

Zoning Board of Adjustment

Town of Wakefield, NH

Notice of Decision

Applicant: Whittier Communications, Inc. (“Whittier”)

Property Location: (1) Tax Maps 9-113, 4870 Province Lake Road, (2) Tax Map 92-34 Province Lake Road.

Subject: Whittier filed two motions for rehearing, requesting that the Zoning Board of Adjustment rehear its applications, which the ZBA had previously denied by a 5-0 vote on September 14, 2023. The ZBA granted the motions for rehearing. The rehearing was held on 11, 2024.

Procedural History:

On September 14, 2023, The ZBA held a hearing on the Whittier applications. Whittier appealed two decisions by the Wakefield Planning Board to grant site plan approval to Vertex Tower Assets, LLC (“Vertex”) for the construction of two new personal wireless service facilities (“cell towers”). On September 14, 2023, the ZBA held a hearing on the applications, and moved by a vote of 5-0 to deny both applications. *See* Notice of Decision, September 19, 2023.¹

Subsequently, on October 12, 2023, Whittier submitted two motions for rehearing. On November 9, 2023, the ZBA voted to grant the motion for hearing. On January 11, 2024, the ZBA held the rehearing, and voted 4-0 to deny the Whittier applications.

Findings:

1. Whittier assented to the ZBA proceeding with 4 members.

¹ The hearing was delayed due to procedural issues. The ZBA had initially granted Vertex’s motion to dismiss the appeal due to a finding the Whittier lacked standing. Whittier appealed that decision to the Superior Court, which reserved and remanded back to the ZBA for a decision on the merits, finding Whittier had standing.

2. The ZBA gave both Vertex and Whittier a full and fair opportunity to be heard on the applications.
3. Vertex presented the Board with RF graphs showing a lack of coverage in the proposed areas, even with the Whittier Tower present. Those graphs were the same which had been presented to the Planning Board.
4. The ZBA reincorporates all prior findings made in its notice of decision dated September 19, 2023, as well as all minutes from the meetings held on September 14, 2023, and January 11, 2024.
5. The ZBA incorporates the entire Planning Board record into its findings.
6. The ZBA finds that Whittier failed to meet its burden to demonstrate that the Planning Board erred when it granted the Vertex applications.
7. The ZBA, by a vote of 4-0 finds that the Planning Board acted lawfully and reasonably in granting the Vertex applications.

Decision

Before the ZBA are two requests made by Whittier for rehearing of decisions made by the ZBA on September 14, 2023. Whittier appealed the Planning Board's October 6, 2022, decisions to grant two applications for site plan approval made by Vertex to construct cell towers. At the September 14, 2023, hearing, the ZBA denied the appeals by a 5-0 vote, which vote was supported by the record, and the written findings issued on September 19, 2023. Whittier timely filed for rehearing, which was granted by the ZBA. The motions for rehearing raised identical issues to those which had been previously raised by Whittier, and were the subject of the September 14, 2023, hearing.


On January 11, 2024, the ZBA reheard the appeals. During both the original hearing, and rehearing, Whittier and Vertex were given an opportunity to address the board, which they both did through counsel. Pursuant to RSA 674:33, the ZBA has the power to "[H]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16."

On rehearing, Whittier raises the same issues which were originally resolved by the ZBA at the September 14, 2023, hearing. During that hearing ZBA members raised the issue of coverage at the proposed locations, and questioned Whittier as to whether sufficient coverage

exists. Whittier responded by suggesting the Board should wait until a carrier is up and running on the Whittier Tower, and then reassess to see if there are actually gaps in coverage. Vertex countered that argument by suggesting the studies presented to the Planning Board and ZBA demonstrate a need for coverage, and that those studies assumed for the purpose of analysis that the Whittier Tower is in existence. During the January 11, 2024, hearing, Vertex again presented the Board with the same RF charts, showing a lack of coverage, assuming the Whittier tower was built and operational. The coverage gaps in the chart showed a clear need for coverage in the proposed areas, which supported the Planning Board's decision. The Board also accepts arguments by Vertex, that the Planning Board must have considered Art. 24 (A)(4) ("ensure that personal wireless service facilities are compatible with the rural setting and character of Wakefield, including its aesthetics and visual features") because the Planning Board imposed conditions upon Vertex that they integrate the cell towers into the surrounding area, by using pine tree concealment product.

After deliberations, the ZBA voted unanimously 4-0, that Whittier had failed to meet its burden on appeal and denied the applications. In making its decision, the ZBA continues to rely on the meeting minutes of the Planning Board dated September 1, 2022, and October 6, 2022, as well as the complete record from the Planning Board. The ZBA also incorporates the minutes from the September 14, 2023, appeal hearing in support of this decision, as well as the minutes from the January 11, 2024, meeting. Finally, the ZBA relied on the information presented during the first Planning Board appeal hearing.

For those reasons, and the reasons provided on the record, the ZBA denies both appeal applications of Whittier.



Don Stewart, Chair
1/17/2024