WAKEFIELD, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT

Appellant: Whittier Communications, Inc.
Property: Tax Map 92, Lot 34

MOTION FOR REHEARING

Whittier Communications, Inc. ("Whittier"), by and through its attorneys, Ransmeier & Spellman, P.C., submits this Motion for Rehearing of the Town of Wakefield Zoning Board of Adjustment's decision of September 14, 2023 in which it denied Whittier's appeals of the Planning Board's decisions of October 6, 2022 approving Vertex Tower Assets, LLC's ("Vertex") site plan application to construct a personal wireless cell tower within four miles of an existing tower owned by Whittier, stating in support thereof as follows.

STANDARD OF REVIEW

> Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. . . .

RSA 677:2.

A motion for rehearing pursuant to RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is *unlawful or unreasonable*. RSA 677:3 (emphasis added).

BACKGROUND

On or about August 26, 2021, Vertex filed with the Planning Board a Major Site Plan Application, seeking approval to construct a cell tower on Province Lake Road (Tax Map 92-34)

(the "Province Line Tower"). Simultaneously, Vertex filed a similar application for a separate cell tower, also to be located on Province Lake Road (Tax Map 9, Lot 113) (the "Savannahwood Tower").

As proposed by Vertex, the Province Line Tower would be 1.9 miles away from the existing Whittier Tower, and the Savannahwood Tower would be 2.25 miles away from the Whittier Tower.

On April 21, 2022, the Planning Board voted to deny Vertex's applications to construct the towers as proposed for failing to satisfy the burden of Article 24, Section E.5 and Section F of the Zoning Ordinance. The Planning Board determined that Vertex failed to submit substantial evidence to overcome the Ordinance's restriction on multiple towers located within a four-mile radius.

Vertex appealed this denial to the Town of Wakefield Zoning Board of Adjustment ("ZBA"), which held a meeting on June 20, 2022. On June 23, 2022, the ZBA issued a Notice of Decision in which it determined that the Whittier Tower was not "in existence" at the time of the Planning Board's denial of Vertex's applications, because construction was not yet completed on the Whittier Tower. Accordingly, the ZBA remanded Vertex's applications to the Planning Board.

Before the Planning Board convened to hear the remanded matters, construction of the Whittier Tower was completed.

On September 1, 2022, the Planning Board held a meeting to hear the remanded matters. Vertex, however, refused to present its applications anew following the ZBA remand.

Rather than denying the application, considering (a) that Vertex refused to present new evidence and (b) that the Whittier Tower was now unambiguously "existing," the Planning Board instead continued the meeting until October 6.

On October 6, 2022, the Planning Board held a meeting regarding the remanded tower applications. At the meeting, the Planning Board, despite acknowledging that the Whittier Tower, having now been constructed, was clearly "existing" pursuant to Article 24, Section E.5 of the Ordinance, voted to approve Vertex's application to construct both towers within four miles of the Whittier Tower.

Whittier subsequently appealed this Planning Board decision to the ZBA. On December 13, 2022, Vertex filed motions to dismiss both of Whittier's appeals (pertaining to the Savannahwood and Province Line Towers), arguing that Whittier lacks legal standing to bring these appeals.

On January 30, 2023, the ZBA held a meeting to rule on these motions to dismiss. The ZBA ruled that Whittier lacks standing, and therefore granted Vertex's motions to dismiss.

Whittier then filed a motion for rehearing with the ZBA on the standing issue. Following the ZBA's denial of the motion for rehearing on March 20, 2023, Whittier timely appealed to the Carroll County Superior Court. Ultimately, the Superior Court determined that Whittier had standing and remanded this matter back to the ZBA.

The ZBA held a hearing on Whittier's appeals on September 14, 2023 and voted 5-0 to deny both of Whittier's appeals. The ZBA issued a written decision on the matter dated September 19, 2023. Whittier now appeals that decision.

ARGUMENT

Vertex is seeking to construct personal wireless cell towers within four miles of an existing tower owned by Whittier. Article 24 of the Wakefield Zoning Ordinance governs the construction and location of new cell towers. Article 24, Section A.4 provides that an express purpose of the Ordinance's personal wireless service facility regulations and restrictions is to "[e]nsure that personal wireless service facilities are compatible with the rural setting and character of Wakefield, including its aesthetics and visual features."

As previously described in Whittier's appeals to the ZBA, to effectuate this stated purpose, the Ordinance unambiguously prohibits a new cell tower from being located within four miles of an existing tower, absent substantial evidence of a demonstrated need for such locations. See Article 24, Section E.5.

The record in this matter clearly indicates that Vertex failed to satisfy its burden of proof that locating its towers well within four miles of the Whittier Tower was necessary.

The evidence presented to the Planning Board established that Vertex's radio frequency data was inaccurate. The Town's independent radio frequency consultant also testified that Vertex's proposed new towers would create only a slight increase in coverage area and that it would be unlikely for wireless carriers to locate on three separate cell towers within a four-mile radius. It was unreasonable for the Planning Board to disregard this information when making its determination here.

Additionally, the record lacks support to show that Vertex satisfied its burden of proof pursuant to Article 24, Section F, which provides as follows:

> When applying for construction of a new tower, mast, monopole, or similar structure, the applicant shall have the burden of proving that there are no existing structures available and suitable to locate its personal wireless service facility and/or transmit or receive radio signals. To meet that burden, the applicant shall

> take all appropriate actions as may be required from the applicant, which may include but not necessarily limited to the following actions: 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.

Vertex never contacted Whittier as required to inquire about the availability to locate its personal wireless service facility on the Whittier Tower, and the Planning Board failed to analyze whether the Whitter Tower would have been a suitable structure pursuant to Article 24, Section F.

The Planning Board also failed to consider the significant detriment to the rural character and aesthetic features of Wakefield that would result from the granting of Vertex's applications, as laid out in Article 24, Section A.4 of the Ordinance.

CONCLUSION

Based on the foregoing, the ZBA's decision to deny Whittier's appeals here was unreasonable and contrary to the Wakefield Zoning Ordinance. Accordingly, the ZBA should grant a rehearing of this matter.

WHEREFORE, Whittier Communications, Inc. respectfully requests that the Zoning Board of Adjustment:

A. Grant this Motion for Rehearing; and

B. Reverse the decision of the Planning Board.

Respectfully submitted,

Whittier Communications, Inc.

By and through its counsel,

RANSMEIER & SPELLMAN, P.C.

Date: October 11, 2023

By: Biron Bedard

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