



TOWN OF WAKEFIELD NEW HAMPSHIRE ZONING BOARD OF ADJUSTMENT

JANUARY 11, 2024

Approved

Don Stewart Chairman via Zoom	✓	Annie Robbins Alternate			
George Frothingham, Vice Chairman		Graham Baker Alternate	✓	Town Counsel Tim Sullivan	✓
John Crowell		Tristen Plummer Alternate		Site Walk	✓
Judi DesRoches	✓			Public Hearing	✓
Robert Baxter	✓				

Others present: Attorney Jon Springer, Attorney Biron Bedard, John Kenney, Donald Lesperance, Byron McHugh, Thomas Martin, Dave Mankus, Fran Parisi, Brian Bennett, Peter Gosselin, Amber Marcoux, Relf Fogg, Leah Gage and Michelle Keating from Clearview TV. Bob Benson, and Jen Czysyz via Zoom

Pledge of Allegiance & Call the meeting to order

Mr. Stewart called the meeting to order at 7:00 and led those present in the pledge.

Seat Alternates as necessary

Mr. Baker was seated for Mr. Frothingham.

Motion for Rehearing

Submitted by Whittier Communications, Inc., through its attorneys, Ransmeier & Spellman, P.C., for property owned by Province Line Associates, LLC located at Tax Map 9-113, 4870 Province Lake Road. The applicant was granted a request for the ZBA to rehear its decision of September 14, 2023 in which it denied Whittier's appeals of the Planning Board's decision of October 6, 2022 approving Vertex Tower Assets, LLC's site plan application to construct a personal wireless cell tower within four miles of an existing tower owned by Whittier Communications. The Applicant alleges that the Planning Board erred when it interpreted Zoning Ordinance Article 24.

Motion for Rehearing

Submitted by Whittier Communications, Inc., through its attorneys, Ransmeier & Spellman, P.C., for property owned by Savannahwood LLC located at Tax Map 92-34 on Province Lake Road. The applicant was granted a request for the ZBA to rehear its decision of September 14, 2023 in which it denied Whittier's appeals of the Planning Board's decision of October 6, 2022 approving Vertex Tower Assets, LLC's site plan application to construct a personal wireless cell tower within four miles of an existing tower owned by Whittier Communications. The Applicant

Section E.5 and Section F. alleges that the Planning Board erred when it interpreted Zoning Ordinance Article 24 Section E.5 and Section F.

Mr. Stewart stated that tonight there are four members of the ZBA present, any vote will require the concurrence of all three members of the board. He asked if the applicant wished to proceed with four members of the board present. Mr. Stewart felt that they should proceed primarily because of the external issues going on with the federal court. The applicant chose to be heard without a full Board. Both matters were heard together.

Attorney Bedard said more than a year ago there were decisions made by the Planning Board to deny Vertex application in April of 2022. Vertex appealed to the ZBA because the Planning Board used Whittier tower as existing even though it wasn't fully constructed yet. The ZBA agreed with Vertex that the tower was not existing and added conditions and sent the matter back to the Planning Board. In September of 2022 the Whittier tower was completed.

When the Planning Board met in September of 2022 they asked Vertex to make a presentation and Vertex refused to do that. He went on to say when the towers were denied in April of 2022 the Planning Board found many reasons for denial. First, that they violated Article 23 D5 which deals with existing towers. Also, that they didn't meet their burden of proof under Article 24F. Nothing about the ZBA's decision in June of 2022 changed the denial of Article 24F. Because nothing changed in respect to that then the Planning Board turned around and approved the towers. We appealed to the ZBA again and were denied for lack of standing.

This time it's our appeal as opposed to Vertex's appeal. This Board denied our appeals due to a lack of standing. The Superior Court remanded it back to the ZBA and we already had one hearing on this matter and we thank the ZBA for granting this rehearing. But since that time a building permit applied for and granted for Verizon to put up an array on Whittier Tower to be up this year in May. He said this should go back to the Planning Board with the evidence of the existing tower and that an array is going up there and that nothing else changed. The Planning Board should have the opportunity to at least create a record, if not reverse their decision.

Mr. Baxter said he was having a hard time following this through the years. He said things keep changing. This is a different issue from the original application. Mr. Bedard said we're not changing anything. He said prior applications were approved and granted. Whittier was trying to get the tower built in 2021 in the middle of Covid. Whittier could not get what he needed to build his tower during that time. He said the decision was made by the Planning Board in April of 2022 and should be what they are abiding by because even the ruling of the ZBA on the existence of the tower there should be denial based on Article 24F. Mr. Baxter said he doesn't see Covid as such an issue because today's supply chain isn't much better.

Mr. Stewart asked if anyone else would like to speak in favor of the Whittier rehearing. Mr. Fogg said it seems like these people have been going through the process properly. The process is confused, not the applicant especially when some things are getting granted on some parts of the ordinance and denied on other parts.

Attorney Springer said he wanted to be very clear. "We are here against our will. We're here because we have to be. We don't waive any claims we have in federal district court and nothing we do tonight waves any of those claims. I want to be very clear about that."

He said he also wanted to talk about the federal shot clock. The FCC has instituted a shot clock for telecommunications applications like Vertex has filed in this case. Federal law grants a municipality 150 days from start to finish to render a decision on the application which includes everything. We've been at this for almost two and a half years.

He said Mr. Bedard only addressed one issue and Mr. Springer said he would address all three; the RF plots showing exactly why the Planning Board did what they did. Whittier cites Article 24A-4 of the ordinance which says, ensure that personal wireless service facilities are compatible with the rural setting and character of Wakefield, including its aesthetics and visual features. Whittier ignores the first section: "Permit carriers to locate personal wireless service facilities in Wakefield, in compliance with the Telecommunications Act of 1996." That includes the shot clock requirement. He said the way this town has treated Vertex. You have acted like this doesn't exist. Whittier knows the shot clock expired over two years ago.

Mr. Springer said it's time the town started looking at that purpose. Vertex did not go back to the Planning Board and just allege a federal law suit. Vertex went back and stood on the record. At the ZBA's September 14, 2023 meeting the Board found unanimously that the Planning Board acted lawfully and reasonably; that Vertex presented sufficient evidence in support of it's application to the Planning Board; that Vertex did not violate Article 24 about the rural character and that it would be maintained. He said the ZBA granted variances which are final and unappealable. Which means this Board found that the towers wouldn't be contrary to public interest, the spirit would be preserved, substantial justice would be done by granting the variances and value of surrounding properties would not be diminished.

Then in November with no notice to Vertex the ZBA held another meeting and flipped, unanimously. The Planning Board approvals were over a year ago. The Planning Board stated in its approval that the two sites are practically identical.

The Planning Boards Radio Frequency expert stated that the Vertex proposed towers would provide coverage where none is presently available assuming the Whittier Tower was operational with a carrier. It doesn't matter if it was existing or not as the Planning Board bases its findings on the fact that the Whittier Tower was operational with a carrier. Why did the Planning Board do that and the RF expert agree? Vertex submitted no fewer than five radio frequency reports for each site. Mr. Springer gave the dates of each submittal. Included in the reports were a lot of radio frequency coverage plots which are computer generated using sophisticated software that takes into account the topography, trees, buildings and they can figure out what height the antennas are going to be. These show the expected radio frequency coverage.

We heard that these plots are inaccurate but the towns expert never said that. Mr. Kenney said at the April 21, 2022 Planning Board meeting, quote: "his and the Towns feeling is to let him get the tower in and see what the coverage actually is." Mr. Springer continued saying that the Town allowed Whittier to build a spec tower. He didn't have a carrier. He waited until a competitor showed up to actually start building. He said there's not a carrier in this country that puts

equipment on a tower and then says let's see what kind of coverage we get. They're going to run radio frequency tests. He said one of the Board members at that last meeting said I think the radio frequencies are unclear and I'd like more information and one of the members wanted the Planning Board chair to come and defend their decision. Mr. Springer handed out pictures of the radio frequency plots and explained the coverage of each. He said in defense of Whittier and Vertex that a 120' tower is not that high. All this information was before the Planning Board and their RF expert. He said the square mile coverage of the two Vertex sites would cover 6.7 square miles, He said that Whittier says the ordinance has a prohibition of multiple personal wireless service facilities within four mile radius.

Mr. Springer continued stating, that's not true. The ordinance doesn't prohibit towers within a four mile radius, just the opposite. It allows towers within that radius if you meet certain criteria. In a four mile radius you have 50.25 square miles and the town only has 44.9 square miles of which 5.3 square miles are water. If Whittier has a prohibition here they'd shut out everyone in town.

Mr. Springer said three of the purposes of the telecom ordinance weigh in their favor. They raise the rural character but ignore the other three. Vertex submitted visual records, a balloon test, for each site. They agreed to have conditions that say they can't build without a carrier. They can't build without a fake tree. Whittier argues that Vertex fails to satisfy its burden of proof of Article 24F requiring evidence of no other existing structure suitable to locate a cell tower. The Vertex application filed on June 26th 2021 Whittier's Tower did not exist. June 2022 Whittier had a foundation and some rebar. We have to meet the requirements on the day of the application and Whittier's Tower did not exist.

He said the Planning Board ruled incorrectly that it was existing because they had the permits but it was not built. The ZBA correctly overruled them. The Planning Board shouldn't have looked at Whittier Tower at all because it was not existing as of the date of the application. In the ZBA's November hearing when Vertex was not present someone said he was frustrated that they did not hear from the Planning Board Chair in defense of their decision. Mr. Springer stated that the Planning Board Chair didn't have to come and defend their decision. He has no obligation to come defend their decision before the ZBA.

Mr. Springer continued saying in Whittier's appeal they say that Vertex did not supply sufficient evidence to prove a need for additional tower locations as required in the Zoning Ordinance and they assert the RF data is inaccurate and the consultant said it is unlikely for carriers to locate on all three towers. Mr. Springer said there is no evidence that the RF plots they supplied are inaccurate. The consultant did not say the additional towers would only create a slight increase in coverage. What the consultant said was it was doubtful on day one it all depends on users and demand. What carriers do is locate on one tower and then say we need to close the gaps and Whittier's Tower don't reach those gaps.

Those are the reasons the ZBA should deny the appeal. He said they respectfully ask the Board to uphold their decision and deny the appeal.

Mr. Benson said he owns the Savannahwood land said we all need good cell phone coverage and the Vertex Towers will give us better coverage. He asked that the Board allow the Vertex Towers.

Mr. Bedard said Vertex does a good job of rearguing their case. The position they are taking is that the Planning Board incorrectly interpreted the Zoning Ordinance and appealed it back to the ZBA and that's why we're here not to see if the ZBA feels the Planning Board got the evidence wrong. The question for this Board is, did the Planning Board get the ordinance wrong. It had nothing to do with coverages, models etc. He said computer modeling and experts are great but don't actually reflect what happens on the ground.

Mr. Bedard said in the Zoning Ordinance it says:

1. "The applicant shall submit a list of all contacts made with owners of potential sites regarding the availability of potential space for a personal wireless service facility.
2. The applicant shall provide copies of all letters of inquiry made to owners of existing structures and letters of rejection. If letters of rejection are not provided, at a minimum, unanswered "Return Receipt Requested" forms from the U.S. Post Office shall be provided for each owner of existing structures that was contacted.
3. If the applicant claims that a structure is not capable of physically supporting a personal wireless service facility, this claim must be certified by a licensed professional civil engineer. The certification shall, at a minimum, explain the structural issues and demonstrate that the structure cannot be modified to support the personal wireless service facility without unreasonable costs." He said these are the three factors.

Mr. Springer said the argument over what the studies mean are a Planning Board issue. If the Planning Board found that Vertex did not meet Section 24F and nothing about the evidence changed thank that reason should still stand. He asked that the ZBA remand it back to the Planning Board. Mr. Bedard said the shot clock doesn't apply. He said part of the delay is Vertex. Vertex came in saying we didn't have standing to even ask that the decision be overturned and they persuaded you to accept that. Mr. Springer responded that the shoot clock gave you 150 days to approve an application. He said he never said that. You have 150 days to render a final decision on an application. He said the RF plots are very real and accurate. That's what the carriers rely on. The statutes dealing with existing towers that Mr. Bedard read deals with a tower on the day of application and the Whittier Tower didn't exist.

Mr. Stewart closed the Public Hearing at 8:00. Mr. Stewart told the Board their options. Mr. Baker said a lot of the appeal deals with Section 24F and specific wording of the ordinance, We also have Section 24D that says should there be any conflict arise between the definitions set forth in this Ordinance and those set forth in either the New Hampshire RSAs or the TCA, the definitions set forth in the New Hampshire RSAs or the TCA shall be controlling. He said he doesn't have the cases where there is a demonstratable gap in coverage the four mile radius is essentially irrelevant. He believes 24D trumps 24F procedurally. Mr. Baxter said he's inclined to deny the appeal. Mrs. DesRoches agrees with Mr. Baxter. Mr. Stewart said he also will take that position.

Mr. Baker made a motion, seconded by Mrs. DesRoches to deny the requests by Whittier Communication in regard to Savannahwood and remanding it back to the Planning Board. (Vote 4-0)

Mr. Baker made a motion, seconded by Mr. Baxter to deny the requests by Whittier Communication in regards to Province Line and remanding it back to the Planning Board. (Vote 4-0)

Mr. Stewart said it has been voted to deny the request on both matters.

Mr. Stewart, Mr. Baker, and Mr. Dick DesRoches attended site walks for the two properties listed below on Saturday January 6th. Mr. Mankus attended the site walk for Byron McHugh.

Variance Application

Variance Application:

Submitted by Donald P. Lesperance, Jr. for property co-owned with Donald P. Lesperance, Sr. Tax Map 180-002, 21 Cosmar Drive. The applicant seeks a variance from Article 3, Table 3-Density and Minimum Dimensional Requirements, in order to add a second story on the commercial building, with a proposed use as an Accessory Dwelling.

Mr. Lesperance chose to be heard by the four members present. Mr. Lesperance said he and his wife want to downsize. They currently live in a large house on High street and he would like to put a second story on his business and make that into a living space.

Mr. Stewart said the Board needs to accept the application, abutters have been notified, fees paid and the notice has run in the paper.

Mr. Stewart made a motion, seconded by Mrs. DesRoches to accept the application. (Vote 4-0)

Mr. Bennett said the footprint is 1750 square feet with a three season porch on one end and storage on the other end which leaves about 1200 square feet of living space. Mr. Stewart explained that there is a thirty day period where anyone can object to the variance being granted. If you take action before the thirty days expire you do it at your own risk. No one spoke against the variance. Mr. Fogg spoke in favor of granting the variance saying this will help workforce housing. Town Building Inspector Mr. Gosselin said the only reason that he had to deny was because of the setbacks and it would be beneficial to Mr. Lesperance to have the setbacks approved for life safety purposes. The deck being able to come out and have a set of stairs come down for safety. Mr. Stewart closed the Public Hearing at 8:15. There was discussion about adding a condition that no further building takes place except covering the deck.

The Board voted on the five criteria.

Criteria 1

Would the proposed use diminish surrounding property values or not?

It would provide an updating of an older building and make Cosmar Drive look nicer which would probably increase neighborhood property values.

Mr. Stewart made a motion, seconded by Mrs. DesRoches, that the applicant has met criteria 1 (Vote 4-0)

Criteria 2

Granting the variance will not be contrary to the public interest.

The property would remain in its current conditions and that it not be expanded beyond the current proposal and that the emergency egress would be properly positioned and not be a living space.

Mr. Stewart made a motion, seconded by Mr. Baker, that criteria 2 has been met with Mr. Stewarts additional comments. (Vote 4-0)

Criteria 3

Granting a variance would do substantial justice.

This is what needs to be done for the applicant to retire and live out his remaining life more comfortably.

Mr. Stewart made a motion, seconded by Mr. Baker, that the applicant has met criteria 3 (Vote 4-0)

Criteria 4

The use is not contrary to the spirit of the ordinance.

The use is not contrary to the spirit of the ordinance because the footprint of the building will not be increased and the addition would be for a second floor with a condition that it would not be expanded beyond that.

Mr. Stewart made a motion, seconded by Mrs. DesRoches, that the applicant has met criteria 4. (Vote 4-0)

Criteria 5

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. The applicant has already spent a lot of money on this project since starting this with the Building Inspector, contractors and bank.

Mr. Stewart made a motion, seconded by Mr. Baker, that the applicant has met criteria 5 (Vote 4-0)

Condition 1: The footprint of the second floor would not be increased beyond what is proposed.

Condition 2: There will be no use of the second floor other than what has been proposed.

Condition 3: The rear exit for safety purposes would be strictly conforming to what the building inspector would require for an emergency exit and will not be used as additional living space.

Mr. Stewart made a motion, seconded by Mrs. DesRoches that these three conditions be part of the notice of decision. (Vote 4-0)

Mr. Stewart said the variance has been approved and suggested he take the Notice of Decision and a copy of the minutes when available to his bank.

Variance Application

Submitted by Bryon McHugh, Tax Map 111-008, 167 Dearborn Road. The applicant seeks a variance from Article 23B, Section E.1-Home Industry, in order to operate a home business to include cutting/selling firewood, welding and car repairs.

Mr. McHugh said he is looking to work on his property between the hours of 9:30 and 2:30. He said he's been in town since 1982 and has been cutting and splitting firewood ever since. He has been cutting and splitting firewood from this same house for nine years. He has four letters from neighbors in support. He handed the pictures to the Chair. He hasn't had any complaints for nine

years. He has $\frac{3}{4}$ of an acre and only uses 200 sq. ft. for the wood. He wants to continue doing what he's done for the past forty one years. He agreed to proceed with four members of the Board present.

No one in the audience wished to speak in favor of Mr. McHugh's application. Mr. Stewart said he had four letters he passed to Board members speaking in favor of his application which will become part of the record. Mr. Stewart said what Mr. McHugh needs is a Conditional Use Permit that would be granted by the Planning Board. And there are requirements that need to be met before a permit is issued. Mr. McHugh has asked for relief from Article 23B, Section E.1 Home Industries. Home industries are permitted in the Residential III and Agricultural districts by Conditional Use Permit from the Planning Board, if in compliance with the requirements of Section B, above, and the following:

1. The parcel on which the Home Industry is operated must be a minimum of three (3) acres in size.

Mr. McHugh said he had no industrial equipment and no employees. Mr. Stewart said we are only voting tonight based on the lot size and whether a lot that size can support log cutting, welding and car repair. If we approve your variance you would still have to take this to the Planning Board to request a Conditional Use Permit. Mr. Fogg asked if this should be sent to the Planning Board first and then sent to the ZBA for this decision. He said time and energy is being spent when you may not get the Conditional Use Permit. Mr. Stewart said it could have gone that way but we're here. If the Planning Board denies it based on the land size he's going to come here anyway. Mr. Mankus spoke in opposition to the application.

Mr. Mankus submitted a letter to the ZBA prior to the meeting. (Letter at the bottom). Mr. Mankus stated that he owned Lake Forest Resort across the street from Mr. McHugh that's been there over fifty years. He says he gets a lot of complaints about the noise of the chainsaw. He said over the last couple of years Mr. McHugh's business has become more commercial, busier and taking more time and it's become a problem for us. He said the character of the neighborhood is small houses, small lots and quiet. He said he always thought this was temporary but it's an illegal operation and he said he could always have filed a complaint and he would be shut down. He passed out two pictures of Mr. McHugh's property where you can see a huge pile of logs. He says a logging truck comes and it's damaging the road. He said zoning is supposed to protect the neighborhood and the rural character. The neighborhood is between two lakes with small lots and a business like this shouldn't be there. He said that when he votes as a member of the Budget committee he votes as if his grandchildren were going to that school. He hopes the ZBA will vote as if this was 200 feet from their home.

Mr. Stewart made a motion, seconded by Mrs. DesRoches, to accept the application as complete. (Vote 3-0-1)

Mr. Martin said he was the person that filed the complaint. He said he bought his house in February 2021. He is a 100% disabled vet. He said he was told by his realtor there were no businesses in the neighborhood. He said Mr. McHugh had the yard all cleaned up for the site walk. He has pictures that show logs stacked up above the roof. This is unsafe and the chain saws are noisy. He hears the chainsaw and has to turn his TV volume way up to hear it. Mr. Martin said he also has two employees. They both say the other has made threats. Mr. Martin says he has run his chainsaws from 8:00 in the morning to 6:00 at night on nice days. He asked that the variance be denied so he can enjoy the rest of his retirement in his yard.

Mr. Stewart reiterated that the Board is only here to determine if the lot size is big enough to run a business.

Mr. Stewart closed the Public Hearing at 8:58. He asked Mr. Gosselin if a cease and desist order had been issued. Mr. Gosselin replied that an order had been issued in October and Mr. McHugh asked to come before the Board to get a variance and then go for a Conditional Use Permit. He isn't privy to what happened with the Town Administrator or the Board of Selectmen but Mr. McHugh was allowed to go for the variance. Mr. Martin said he ran his chainsaws after the cease and desist.

Mr. Stewart said his decision is based on the site walk, what has been presented here tonight and the letters. He does not feel what Mr. McHugh is doing is proper for the neighborhood. Mr. Baker doesn't feel it's appropriate on a 6.7 acre lot. Mr. Baxter agrees. Mrs. DesRoches feels the lot is too small. She might feel differently if it were a 1 ½ to 2 acre lot.

Mr. Stewart made a motion, seconded by Mr. Baker, to deny the application. (Vote 3-0-1)

Mr. McHugh said he's not stopping.

Board Business

Correspondence

Approval of Minutes

Mr. Stewart made a motion, seconded by Mrs. DesRoches, to adopt the minutes of December 14, 2023. (Vote 3-0-1)

Set Next Meeting Date

Nothing scheduled

Adjournment

Mrs. DesRoches made a motion, seconded by Mr. Baker, to adjourn the meeting at 9:11 (Vote 4-0)

Respectfully submitted for approval at the next ZBA meeting,

Priscilla Colbath, ZBA Secretary

I am responding to a "Abutters Notice" I received a week ago related to a home industry proposed at 1.67 Dearborn Rd. As a direct abutter across the street, I object to the Board granting the applicant a Variance for any of several prohibitions which I think would apply in this instance.

Namely: Zoning Ordinance Article 23B-E-L parcel size 3 acres

The obvious intention here is to not allow Home Industries, which activities are outside the home in congested neighborhoods. The subject parcel being 213 of an acre, with many similar small house lots nearby would have to be 4% times bigger to meet that requirement. The minimum current lot size for development in Wakefield is far greater than .67 of an acre. On the site walk last Saturday, I observed a not so small house, a garage, six cars and trucks and a 12 foot tall pile of tree length logs in the front yard, not a typical residential picture.

Article 238-83 The activity must not change the character of the premises or the surrounding neighborhood.

Article 14 H Aesthetic Compatibility. All buildings and structures shall be aesthetically Compatible.....

Article 238-E-3. Shall be permanently screened from the view of abutters and the Public way.. plantings, fences, Anyone traveling down Dearborn Road will agree tarps tied to trees does not fall near the spirit of the above Articles.

Article L4-A Noise. No noise shall be produced that is objectional to the public.... Although the ZBA is only required to notify abutters within 100 feet of the subject property the noise of the firewood processing travels thru the surrounding properties more than 1000 feet. I have approved Campsites as close as 150 feet and I would consider them unusable if this firewood activity was to continue. Over the last few years, with the addition of an employee the activity has increased,

causing complaints from my campers throughout the campground, to the chainsaw and the dumping of bucket loads of wood into a metal trailer.

Although Stratford Planning seems to have overlooked the applicants "proposed use" "Welding and car repair" in their summary to the Board, I would object to that use also for the above reasons and I believe Article 8, Aquifer Conservation District that prohibits "automotive repair shops" would apply.

Respectfully. Dave Mankus Manager Lake Forest Resort.