zoning considerations including use, aesthetics and safety. The Zoning Bylaws remain the primary controlling law in regulating location of such towers. The Federal statute merely subjects the exercise of local zoning authority to the following limitations:

1. Local Regulation May Not Unreasonably Discriminate Among Providers.

It is the finding of this Board that Wellesley has not discriminated against the petitioner, Sprint Spectrum. Sprint Spectrum already has three antennas in Wellesley, and owns more antennas than Verizon and only one less than AT&T and Omnipoint, who each have three individual antennas and one shared antenna. Clearly, Wellesley has not discriminated against Sprint, and would not be doing so by denying its petition for a Special Permit.

2. Local Regulation May Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services.

It is the finding of this Board that Sprint has produced no evidence that there is a significant gap in coverage in Wellesley that cannot be closed by a less intrusive means than siting an 80 foot monopole in the middle of a residential neighborhood and across the street from an elementary school. In its submissions, Sprint did not demonstrate a serious effort attempt to find other locations for less intrusive devices, and, in fact, did not disclose until questioned at the May 10, 2001 Public Hearing, that it was in negotiations with the owners of three other sites.

3. Local Regulators Must Act Within a Reasonable Period of Time

It is the finding of this Board that it has acted expeditiously in scheduling the initial hearing, and agreed to Sprint's request for a continuance in order to submit additional material and revised plans.

4. All Decisions Denying a Request Must Be Supported by Substantial Evidence

It is the finding of this Board that this written decision contains the requisite substantial evidence contained in the written record, most of which is also included in this document. The United States Circuit Court of Appeals for the First Circuit, in the case Southwestern Bell Mobile Systems, Inc. v. Zoning Board of Appeals of Leicester, Massachusetts defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

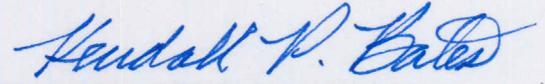
Due to the failure of Sprint to meet four out of five of the standards pursuant to Section XXII C and the only two of the seven standards of Section XXV D. of the Zoning Bylaw which are relevant, for the reasons listed above, the Special Permit Granting Authority unanimously voted at the Public Hearing held on May 10, 2001 to deny the Special Permit requested by Sprint Spectrum LP. Therefore, this Special Permit is denied and the petition hereby dismissed.

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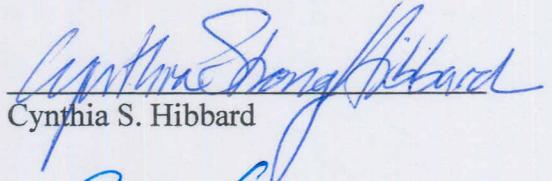
ZBA 2001-13
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APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN
THE OFFICE OF THE TOWN CLERK.

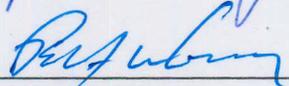
Cc: Planning Board
Inspector of Buildings
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Kendall P. Bates, Chairman



Cynthia S. Hibbard



Robert W. Levy

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