

**MINUTES OF THE BOARD OF ADJUSTMENT
FEBRUARY 18, 2009**

PRESENT: Chair Harrison, Mr. Burr, Ms. Cockey, Ms. English, Vice Chair Fleischer, Ms. Holloway, Mr. Kenney, Mr. Susswein and Mr. Whipple; also, Mr. Sullivan, Esq., and Mr. Charreun, Assistant Secretary

ABSENT: Mr. Franco, Secretary

Assistant Secretary Charreun called the roll and announced the regular meeting of the Montclair Board of Adjustment. Notice had been given in accordance with the Open Public Meetings Act. Chair Harrison welcomed Mr. Burr to the Board.

On motion by Mr. Whipple, seconded by Mr. Susswein, the **Minutes of the November 19, 2008** regular meeting were adopted as modified, Ms. Cockey, Mr. Fleischer, and Ms. Holloway abstaining. On motion by Mr. Fleischer, seconded by Mr. Susswein, the **Minutes of the December 10, 2008** regular meeting were adopted as modified, Ms. Cockey and Ms. English, abstaining.

On motion by Mr. Whipple, seconded by Ms. English, the following Resolution memorializing the approval of the application of **Sharmila Dey, 338 Highland Avenue** was adopted as modified, Mr. Fleischer abstaining:

WHEREAS, **Sharmila Dey**, as owner, did make application to the Board of Adjustment of the Township of Montclair, to construct a second floor addition onto the southerly side of the dwelling, on property designated as Lot 3 in Block 703 on the Tax Map of the Township of Montclair and located in the R-1 One-Family Zone; and

WHEREAS, the applicant sought a variance pursuant to N.J.S.A. 40:55D-70c from **Montclair Code Section 347-45B(1)** in that a minimum front yard setback of 59.3 feet is required from Highland Avenue and a lesser front yard setback of approximately 51 feet is proposed; and

WHEREAS, the applicant submitted a property survey dated September 18, 2001, and a plot plan, partial floor plans, and partial elevations prepared by John Thomas Collins Architect, dated June 2008; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on January 21, 2009, at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is a through lot with frontages of 95 feet along Highland Avenue and 95 feet along Edgecliff Road. The subject property measures

18,047.92 square feet in area, is located in the R-1 One Family Zone, and contains a single-family dwelling.

2. The applicant proposes to construct a second floor addition onto the southerly side of the dwelling above the existing enclosed porch. The second floor addition would extend further to the rear and be supported by columns. The enclosed roof and wall of the enclosed porch would be removed and reconstructed as part of the project. The proposed addition would contain a new bathroom and would be aligned with the southerly side wall and front wall of the enclosed porch below it.

3. The front yard setback requirement for the subject property is approximately 59.3 feet from Highland Avenue, which is based on the average front yard setback of the applicable dwellings on Highland Avenue pursuant to the ordinance. The existing dwelling has a nonconforming front yard setback of 49.79 feet from Highland Avenue as measured to the southeast corner of the main section of the dwelling. The existing enclosed porch and the proposed addition are set back approximately 51 feet from Highland Avenue and a variance is requested.

4. The Board determined that the variance requested could be approved. The proposed addition would be aligned with the southerly side wall and front wall of the enclosed porch below it and is located slightly further back than the main section of the dwelling. The proposed addition would not have negative impact on nearby properties.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and that the requested variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant proved that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and that the benefits of the deviation would substantially outweigh any detriment and would not cause substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of N.J.S.A. 40:55D-70c(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of Sharmila Dey is approved; and

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Susswein, seconded by Ms. English, the following Resolution memorializing the denial of the application of **MetroPCS New York, LLC, 641 Bloomfield Avenue** was adopted, Chair Harrison, Mr. Fleischer, Ms. Cockey, Ms. Holloway, and Mr. Whipple abstaining:

WHEREAS, MetroPCS New York, LLC (hereinafter "MetroPCS"), did make application to the Board of Adjustment of the Township of Montclair (hereinafter "the Board") to install six panel antennas, one GPS antenna and five equipment cabinets on the roof of the existing building located at 641 Bloomfield Avenue (hereinafter "the subject property") designated as Lot 14 in Block 2209 on the Montclair Township Tax Map and located in the "Center Area" of the C-1 Central Business Zone; and

WHEREAS, the applicant requested variances pursuant to N.J.S.A. 40:55D-70d(3) to allow four antennas to exceed the top of the parapet wall to which it is attached contrary to Montclair Code Section 347-17.1C(5)(d); and

WHEREAS, the applicant submitted a site plan prepared by The Cedars Group, Inc., Sheets Z1, Z3 and Z4 dated May 14, 2008 revised through May 31, 2008 and Sheet Z2 dated May 14, 2008 revised through May 28, 2008; and

WHEREAS, this matter came on to be heard at regular meetings of the Board of Adjustment held on November 19, December 10, 2008 and January 21, 2009 at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property located on the northerly side of Bloomfield Avenue between Midland Avenue and Valley Road contains 11,620 square feet in size upon which is situated a six story commercial building. The lot is split zoned, the southerly portion containing the building is located in the C-1 Central Business Zone and the northerly portion consisting primarily of a parking area is located in the R-2 Two Family Zone.

2. By resolution adopted February 26, 1992, the Board approved the application of Nynex Mobile Communications Company for variance relief to install twelve antennas on the roof of the building on the subject property. By resolution adopted January 15, 1997, the Board approved the application of Sprint Spectrum for variance relief to locate nine PCS antennas and one GPS antenna on the rooftop of the subject property. By resolution adopted December 11, 2000, the Montclair Township Planning Board approved the conditional use application of Nextel of New York, Inc. d/b/a Nextel Communications to install twelve panel antennas on the rooftop of the building on the subject property. By resolutions adopted July 20, 2005 and January 18, 2006, the Board approved the application of Omnipoint Communications, Inc. for variance relief to install six panel antennas, three equipment cabinets and one battery cabinet on the roof of the building of the subject property. By resolution adopted November 19, 2008, the Board approved the application of New Cingular Wireless PCS, LLC for variance relief to install twelve antennas, eight equipment cabinets and one GPS antenna on the roof of the building of the subject property. All the antennas and associated equipment have been installed on the roof of the subject property with the exception of the recently approved New Cingular Wireless PCS, LLC application.

3. MetroPCS is licensed by the Federal Communications Commission to provide personal communication services which includes wireless telephone, data and other communications services to its subscribers. Two antennas in the alpha sector are proposed to be mounted flush with the top edge of the parapet on the northeasterly corner of the building at a height of 85 feet above grade. Two antennas in the beta sector are proposed to be mounted on pipe masts attached to the back of the roof parapet in the southeasterly corner, 6 feet above the top of the parapet at a height of 80 feet 11 inches above grade. Two antennas in the gamma sector are proposed to be mounted on pipe masts attached to the back of the parapet of the staircase bulkhead located at the northwesterly corner of the roof, 6 feet above the top of the parapet at a height of 90 feet above grade. A screened equipment enclosure measuring 11 feet by 21 feet is proposed to be located on the roof approximately 14 feet from the easterly wall of the building. Four equipment cabinets and one PTC cabinet will be located in the enclosure. The equipment cabinets are of varying heights and the tallest of the cabinets is depicted at 9 feet 6 inches above the roof surface and 81 feet 7 inches above grade level, however, the applicant advised the Board it could be reduced in height by one foot. The top of the screen panels enclosing the equipment would measure 9 feet from the roof surface. A GPS antenna is proposed to be mounted on the easterly side of the equipment screen and would extend one foot above the top of the screen.

4. The applicant failed to make a reasonable and good faith effort to pursue alternate less intrusive sites. At the first public hearing, the applicant presented the testimony of Richard Komissar, a leasing consultant charged with locating possible sites to provide coverage for the carrier. Mr. Komissar testified that he dismissed 219 Fullerton Avenue, 205 Claremont Avenue, the Police Department building and the Hahnes parking lot since they were either outside the coverage area or too small requiring construction of a large monopole. Three other sites, 48 South Park Street, 45 Church Street and the DCH Auto Group parking garage were not pursued after the respective owners either did not answer or acquiesce in response to Mr. Komissar's verbal inquiries. It was apparent to the Board that Mr. Komissar's focus was on the subject property. He failed to adequately investigate obviously viable sites such as 10 Crestmont Road and 415 Claremont Avenue. His perfunctory efforts evidenced the applicant's lack of good faith in locating alternate sites.

In response to a request by the Board, the applicant's radio frequency engineer, Fahd Kananth, reviewed the seven-story building at 10 Crestmont Road which contains rooftop wireless telecommunications antennas of two carriers and is located at a higher elevation than the subject property. Mr. Kananth testified the site would provide significant coverage utilizing flush mounted antennas in conformance with the zoning ordinance. He further opined that utilization of this site with an additional site would fill the coverage gap without the need to utilize the subject property.

In response to an inquiry by the Board, Mr. Kananth reviewed the six-story building located at 36 Hawthorne Place. By Resolution adopted October 15, 2008, the Board approved the application of MetroPCS for variance relief to locate antennas and equipment cabinet on the roof of that property which are not yet operational.

It was apparent to the Board that the 36 Hawthorne Place site could be utilized in conjunction with the 10 Crestmont Road site to fill the coverage gap by adding additional antennas and/or realigning antennas recently approved by the Board. At the December 10, 2008 hearing, Mr. Kananth agreed coverage could be optimized at the 36 Hawthorne Place site and at the Board's request, agreed to further investigate the viability of such a proposal. At the January 21, 2009 hearing, Mr. Kananth returned with coverage propagation maps and advised the Board there would still be coverage gaps even with additional antennas at 36 Hawthorne Place. Under cross examination by the Board, however, Mr. Kananth changed his position and ultimately conceded the combination of 10 Crestmont Road and optimized 36 Hawthorne Place would adequately address the coverage gap. MetroPCS has a clear, less intrusive alternative to the proposed site which would resolve the gap in coverage.

5. In order to meet the "positive" criteria in connection with an application for variance pursuant to N.J.S.A. 40:55D-70d(3) an applicant has the burden of presenting:

. . . proof sufficient to satisfy the board of adjustment that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. That standard of proof will focus both the applicant's and the board's attention on the specific deviation from conditions imposed by the ordinance, and will permit the board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use. Thus, a conditional-use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems.

Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 298-299 (1994).

The subject property is in a highly visible location which the applicant's planning witness recognized as the "gateway into the community, the downtown shopping district". The rooftop of the subject property contains wireless telecommunications antennas and equipment cabinets associated with four carriers. A fifth carrier has been approved, however, the antennas and equipment have not yet been constructed. As evidenced by Exhibits A-6 and A-7, the proposed antennas and equipment cabinet screen represent substantial visual intrusions viewed from the intersection of Bloomfield Avenue and Orange Road approximately 500 feet northwest of the site as well as the intersection of Bloomfield Avenue and Maple Plaza approximately 430 feet southeast of the site. The antennas are also visible from Valley Road and Portland Place as shown on Exhibits A-5 and A-8. The Board determined the site had reached its capacity and the visual intrusion resulting from the proposed antennas and associated equipment

rendered the site no longer suitable given the deviations from the conditional use ordinance requested herein.

6. As set forth in Paragraph 5 herein, the applicant's proposal represents a substantial visual intrusion on an already overcrowded rooftop in a prominent location within a Historic District. Approval of this application would result in substantial adverse impact on adjacent properties which would cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good.

7. Installation of wireless telecommunications antennas are conditional uses in the C-1 Zone governed by Section 347-17.1C(4) of the Montclair Code. The purposes of the Telecommunications Ordinance are set forth in Section 347-17.1A(2) as follows:

- (a) Encourage the utilization of existing structures, such as tall buildings, bell towers and municipal structures, to mount and install wireless telecommunications antennae and equipment.
- (b) Minimize the location of facilities in visually sensitive areas.
- (c) Encourage creative design measures to camouflage facilities.
- (d) Protect historic and residential areas from potential adverse impacts of communication equipment.

The building which is the subject of this application is located in a prominent visually sensitive area of the Township. The addition of the proposed antennas and equipment cabinets on an already overcrowded rooftop is inconsistent with the intent of the ordinance to minimize visual impacts. Although the Ordinance encourages creative design measures to camouflage facilities, this applicant has done nothing creative in order to mask the overall adverse visual impact connected with this application. In addition, the building is located in a Historic District and is adjacent to the R-2 Residential Zone. Although a Certificate of Appropriateness was issued by the Montclair Historical Preservation Commission, it is the Board's belief that the Commission preferred collocation on the subject property rather than another building within the Historic District without any antennas. The Board, however, recognizes that the coverage gap sought to be filled by MetroPCS can be accomplished by utilization of sites outside the Historic District. For these reasons, the grant of the requested conditional use variances associated with this application at this particular site would substantially impair the intent and purpose of the zone plan and zoning ordinance.

8. In *Medici v. BPR Co.*, 107 N.J. 1 (1987), the New Jersey Supreme Court held that in the context of a use variance application, the applicant has the burden of establishing an "enhanced quality of proof" that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The requirement to establish the "enhanced quality of proof" applies with equal force to variance requests pursuant to N.J.S.A. 40:55D-70d(3). *Cell v. Zoning Bd. of Adjustment*, 172 N.J. 75 (2002); *Omnipoint v. Board of Adjustment*, 337 N.J. Super. 398 (App. Div. 2001). The applicant's planner testified at the January 21, 2009 public hearing that he had reviewed the 2006 Master Plan Reexamination Report and found "this application does not conflict with any of the recommendations in the 2006 plan". The witness did not offer any factual basis for his conclusion and the Board properly rejected the testimony as a

“net opinion”. The failure to present sufficient credible evidence to establish the requisite “enhanced quality of proof” in and of itself warrants denial of the application.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant failed to prove the requisite special reasons for the granting of this application and failed to prove by a preponderance of the evidence that the proposed relief could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance in accordance with *Coventry Square v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285 (1994); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair, that the within application of MetroPCS for variance relief pursuant to N.J.S.A. 40:55D-70d(3) is hereby denied.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Whipple, seconded by Mr. Susswein, the following Resolution memorializing the approval of the application of **The Presbyterian Church of Upper Montclair, 53 Norwood Avenue** was adopted, Mr. Fleischer abstaining:

WHEREAS, **The Presbyterian Church of Upper Montclair**, as owner, did make application to the Board of Adjustment of the Township of Montclair, to locate central air-conditioning units in the northerly front yard of their property between the building and Fernwood Avenue, on property designated as Lot 1 in Block 3601 on the Tax Map of the Township of Montclair and located in the R-1 One-Family Zone; and

WHEREAS, the applicant sought a variance pursuant to N.J.S.A. 40:55D-70c from **Montclair Code Section 347-46C** in that accessory structures such as central air conditioning units are not permitted in a front yard; and

WHEREAS, the applicant submitted a site plan prepared by Sionas Architecture dated July 25, 2008; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on January 21, 2009, at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is an unusual type of corner lot located within the intersections of three streets: Norwood Avenue, Inwood Avenue, and Fernwood Avenue. This results in an “island” type of lot with multiple front yards, and no side or rear yards.

2. The property contains two buildings; a 1½ -story church and a 2½-story building with an attached garage. The subject property is in the R-1 One-Family Zone and measures 43,300 square feet in area.

3. The applicant proposes to locate 2 central air-conditioning units in the northerly front yard of their property between the church building and Fernwood Avenue. A variance is requested in that accessory structures such as central air-conditioning units are not permitted in a front yard.

4. The units are proposed located in a window well, where 1 central air-conditioning unit already exists, for a total of 3. The applicant indicated that the size of the central air-conditioning units is such that they would not be seen above the top of the window well. The proposed air-condition units are approximately 15.4 feet from the sidewalk and complies with all other zoning requirements.

5. The Board determined that the variance requested could be approved since the property has no conforming location to locate the central air-conditioning units. The proposed location is the most suitable location on the subject property. With the additional landscaping being added to the area of the window well as described below, as well as the considerable distance to the nearest dwelling, the proposed central air-conditioning units would not have negative impact on nearby properties.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and that the requested variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant proved that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and that the benefits of the deviation would substantially outweigh any detriment and would not cause substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of N.J.S.A. 40:55D-70c(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of The Presbyterian Church of Upper Montclair is approved, subject to the following condition:

1. The applicant shall add a row of plantings near the edge of the window well where the central air-conditioning units are located.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Fleischer, seconded by Mr. Susswein, the following Resolution memorializing the approval of the application of **Ms. Lee Heh Margolies, 3 Erwin Park** was adopted, Ms. Cockey and Ms. English abstaining:

WHEREAS, **Lee Heh Margolies**,, as owner, did make application to the Board of Adjustment of the Township of Montclair, to construct a second floor addition at the rear of her single family dwelling, on property designated as Lot 4 in Block 2403 on the Tax Map of the Township of Montclair and located in the R-1 One-Family Zone; and

WHEREAS, the applicant sought a variance pursuant to N.J.S.A. 40:55D-70c from **Montclair Code Section 347-45B(2)** in that a minimum setback of 51 feet is required from the right-of-way edge of Erwin Park a lesser setback of 42.81 feet is proposed; and

WHEREAS, the applicant submitted a property survey dated April 1, 2008 and a plot plan, floor plans and elevations, prepared by George Held AIA and Associates, revised through August 12, 2008; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on January 28, 2009, at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is a corner lot located on curved section of Erwin Park which forms a corner lot. Erwin Park is a private street with a 25-foot wide right-of-way. The property is in the R-1 One Family Zone, measures 29,729 square feet of area, and contains a single-family dwelling with a detached garage.

2. The applicant proposes to construct a second floor addition at the rear of her dwelling, which is on the northerly side of the dwelling. The addition would be aligned with the walls of the existing 1-story section below it. The plans indicate that the second floor will contain a bedroom with a walk in closet, laundry room, and computer room.

3. The existing 1-story section of the dwelling, which received a front setback variance in 1988, is located 42.81 feet at its closest point from the right-of-way edge of Erwin Park. The minimum required front yard setback in this area for the subject property is approximately 51 feet, which is the front yard setback of the existing dwelling located on the adjoining property to the north. A variance is requested in that a minimum setback of 51 feet is required from the right-of-way edge of Erwin Park a lesser setback of 42.81 feet is proposed. The proposed addition complies with all other zoning requirements.

4. The Board determined that the variance requested could be approved. The proposed addition would be aligned with the walls of the existing 1-story section

below it. There is also significant space to the adjoining dwelling and the proposed addition would not have negative impact on nearby properties.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and that the requested variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant proved that the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements, and that the benefits of the deviation would substantially outweigh any detriment and would not cause substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of N.J.S.A. 40:55D-70c(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of Lee Heh Margolies is approved; and

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Whipple, seconded by Mr. Susswein, the following Resolution memorializing the approval of the application of **Scott Hermo, 62 Gates Avenue** was adopted, Ms. Cockey and Ms. English abstaining:

WHEREAS, **Scott Hermo**, as owner, did make application to the Board of Adjustment of the Township of Montclair, to construct an addition and deck onto the rear of his single-family dwelling, on property designated as Lot 58 in Block 3001 on the Tax Map of the Township of Montclair and located in the R-1 One-Family Zone; and

WHEREAS, the applicant sought a variance pursuant to N.J.S.A. 40:55D-70c from **Montclair Code Section 347-45A(2)** in that a maximum of 2½ stories is permitted, and 3 stories is proposed; and

WHEREAS, the applicant submitted a boundary & topographic survey, dated June 20, 2008, and a plot plan, floor plans, and elevations prepared by Derek W. Cox, A.I.A./C.L.A., revised to December 10, 2008, which were further revised as described below; and

WHEREAS, this matter came on to be heard at a regular meeting of the Board of Adjustment held on January 28, 2009, at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is an interior lot located in the R-1 Single Family Zone and contains a single-family dwelling. The subject property measures 50 feet in width and contains 7,525 square feet in lot area. The lot slopes down from the front to the rear. There is no garage parking on the site, and the existing driveway extends below an elevated deck at the rear of the dwelling where parking is located.

2. The applicant proposes to remove the large existing deck at the rear of the dwelling and construct an addition and deck. The addition is 3 stories at its largest section, and the ground floor level of the addition will contain garage parking. The plans initially submitted with the application required a variance for exceeding 2½ stories; however, they also required variances for exceeding the maximum principal building coverage of 25 percent, and for the addition exceeding 35 feet in height. These 2 additional variances were not included in the public notice for the application due to an error in the reading of the plans.

3. At the hearing the applicant submitted revised set of plans marked as Exhibit A-1, dated January 26, 2009. The revised plans still required the requested variance for exceeding 2½ stories; however the slope of the roof on the tallest section of the addition was modified to reduce the height of the addition to a maximum of 34 feet 2½ inches, measured as per the ordinance requirements, which complies with the height limit of 35 feet and does not require a variance.

4. The revised plan submitted at the hearing also depicted that the proposed addition would be reduced in size from 44 feet in length to 38 feet, and in width from 26 feet 3 inches to 23 feet 4¾ inches. This reduction produced a principal building coverage of 25.8 percent, which still required a variance from **Montclair Code Section 347-45E** in that maximum of 25 percent is permitted. The applicant decided not to request this variance and indicated that the plan would be further revised to conform to the 25 percent principal building coverage by eliminating 64 square feet from the deck and stair depicted on Exhibit A-1.

5. The Board discussed the application and the revised plan and determined that the variance requested for exceeding 2½ stories could be approved. The design of the addition is stepped down from the taller existing dwelling and the 3 story condition of the addition is caused by the sloping topography of the lot. The proposed addition would not have negative impact on nearby properties.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved peculiar and exceptional practical difficulties and exceptional and undue hardship and that the requested variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to N.J.S.A. 40:55D-70c(1); and

WHEREAS, the Board, based on the aforementioned findings, concluded that the applicant proved that the purposes of the Municipal Land Use Law would be advanced

by a deviation from the zoning ordinance requirements, and that the benefits of the deviation would substantially outweigh any detriment and would not cause substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of N.J.S.A. 40:55D-70c(2); and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair that the within application of Scott Herno is approved, subject to the following conditions:

1. Any new central air-conditioning units shall comply with the zoning requirements.
2. The dwelling shall conform to 25 percent maximum principal building coverage requirements.
3. The height of the addition shall not exceed the 35-foot maximum height.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

On motion by Mr. Whipple, seconded by Mr. Fleischer, the following Resolution memorializing the approval of the application of **Omnipoint Communications, Inc, 36 Hawthorne Place** was adopted as modified, Ms. Cockey and Ms. English abstaining:

WHEREAS, Omnipoint Communications, Inc. (hereinafter "Omnipoint"), did make application, as amended, to the Board of Adjustment of the Township of Montclair (hereinafter "the Board") to install nine panel antennas, one GPS antenna, three equipment cabinets and one PPC cabinet within screening on the roof of the residential apartment building located at 36 Hawthorne Place (hereinafter "the subject property") designated as Lot 2 in Block 2110 on the Township Tax Map and located in the R-4 Zone; and

WHEREAS, the applicant requested variance relief from N.J.S.A. 40:55D-70d(3) for failure to comply with all of the conditional use standards contained in Montclair Township Code Section 347-17.1C(5); and

WHEREAS, the applicant submitted a site plan and details prepared by French and Parrello dated July 16, 2008 revised through January 23, 2009 consisting of Sheets C-01, A-01 through A-05 which were marked as Exhibit A-1 at the public hearing; and

WHEREAS, this matter came on to be heard at a meeting of the Board of Adjustment held on January 28, 2009 at which time it was established that notice was properly published and that property owners within 200 feet of the subject property had been properly served with notice; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The subject property is located at the intersection of Hawthorne Place and Gates Avenue measures 142,441 square feet in size and contains a six story residential apartment building.

2. By resolution adopted January 19, 2005, the Board approved the application of Cellular Telephone Company, d/b/a AT&T Wireless for variance relief to install twelve flush mounted panel antennas, one GPS antenna and six equipment cabinets on the rooftop of the subject property. By resolution adopted January 18, 2006 the Board approved the application of Sprint Spectrum, LP for variance relief to install thirteen panel antennas, one GPS antenna and four equipment cabinets on the roof of the subject property. By Resolution adopted October 15, 2008, the Board approved the application of MetroPCS New York, LLC for variance relief to install seven panel antennas, one GPS antenna and four equipment cabinets on the roof of the subject property.

3. Omnipoint is licensed by the Federal Communications Commission to provide wireless communication services. Installation of the antennas will provide improved coverage to Omnipoint subscribers as per its FCC license which constitutes appropriate municipal action in a manner which promotes the public health, safety and general welfare consistent with the purposes of the Municipal Land Use Law.

4. The plan (Exhibit A-1) depicted nine panel antennas flush mounted on a screened enclosure measuring 21 feet 7 inches by 8 feet 10 inches in area surrounding the equipment cabinets. The top of the proposed antennas and equipment screening would be 73 feet 6 inches above ground level.

5. In response to concerns raised by the Board, the applicant agreed to revise the proposal to provide a stealth enclosure with the antennas inside which would require expanding the stealth enclosure not more than five feet horizontally. This would result in a reduction in height of the enclosure of up to one foot.

6. The application complies with all of the conditional use standards contained in the Montclair Township Zoning Ordinance except that the apartment building is 58 feet 8 inches in height where a minimum of 60 feet is required pursuant to Montclair Code Section 347-17.1C(5)(a) and the nine proposed antennas exceed the height of the top of the building roof line contrary to Montclair Code Section 347-17.1C(5)(d).

7. Based upon the size and location of the existing apartment building, the proposed roof top location of the site is particularly suited for wireless communication antennas and continues to be an appropriate site for the conditional use notwithstanding the deviations from the conditions imposed by the ordinance consistent with *Coventry Square v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285 (1994).

8. Based upon the testimony of the applicant's RF Compliance expert, the proposed antennas and related equipment shall comply with all applicable State and Federal regulations for radiation transmission levels.

9. Based upon the conditions imposed below, the visual intrusion caused by the height of the proposed antennas is minimal and will not adversely impact adjacent properties and is not inconsistent with the intent and purpose of the zone plan and zoning ordinance.

10. The application does not involve any noise, vibrations, smoke, dust, odors, heat or glare and thus will not cause substantial detriment to the public good and is not inconsistent with the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board, based on the foregoing findings, concluded that the applicant proved the requisite special reasons for the granting of this application and proved by a preponderance of the evidence that the proposed relief could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Montclair, that the within application of Omnipoint, for variance relief pursuant to N.J.S.A. 40:55D-70d(3) is hereby approved subject to the following conditions:

1. As stipulated by the applicant, the plans shall be revised to utilize a stealth enclosure with the panel antennas affixed inside, expanding the enclosure not more than five feet horizontally and resulting in a corresponding reduction in height of up to one foot.

2. The stealth enclosure shall be painted an off-white color to match the building to be approved by the Planning Department.

3. The applicant shall be responsible for all inspection fees required under Montclair Code Section 202-27 as well as escrow fees incurred in connection with review of this matter.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

The Board discussed the correspondence received from the Calvin Trevenen, Esq., on behalf of **Anthony C. Sapp & Denise Powell, 29 Cedar Avenue**. The applicants were granted a variance to exceed the permitted height for an accessory structure at the January 28, 2009 special meeting, subject to conditions. The applicants are currently requesting to abandon the approved application. Mr. Sullivan provided a brief explanation. On motion by Mr. Whipple, seconded by Ms. English, the applicants' request was approved, and the approved application was abandoned.

The application of **Immaculate Conception High School, Codey Field - 267 Orange Road** was adjourned to the March 18, 2009 regular meeting of the Board, at the applicant's request. No further notice would be given. The Board was granted an extension of time on the application. The application of **Joseph & Holly Christovao, 22 Macopin Avenue** was adjourned to the March 18, 2009 regular meeting of the Board, at the applicants' request. No further notice would be given. The Board was granted an extension of time on the application.

Chair Harrison was recused and Vice Chair Fleischer called the application of **Omnipoint Communications, Inc., 153 Park Street** for the purpose of scheduling special meeting dates to continue the application. Robert Trautmann, Esq., appeared on behalf of James Pryor, Esq., as attorney for the applicant, and Terry Thornton, Esq., resident of 160 Park Street, and objector to the application was also present. Mr. Sullivan provided an explanation to the Board regarding the previous correspondence dated February 11, 2009 from Mr. Pryor indicating a concern over a potential conflict with the Township's utilization of Mr. Comi's services as a consultant. Mr. Sullivan recommended that the matter be carried to the March 18, 2009 regular meeting, and that future meeting dates would be discussed at that time. The Board was granted an extension of time on the application. No further notice would be given. He also indicated that Mr. Pryor should submit a Memorandum of Law on the conflict topic no later than March 4, 2009, that Ms. Thornton should do the same no later than March 11, 2009. The conflict topic will also be discussed at the March 18, 2009 meeting. The Board had a brief discussion. Mr. Whipple disclosed to the applicant that a personal friend of his had recently purchased an adjoining property. He also stated that he did not believe it would affect his ability to judge the application fairly and impartially. The applicant did not comment on Mr. Whipple's statement.

Chair Harrison called the reopening of the public hearing for application of **Michael & Ariane Duarte, 33 Walnut Street**. Public notice for the reopened hearing was in order. Catherine Donadio, Esq. appeared as attorney. Michael Duarte, restaurant owner, was sworn. He reiterated his prior testimony that the restaurant is currently open for seating from 5:30 pm to 10:00 pm Wednesday through Saturday. He stated that they could not remain limited to those hours since, once or twice a month they have a private party or some type of special event on an off day. The Board questioned Mr. Duarte extensively. He stated that the kitchen is sometimes in operation during off hours, typically on Saturdays, when they are preparing food for off-site catering. This does not affect the neighborhood since the restaurant does not seat any customers during that time. They have no interest in being open for lunch on Monday through Friday. They want to be open for dinner at most 6 evenings per week, and also be able to have limited daytime lunch/brunch and special event activity, and offsite catering preparation activities on some weekends. He agreed that it would make sense to increase the interior seating limit to 48 seats due to the arrangement of the seating depicted. Chair Harrison called for questions from the public for Mr. Duarte. Carmel Loughman, 26 Walnut Street, asked questions about the outdoor seating. Mr. Duarte stated that he has had up to 16 seats outside during warm weather months. Mr. Marzullo, 157 Chestnut Street, did not ask a question and voiced support for the application. The Board had a brief discussion. The potential increase in the interior seating from 44 to 48 seats will increase on-site parking requirement. The Chair Harrison called for public comment.

John Deermount, 43 Walnut Street, was sworn and stated his support for the application. Joe Cetrulo, 36 Walnut Street, was sworn and stated his support for the application. Carmel Loughman, 26 Walnut Street, was sworn and voiced concerns over the proposed expansion of the restaurant. She stated that the existing restaurant currently has some negative effects on the neighborhood that are controllable due to its relatively small size. She stated that the enlarged restaurant will expand the problems associated with the restaurant which will negatively affect the neighborhood. The Board questioned Ms. Loughman. Ms. Donadio summarized the application and requested that the Board vote on the application. The Board discussed the application and determined that the variance requested could be approved subject to conditions. On motion by Mr. Fleischer, seconded by Ms. English the application was approved, subject to the following conditions:

1. Hours of operation (exclusive of off-premises catering) shall be limited as follows:
 - a. 5:30 p.m. to 10:00 p.m. six days a week representing the time in which customers may arrive to be seated.
 - b. Brunch/lunch special events/private parties shall be limited to 12:00 p.m. (noon) to 4:00 p.m. and shall not exceed two per week (Sunday through Saturday) and four in any calendar month.
2. A maximum of 48 interior seats is allowed.
3. The applicants shall install an enclosure around the dumpster and recycling container(s) which shall be approved by the Planning Department.
4. This approval is limited to the use as outlined herein without a liquor license. Use of the property with a liquor license shall require prior approval from this Board.
5. No expansion of existed permitted outside seating either in area or number shall be permitted and the applicants shall comply with all applicable ordinances regulating outdoor seating.

Chair Harrison called the variance application of **Daniel Gerdes, 17 Carolin Road**. The applicant was sworn and described the application. The property has an irregularly shaped rear yard, which extends deeper at the westerly side of the rear yard. The property contains a single-family dwelling and a detached garage in the northwesterly rear corner within the deepest section of the rear yard. The existing detached garage is in poor condition due to its age and would be demolished. The existing garage is approximately 20 feet 6 inches wide by 22 feet 8 inches long and has a nonconforming side yard setback of 0.84 feet from the westerly side property line. The garage also has a nonconforming rear yard setback of 2.47 feet and a conforming setback of 6.57 feet from the section of the rear property line that runs along the easterly side of the garage. The proposed garage is smaller than the existing garage, measuring 20 feet wide by 22 feet long, and is proposed to be shifted to the west. The westerly side yard setback would be increased to 3 feet 6 inches, and the rear yard setback would be increased to 3 feet 7 inches. As a result of the shifting of the proposed

garage to the west, the conforming setback of 6.57 feet from the section of the rear property line that runs along the easterly side of the garage would be reduced, to a nonconforming 4 feet 7 inches. Variances are requested and that minimum side and rear setbacks of 6 feet are required. A conforming height of 13 feet 8 inches is proposed. The proposed garage complies with all other zoning requirements.

Marked into evidence were:

- A-1 Photographs of the interior and exterior of the existing garage
- A-2 Diagram of the footprint of the proposed garage and the proposed setbacks

The Board questioned the applicant. Chair Harrison called for questions and comments from the public. Christopher Skutch, 94 Wildwood Avenue, was sworn and stated that his property survey indicates that the applicant's existing garage is partially located on his property, which will affect the applicant's ability to shift the garage to the west as proposed. Mr. Sullivan called for a short recess to review the topic with the applicant and Mr. Skutch.

Marked into evidence were:

- A-3 The applicant's survey prepared by Richlan, Lupo and Associates, Inc. dated October 12, 2007
- A-4 Property Survey of 94 Wildwood Avenue, prepared by Richard J. Hingos, Inc. dated September 8, 2008

Mr. Sullivan provided a brief explanation to the Board. The property survey of 94 Wildwood Avenue depicts a rear yard overlap of 9 feet wide and 14 feet in depth onto the subject property which includes a portion of the existing garage. The overlap is not depicted on the Township Tax Map or on the applicant's survey. Mr. Skutch indicated a willingness to work with the applicant to resolve the survey dispute and convey his interest in the overlap portion of the property to the applicant, if necessary. The Board discussed the application. In considering the application, the Board determined that subject to compliance with the conditions below, the application can be approved. The garage is being slightly reduced in size and notwithstanding the reduction in the setback from the rear property line that runs along the easterly side of the garage, the location of the proposed garage is an improvement from that of the previously existing garage. Subject to the condition below, there would be no detriment to any nearby property. On motion by Mr. Susswein, seconded by Ms. English the application was approved, subject to the following condition:

1. Within 6 months the discrepancy between the property surveys shall be resolved to the satisfaction of the Planning Department or the owner of 94 Wildwood Avenue shall convey by deed any interest he may have in the overlap area described in Paragraph 4 above (see Resolution) to the applicant.

Chair Harrison called the continuation of the application of **S.W. Flowers, M.D., 460 Bloomfield Avenue**. Calvin Trevenen, Esq. appeared as attorney and described

the application. He stated that the applicant was last before the Board on October 15, 2008 and that revised plans have been submitted to address certain concerns expressed by the Board. No new variances are requested. The applicant is under contract to purchase 2 first floor commercial condominium units, combine the 2 spaces, and is seeking a variance to occupy a portion of the combined space as a medical office. He recalled Jonathan Perlstein, Architect, was still under oath. The application contemplates modifications to the interior of two first floor commercial condominium units with street frontage on Bloomfield Avenue. The applicant proposes to use the space for a combination of retail/medical use providing alternative medical approaches to treatment in combination with the sale of products. The proposal includes a retail sales area of 620 square feet across the combined store front and the remaining 1,877 square feet to be utilized for non-retail purposes for a total of 2,497 net square feet of floor area. The revised plan includes a new primary tenant entry door in the store front that leads to an interior ramp from grade level up to the first floor. The existing entry doors would remain.

Marked into evidence was:

- A-1a Rendering depicting the interior of the proposed retail sales area
- A-1b Composite Photo/Rendering depicting the proposed front elevation

The Board questioned Mr. Perlstein. He answered specific questions and provided details on the floor plan and the elevations. He stated that the existing retail area within one of the units to be combined contains approximately 850 square feet of floor area. No questions were offered from the public.

Dr. S.W. Flowers was sworn. He described his medical practice and stated that a variety of complimentary services are utilized within the alternative medicine component of his practice. He has an office in Maplewood and was also recently located at 125 Valley Road in Montclair. The Board questioned the applicant. He described the variety of services provided by his practice, the proposed floor plan, and which services are rendered by licensed medical doctors and which services are not. No questions were offered from the public.

Michael Petry, PP, was sworn and stated his qualifications as a Professional Planner. He described the application. The subject property is located at the intersection of Bloomfield Avenue and South Fullerton Avenue and contains a three-story building with commercial condominium units. The subject property is located in the "Center Area" of the C-1 Central Business Zone. The subject condominium units have been primarily used for office space in recent history which is not a permitted use. Most recently the units contained an attorney's office and a retail store. The overall character of the within proposal is more consistent with the intent and purpose of the C-1 Central Business Zone than previous uses of the property. With respect to the use variance to permit first floor medical office use, there are various purposes of zoning and special reasons in support of the use variance, including that it promotes the appropriate use of land and the general welfare because the site is particularly suited for the use, provides sufficient space at an appropriate location for the proposed use, promotes a desirable visual environment through creative development techniques, retains and conserves a

property and building with historical and architectural value and coordinates public and private initiatives shaping land development and the more efficient use of land. The application is not inconsistent with the character of the neighborhood and will not adversely impact the public good. Approval of this application is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance which seeks to encourage pedestrian-oriented and specialized shopping opportunities in a downtown setting.

Marked into evidence were:

- A-2 Aerial Map, Petry Engineering, LLC
- A-3 Tax Map, zoning information added, depicting spa type uses in vicinity

The Board questioned Mr. Petry. He provided a breakdown of the floor plan and proposed uses, and how the specific uses would be considered in the zoning ordinance. No questions were offered from the public. Chair Harrison called for public comment. Glynnis Alberts, 110 No. Fullerton Avenue, was sworn and stated her support for the application. Michael Della Fave, 36 Draper Terrace, was sworn and stated his support for the application. Anne Franges, current owner of the subject condominium units, was sworn and stated her support for the application. Sally Malanga, 57 Ridge Road, West Orange, was sworn and stated her support for the application. Steven Penneston, 162 Walnut Street, Bloomfield, was sworn and stated his support for the application. Pam Arian, 155 Montclair Avenue, was sworn and stated her support for the application. Mr. Trevenen summarized the application. The Board discussed the application. The Board concluded that the applicant proved the requisite special reasons for the granting of this application and proved by a preponderance of the evidence that the proposed relief could be granted without substantial detriment to the public good, and would not substantially impair the intent and purpose of the zone plan and zoning ordinance. On motion by Mr. Susswein, seconded by Mr. Whipple the application was approved, subject to the following conditions:

1. A minimum of 600 square feet shall be utilized as active retail across the entire frontage which shall not be used for a waiting area.
2. No more than 1,000 square feet shall be devoted to medical office use as currently defined in Section 347-2 of the Montclair Code.
3. The building shall be handicap accessible consistent with the testimony at the public hearings.
4. The applicant shall obtain approval from the Montclair Historic Preservation Commission.

On motion by Mr. Susswein, seconded by Mr. Whipple the meeting was adjourned.