



**TOWN OF WAKEFIELD NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT**

JUNE 20, 2022

HELD IN PERSON AND ON ZOOM

Approved

Site Walk

Don Stewart Chairman	✓	Robert Baxter Alternate (1 st appeal)	✓	Victor Vinagro, Land Use Clerk & Code Enforcement Officer	✓
George Frothingham, Vice Chairman	✓	Graham Baker Alternate (2 nd appeal)	✓	Town Counsel Steven M. Whitley	✓
John Crowell	✓			Site Walk	
Judi DesRoches				Public Hearing	✓
Annie Robbins	✓				

Others present: John Kenny, Madelyn Ness, Robert Ness, Joe Moersch, Rossanna Gordon Moersch, John Shull, Lynn Shull, Doug Stewart, Michelle Keating and Max Gearing from Clearview TV.

Present on Zoom: Jack Hepburn

Pledge of Allegiance and call the meeting to order

Chairman Stewart called the meeting to order at 7:00 and led those present in the flag salute and introductions were made.

Seat Alternates as necessary

Alternate Robert Baxter was seated for Judi DesRoches.

Mr. Stewart made a motion, seconded by Mr. Frothingham, enter nonpublic session at 7:00 under 91-A 3:11 (c) & (l). Roll call vote: Robbins aye, Crowell aye, Baxter aye, Frothingham aye, Stewart aye. (Vote 5-0)

The Board returned to public session at 7:25. During nonpublic the Board had a discussion with their attorney.

Introductions were made.

Mr. Stewart said we have two matters in front of us this evening.

Public Hearings

Public Hearing 1

Appeal of Planning Board Decision: submitted by Francis D Parisi, Vertex Tower Assets, LLC for property owned by Province Line Associates, Adam & Christine Benzing co-trustees, located

on 4870 Province Lake Road, Tax Map 9-113. The applicant is appealing the Planning Board's decision to deny the major site plan application based upon Article 24, Section E.5 and Section F of the Town's Zoning Ordinance. The applicant seeks to construct a personal wireless services facility consisting of a 120' tall monopole (126' to the top of the highest appurtenance).

Mr. Vinagro said the application is complete, the abutters have been notified, fees paid and notice has run.

Mr. Frothingham made a motion, seconded by Mr. Baxter, that the application is complete and they can move forward. (Vote 5-0)

Mr. Parisi introduced himself and said he had been here in the fall seeking a variance for the height of the tower and the variance was granted by the ZBA subject to Planning Board approval of the site plan. The Planning Board denied the approval and he was quite surprised. They had submitted an immense amount of data to that Board. The Planning Board hired a consultant at his expense and he requested that they submit more data to him. Notwithstanding the expense the consultant never submitted a report saying that the data was inadequate. He said, we're not sure why the Planning Board denied it. Mr. Parisi said the Planning Board cited a provision of the zoning regulations, making some errors in judgement. He said there are two reasons they appealed. The Planning Board made an error when considering what they called an existing facility and even if it was existing, he provided substantial data showing the need for our facilities. There is a need for all three facilities.

Mr. Parisi said there are three good reasons he feels why they should be granted site plan approval. 1. That the Planning Board's decision was made in error and that they considered a facility that was non existing, existing. 2. The decision was unreasonable and unlawful. We provided a complete site plan, all the data required by the zoning bylaws, and the Board ignored the site plan. They didn't say the site plan was inadequate in any way. We believe the denial, when we gave them everything, they asked for was unreasonable and unlawful. 3. These facilities need to get another level of scrutiny because they are heavily federally regulated. He said there are different ways towns have to look at these facilities. You can't prohibit telecommunications. You can't just say no. The federal law doesn't say you have to say yes, it says you can't say no without sufficient reason.

Mr. Parisi said we believe that the denial of the application is a prohibition against telecommunications services. He said the Planning Board had no data to deny it. He said there were complaints from a competitor and the Board listened to that more than the data we provided and didn't ask for a conclusion from the consultant. He believes there is sufficient grounds on any of those three counts to give this Board the authority to overturn. He said he is really here as a courtesy because we have filed an appeal in federal court. He said he doesn't want to be there. It cost time and money and is an aggravation for both sides. So, he said to the ZBA, this is an opportunity for you to work things out more reasonably.

Mr. Parisi said we had talked about certain conditions at the Planning Board that we were agreeable to and we can talk about those tonight. There is a major condition we should talk about tonight. If we don't resolve this here, we will just continue on to federal court. He said that's not a threat. We're here to assert our rights under federal law. If the town wouldn't like to discuss

reasonable conditions we'll just stay on the course to federal court. He said you have the right to overturn the Planning Board. We don't have to go back to the Planning Board. You can just say, site plan approved and we can move on. He asked the ZBA members if they had a chance to go through the data and the appeal they submitted.

Mr. Frothingham asked if he would like to talk about the major condition he mentioned. Mr. Parisi explained that they are not a telecommunications company. They are an infrastructure company and he said we lease space on towers. He would agree as a condition that they will not pull a building permit until they have a commitment from a carrier. Because of the pandemic we have been slowed just like the other tower has. Mr. Baxter asked about space on a tower for fire and police. Mr. Parisi said they would agree to a condition to reserve reasonable space on the tower for police and fire. Mr. Parisi said originally, they were going to propose higher towers but when they learned about the third tower, they lowered their heights. He asked that the Zoning Board to overturn the Planning Boards decision to allow them to move forward.

Mr. Stewart opened the Public Hearing at 7:42. No one present wished to speak in favor of the appeal. Mr. Stewart asked if anyone would like to speak in opposition to the appeal. Mr. Kenney said the foundation for his tower was being poured this week and he expects the tower to be up by the end of the month. He explained the difficulty he has had with supply, engineering and costs. He said the Planning Board's decision reflected what the townspeople wanted. They wanted to wait until Mr. Kenney's tower was up to see what the coverage would be and if more towers were needed Vertex could come back. Mr. Kenney said he has talked to several carriers and they are not going to go on three towers in East Wakefield. He said he's been talking with fire and police for months and they are anxious to be on his tower as soon as it's up. Mr. Kenney said his tower will give coverage to the Belleau Lake area. Mr. Baxter asked about coverage for Province Lake and Mr. Kenney said you actually get coverage from his Whittier site. He said a tower in Effingham would be ideal for Province Lake coverage. Mr. Parisi said we are not trying to replace Mr. Kenney's tower; we're trying to complement it.

Doug Stewart said no one at the Public Hearings was in favor of the towers except those who had a vested interest. He said the Planning Board had multiple conversations with the independent third party consultant from IDK Communications. The consultant attended the last Planning Board meeting and he stated that if there were three towers in the air that you will not get consistent coverage across the three towers because you will not get carriers to lease space on every one of those towers. Doug Stewart also said that the reason the Planning Board considered Mr. Kenney's tower existing was because of the slow down caused by the pandemic. They felt if this went to court a judge would have to decide if that opinion was viable.

Graham Baker said he is an alternate to the ZBA but is speaking as a member of the public. He told the Board that this is a point of information that he just discovered, a fourth tower on Wiggin Mountain in Parsonsfield that has been registered and is in the Province Line area directly across from Province Lake on the other side of the golf course. He said this complicates matters as it's within two miles of the Province Line location. He said it is not yet existing and he doesn't know the status of the build. He said this is the exact location that the Parsonsfield tower is intended to cover. It should cover the western side of Province Lake plus the campgrounds. Mr. Baker feels it would be useful to contact the Parsonsfield Planning Board. Taking into

consideration the elevation of this tower is one hundred and seventy feet higher than the proposed Province Line tower which may provide the needed coverage.

Derek Thibodeau, representing Province Line said, if Mr. Parisi promised they won't build a tower until they have a carrier, what's the competition? He said he is a resident of Parsonsfield. and the tower in Parsonsfield is actually on the northern side of Wiggins Mountain. Province Line owns the west side all the way to the top. The Parsonsfield tower is trying to connect with the tower in Newfield. Joe Moreschi said it was his understanding that we were going to wait to find out what the Kenney tower did. Adam Benzing of Province Line said he wanted to advocate for his 106 families at his camp who have no coverage. Madelyn Ness questioned the closeness of the towers. Mr. Parisi said we take into account the topography and terrain. The two miles are arbitrary.

Mr. Stewart closed the Public Hearing at 8:11.

Mr. Stewart re-opened the Public Hearing at 8:13.

Jack Hepburn said it's their opinion (Mr. Kenney and Hepburn) that the Planning Boards decision was a reasonable interpretation of the zoning ordinance. He went on to say that the applicant had to provide sufficient evidence as to why they could put two towers within a four mile radius of Mr. Kenney's tower. It's their position that the Planning Boards decision was reasonable. The ZBA is not substituting their own judgment rather they are to determine if the Planning Boards decision was a reasonable and lawful interpretation of the zoning ordinance. The Planning Board considered it existing because it's been permitted and under construction and the pandemic slowed it down and the Zoning Board should not overturn it.

Mr. Stewart closed the Public Hearing at 8:15.

Mr. Stewart said the discussion among the Board is whether the Planning Board correctly or incorrectly rendered it's decision vis-à-vis the Province Line application. The Planning Board issued in its decision that the tower was under construction at the time of their decision so the tower therefore was in existence. We need to determine if the tower was in existence. Relative to Article 4, Section E5 of the zoning ordinance they said there was no evidence of a non-existing facility as the basis for their denial, Mr. Stewart asked the Board members; was Mr. Kenney's tower existing at the time of the decision? Mr. Frothingham said he is willing to accept that it was existing. Mr. Baxter said existing to him means it's already there. He does not see that it was existing. Mr. Crowell agreed with Mr. Baxter.

Mrs. Robbins asked if there was any evidence that this project was delayed because of the pandemic? Was there an order made for the tower? Mr. Kenney said last fall he started on the access road and he cleared all the trees. Towards the middle of the winter the company he was dealing with was having problems, everyone had to be laid off because of the pandemic. There were problems with the engineering because of the pandemic and steel shortages added to all of this. He said the tower should have been up by now. The engineer he was dealing with left the company and the one they hired was not up to par. He has finally gotten word that his drawings are done, the tower is finally being built and he expects to have it by the end of the month. Until he had supplies from the tower company he was at their mercy. Mrs. Robbins asked if the project is vested. Mr. Kenney said he has \$200,000 in the project right now.

Mr. Stewart said the ZBA has to decide if the Planning Board was correct that the tower was existing at the time of their rejection of the site plan. Mrs. Robbins believes that the tower was existing. Mr. Frothingham asked why, in our local zoning regulations, that there is a requirement for a four mile radius. He feels that this will be a critical point. Mr. Stewart said it isn't that the four mile is or isn't correct but relative to the decision the Planning Board made. They looked at the evidence offered by the applicant and they made a decision that the facility was existing. He said, did the applicant meet their burden of proof that the tower as proposed was necessary? Mr. Frothingham said the ZBA has the authority to overrule. The Zoning Board has to follow the zoning regulations. If the regulations say four miles you make your decision based on four miles. The ZBA can consider the reason for those four miles then weigh against that the effect of the requirement being met by denying this application. He believes that the reason for the four mile restriction is in the zoning regulations is that the town was concerned about the visual aspect.

Mr. Kenney said the reason that restriction was put in zoning was to force the power people to co-locate on one tower. Mrs. Robbins said she read that colocation is what is recommended by the federal government and the state. Towns have created areas to fulfill those guidelines.

Mr. Stewart made a motion, seconded by Mrs. Robbins to return to nonpublic session with council at 8:35. Roll Call: Robbins aye, Crowell aye, Baxter aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Baker joined them in nonpublic session.

The Board returned to public session at 8:45. While in nonpublic session the Board had a discussion with their attorney.

Mr. Stewart said the question before the Board is, was the Whittier Tower in existence when the Planning Board made its decision to decline the issuance of the site plan vis-a-vis the Province Line application.

Mr. Stewart made a motion, seconded by Mr. Frothingham, that the Zoning Board finds that the Whittier Tower was not in existence at the time of the rejection of the application for the Province Line Tower. Roll call vote: Robbins aye, Crowell aye, Baxter aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Stewart said, having found that the Planning Board did not have the Whittier Tower in existence as their decision suggested.

Mr. Stewart further moves, seconded by Mr. Baxter, that we remand the Planning Board decision vis-à-vis the Province Line Associates Trust back to the Planning Board for further consideration in line with our decision that the tower did not exist. Roll call vote: Robbins aye, Crowell aye, Baxter aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Stewart said, Mr. Parisi, it has been determined that the Planning Board's decision vis-à-vis the Whittier Tower was wrong. We are remanding the Province Line matter back to the Planning Board and that brings closure to this matter this evening.

Mr. Parisi responded that he respectfully disagrees, he believes the Board is just punting it back to the Planning Board and he believes he knows what they'll say and he'll have to consider appealing this decision. He feels the planning Board will say it will be existing next week. He feels this Board is not focusing on the fact that there isn't a prohibition against a tower within

four miles. It's that we need to provide substantial evidence that that tower doesn't provide the required coverage which he feels they did. Remanding it back to the Planning Board to say, it's in existence now does not resolve this matter, it furthers the litigation. He asked that they simply overturn the decision rather than remand it. He asked that the ZBA overturn their decision and find that they did provide substantial evidence that there is no tower within four miles, that's existing, that provides the required coverage.

Mr. Stewart disagrees, he told Mr. Parisi that the ZBA is not in the position to apply conditions to your development. We have listened to your appeal and have determined the Planning Board was in error. Mr. Parisi asked that the ZBA do it with conditions and guidance so they're not back in front of the Zoning Board. He said all you're doing here is furthering the litigation. Mr. Stewart said the matter of Province Line is closed.

Public Hearing 2

Mr. Stewart made a change to the Board asking Mr. Baxter to step down and seated Alternate Graham Baker, who will now be sitting for Mr. DesRoches.

Appeal of Planning Board Decision: submitted Francis D. Parisi, Vertex Towers Assets, LLC for property owned by Savannahwood LLC, Tax Map 92-34, Province Lake Road. The applicant is appealing the Planning Board decision to deny the major site plan application based upon Article 24, Section E.5 and Section F of the Town's Zoning Ordinance. The applicant seeks to construct a personal wireless services facility consisting of a 120' tall monopole (126' to the top of the highest appurtenance)

Mr. Stewart asked if the Board was willing to waive the applicants presentation on this appeal. By consensus, the Board agreed.

Mr. Stewart made a motion, seconded by Mr. Frothingham, to allow the applicant to make an abbreviated opportunity to speak to the Board. Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Parisi asked to speak. He said that the data here is infinitely more compelling given the topography and population. He said all we're doing is prolonging this matter not resolving it. He said if you're going to vote with a new member who spoke in opposition of the last tower then we should probably continue this so we can get more detailed about the data. It's not whether the tower was existing, it's whether we did not provide enough evidence that there is a need for the tower notwithstanding that existing facility. If we're not going to resolve this, I'll ask for a continuance so we can get deeper into the data. We're just sending this back to the Planning Board. We'll just take our chances in federal court because I know what the Planning Board is going to say. Mr. Stewart said he does not believe the expert engaged by the Planning Board ever produced a report. Mr. Parisi said he's never seen anything

Mr. Stewart opened the public hearing at 9:00.

Lynn Shull said she lives on Perkins Hill Road and the balloon was visible from her living room. She said the owner of the land is a lumberer and will be lumbering that land. Mr. Kenney said he was at each Planning board meeting and was asked where he was with the tower and he kept them informed. Mr. Kenney also felt that the threat of a lawsuit was inappropriate. He felt Mr. Parisi was intimidating. Mr. Parisi said they have a stellar reputation. He said he's not here to

intimidate or threaten anyone. He said the Whittier tower was approved about fifteen years ago and nothing had been done until we showed up. We build towers very thoughtfully. Mr. Doug Stewart agrees with Mr. Parisi that this site is more compelling. He said there is actually less need for service at that site. At the site walk he had good coverage. He said the wording in the original application has words that if we don't do what Vertex Tower wants, we will see you in court. Rosanna Gordon Moreshi from Perkins Hill Road said she saw the balloon from her backyard. She also has good coverage.

Jack Hepburn said the critical question for the Board tonight is not whether the Planning Board was correct but was the Planning Board's decision reasonable and a lawful interpretation of the zoning ordinance. The ordinance is vague and the term existing is not defined. After discussion, the Board felt it was existing. He said that in the original straw pole two people thought it was existing and three didn't. It's not the job of the ZBA to insert their position but to decide if the Planning Board was reasonable. He feels tonight the ZBA is misapplying the law and substituting their own judgement.

Mr. Stewart said we need to make a decision whether the Planning Board was correct, not necessarily unreasonable but correct in its determination that the Whittier Tower was in existence. He said gravel and cement does not put a tower in the air.

Mr. Stewart made a motion, seconded by Mr. Frothingham, that the Board finds that the Planning Board erred in its determination that the Whittier Tower was in existence.

Mrs. Robbins said she hoped that if this was remanded back to the Planning Board that the applicant shows his neighborliness by agreeing to the conditions that might be put on. Mr. Stewart called for the vote.

Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Stewart made a motion, seconded by Mr. Frothingham, that we remand the Savannahwood matter back to the Planning Board for further deliberation on their part consistent with our findings that the Whittier Tower was not in existence at the time they made their denial of the Master Plan for Savannahwood.

Mr. Baker asked if they could include conditions with their remand. Mr. Stewart said we vote on the motion then add the conditions we'd like to attach.

Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Baker made a motion, seconded by Mr. Stewart to stipulate to the Planning Board at a minimum hold Vertex to the conditions that they, prior to getting a building permit that they present a commitment from a carrier to the Town. The second condition would that tower space be reserved for police and fire.

Mrs. Robbins asked to add a third condition. Mr. Frothingham said that we received advice that we shouldn't add conditions. Mr. Stewart feels these conditions would be appropriate to communicate to the Planning Board. **Mrs. Robbins said that she would like to add a condition to be considered by the Planning Board that they add camouflage in certain parts. Mr. Baker seconded the amendment.** Mr. Stewart considered this as an amendment to Mr. Baker's

motion. The Board voted on the amendment. **Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham nay, Stewart aye. (Vote 4-1)**

Mr. Stewart called for the vote on the amended motion. **Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham nay, Stewart aye. (Vote 4-1)**

Mr. Parisi asked if the same conditions apply to the first application. He said the camouflage was unique to Savannahwood but the other two conditions might be appropriate to be placed on the Province Line Tower. He believes that the Board could reopen and add that as a condition.

Mr. Stewart made a motion, seconded by Mrs. Robbins to reopen the Province Line matter to add two conditions? Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Baker made a motion, seconded by Mr. Stewart, to add to the remand as a minimum a condition that Vertex agrees prior to getting a building permit that they present a commitment from a carrier to the Town. The second condition would that space be reserved for police and fire. Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Adjournment

Mr. Frothingham made a motion to adjourn. Mrs. Robbins asked to approve the minutes. Mr. Frothingham withdrew his motion.

Mrs. Robbins made a motion, seconded by Mr. Baker, to approve the minutes of May 18, 2022. Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Mr. Frothingham made a motion, seconded by Mrs. Robbins, to adjourn the meeting at 9:29. Roll call vote: Robbins aye, Crowell aye, Baker aye, Frothingham aye, Stewart aye. (Vote 5-0)

Respectfully submitted for approval at the next ZBA meeting,

Priscilla Colbath, ZBA Secretary