



TOWN OF WAKEFIELD NEW HAMPSHIRE
 ZONING BOARD OF ADJUSTMENT
 JANUARY 30, 2023
 HELD IN PERSON AND ON ZOOM
 Approved

Don Stewart Chairman	✓ Robert Baxter Alternate	✓ Victor Vinagro, Land Use Clerk & Code Enforcement Officer	✓
George Frothingham, Vice Chairman	✓ Graham Baker Alternate	Town Counsel	✓
John Crowell	✓ Tristen Plummer Alternate	Site Walk	
Judi DesRoches	✓	Public Hearing	✓
Annie Robbins			

Others present: John Kenny, Jack Hepburn, Fran Parisi, John Springer, Michelle Keating and Max Gehring from Clearview TV. Present on Zoom: Bob Benson

Pledge of Allegiance and call the meeting to order

Chairman Stewart called the meeting to order at 7:10 and led those present in the flag salute.

Seat Alternates as necessary

Alternate Robert Baxter was seated for Annie Robbins and introductions were made.

Public Hearings

Application for Appeal of Administrative Decision

Submitted by Whittier Communications, Inc. for property owned by Province Line Associates, LLC located at Tax Map 9-113, 4870 Province Lake Road. The applicant is seeking that the ZBA overturn a Planning Board decision dated October 6, 2022, granting the Major Site Plan Application of Vertex Tower Assets, LLC to construct and operate a Cell Tower on the subject property. The Applicant alleges that the Planning Board erred when it interpreted Zoning Ordinance Article 24 Section E.5 and Section F.

Application for Appeal of Administrative Decision

Submitted by Whittier Communications, Inc. for property owned by Savannahwood LLC located at Tax Map 92-34 on Province Lake Road. The applicant is seeking that the ZBA overturn a Planning Board decision dated October 6, 2022, granting the Major Site Plan Application of

Vertex Tower Assets, LLC to construct and operate a Cell Tower on the subject property. The Applicant alleges that the Planning Board erred when it interpreted Zoning Ordinance Article 24 Section E.5 and Section F.

Attorney John Springer, representing Vertex Tower Assets, stated that he had presented a detailed motion to dismiss. He said Whittier lacks standing to pursue this appeal. He said Whittier owns and operates cell towers. It does exactly what Vertex does. Whittier is a taxpayer in town and that's it. He cited the Goldstein v Town of Bedford case to show that being a taxpayer in a town doesn't give you standing. He also cited the Nautilus v Town of Exeter case where they were citizens of the town, taxpayers and property owners and the Supreme Court said they didn't have standing to proceed. In that case there were two existing health clubs and the Planning Board allowed another health club to come into town and the two health clubs challenged that decision. He said the only thing that Whittier has said in its appeal as to why they are an aggrieved party is as that the Planning Board has approved the Savannahwood Wood Tower 2.2 miles away and the Province Line Tower at 1.9 miles away.

The Nautilus case sets out four factual inquiries. The first element is proximity. In the Nautilus case one health club was 1.7 miles away and the other 6 miles away and shareholders were between .8 and 2 ½ miles away. The Supreme Court said that does not meet our proximity test. If 8/10s of a mile and 1.7 miles doesn't meet the proximity test than 1.9 and 2.2 doesn't in this case. The second element is the type of change proposed. It's hard to understand how Whittier can challenge the Planning Board's decision which grants permission to build a cell tower as the same Board granted permission to build his tower. The third element is the immediacy of the injury claimed. The injury has to be to their land. It's not injury to Mr. Kenney or Whittier, it's the property itself. They have to show damage.

The final element is whether they participated in the proceedings. They did meet that element. Mr. Springer also referred to the Hannaford case involved competing supermarkets and standing. You can meet two elements and still not pass the test. In the Hannaford case they met two of the criteria but failed the proximity and injury tests. Cases he has mentioned and other cases show that them saying we have an interest in making sure the ordinance is upheld, the court said that isn't enough. Mr. Springer said that's what Whittier is saying, we want to see the ordinance upheld. Under the Hannaford and other cases that's not enough.

Mr. Springer said that Whittier cites the Weeks Restaurant V City of Dover case, which is one of the earliest cases of this sort (1979). One of the parties in this case was Sambos Restaurant. The court said that Weeks and Sambos are separated only by a highway. Traffic congestion could adversely affect Weeks business. It's because of those facts that the court said Weeks has standing. So that case isn't applicable to this situation. Whittier says the first factor of the Nautilus case is proximity to the sites which is true but they don't tell you what the proximity was. He said Whittier also says that they have a vested interest in the rural character of Wakefield. No one legally has a vested interest in the ordinance or the rural character and the Goldstein case makes that clear. Mr. Springer said in the Whittier objection Whittier said that Vertex consistently stated that their two cell towers should not be viewed as competition because three cell towers are necessary in this location for sufficient coverage. Mr. Springer said there is no doubt that Whittier and Vertex are in competition. Vertex was talking about RF only. He

ended by offering to answer any questions and asked the Board to dismiss this case for lack of standing.

Chairman Stewart asked if there was anyone who would like to speak in favor of dismissal. Mr. Benson, who owns the parcel on Perkins Hill Road, said this has been going on far too long. It's not fair to deprive these people of cell coverage. He said he cares about the rural character of Wakefield. He has hundreds of acres and he's never built a single thing on any of this land.

Mr. Hepburn, attorney for Whittier Communications said the statute we are dealing with here is RSA 676:5 which sets a pretty low bar for who may appeal a Planning Board decision. Anybody who is aggrieved or harmed by the Planning Board decision may appeal. He said the standard that the New Hampshire Supreme Court has consistently applied is that in order to be a aggrieved party you must have a direct interest in the Planning Board decision. Mr. Kenney clearly has an interest in the outcome and has been harmed by that decision.

Mr. Hepburn went on to say that Mr. Kenney had an approved tower site although he hadn't built it. Vertex comes in and submits plans to put in two towers within the four mile radius which is not allowed under the zoning ordinance. Mr. Kenney then had to decide if he wanted to spend the time and money to erect his tower. After talks with council and meetings with the Planning Board Mr. Kenney understood the zoning ordinance to preclude multiple towers within four miles. And by relying on the ordinance he built his tower. This isn't a general taxpayer that wants the ordinance complied with. This is an entity who got approval from the Planning Board to put in a cell tower and now will be directly harmed by that decision. At the Planning Board meeting April 21, 2022 Mr. Fifield asked Ivan, the RE Consultant what was the likelihood that carriers would locate on all three towers. Ivan responded that it would be doubtful. This increases the likelihood that Mr. Kenney's tower will become an orphaned tower. Its clear that that decision harms Mr. Kenney.

He said the decision hurts the land not the business because the land now may not be viable for a cell tower. Common sense tells you that he's been harmed by this decision. He said the minutes of the Planning Board meeting will show that Mr. Kenny has not been anti-competitive with Vertex. He and the public sentiment was let's get the tower up with a carrier and then evaluate the coverage. If the cover shows gaps then Vertex can come put a tower up. We feel that there is standing. He said when the Board agrees with us, we can discuss the merits of why we feel the Planning Board erred in it's decision allowing the towers within four miles of Mr. Kenney's tower. He said Vertex bringing up the other cases is apples and oranges. In the cases Mr. Springer stated there wasn't a specific milage restriction in the ordinance. The ordinance specifically lays out a four mile radius restriction. We feel Whittier does have standing to challenge this decision.

Mr. Baxter asked why there was no coverage yet from Mr. Kenney's tower. Mr. Hepburn said carriers won't locate yet until this is resolved. Carriers don't want to get involve in litigation. Mr. Kenney said carriers going on a tower doesn't happen overnight but carriers will come. Mr. Baxter asked Mr. Kenny why he wasn't working to get them to come and Mr. Kenny responded that he certainly was. Mr. Kenney said he has been working for ten years with the Belleau Lake people to put a tower out there and he finally agreed to do that never thinking that there would be

other towers on both sides of his. Mr. Frothingham said competition is not a valid position to take. Mr. Frothingham said it seemed that you are talking about competition using different words. It was raised several times, let's let the Whittier Tower go up then see if we need other towers. That's like, let's let Burger King build and then see if we need other restaurants. He said it seemed like Mr. Hepburn was making that sort of argument. Mr. Hepburn said it's not competition, the harm is that Whittier is an aggrieved party because of the Planning Boards decision which is going to harm Whittier's land by making it less likely that carriers will locate there. Mr. Frothingham said it still sounds like competition to him.

Mr. Stewart said one of the four conditions you have to meet is indicating specific injury and asked Mr. Hepburn to define what injury Whittier has suffered. Mr. Hepburn said time energy and resources and that this land is harmed now because the likelihood of it being able to be a place where carriers can locate has harmed the land. We have the word of the RF consultant that its doubtful carriers will utilize all three towers and Mr. Kenney's tower could become an orphan tower. Mr. Stewart asked if this was speculative at this point. Mr. Hepburn replied that currently Whittier is in negotiations with carriers and if the other two towers are allowed the likelihood is diminished.

Mr. Stewart said Whittier is the one who has to demonstrate standing. He said and the four conditions have to be met in order for you to prevail. Mr. Hepburn said he may not agree with that, the statute is clear, any aggrieved party and this Board can interpret that Whittier is an aggrieved party. He also said that the Supreme Court has said a party is aggrieved if they have a definite direct interest in the outcome. Mr. Stewart asked if Mr. Hepburn was suggesting that the Board could take positions different than how the New Hampshire courts have ruled? Mr. Hepburn responded, no. Mr. Kenney said the spirit of the ordinance was to have less towers not towers all over Wakefield. He said he built the tower and was led to believe that he would be ok so he built the tower. He said you could end up with three different carriers on three different towers and that's not what you wanted.

Mr. Springer said the Board can not define what an aggrieved party is. The way you define an aggrieved party is to look at the four criteria. None of them deal with time and investment. It's irrelevant. His belief that the ordinance was never going to get changed is also irrelevant. The ordinance does not prohibit towers within a four mile radius but allows them as long as you meet certain criteria. They built a spec tower as far as carriers go. He said the Notice of Decision from the Planning Board said, "The Planning Board's consultant stated that the proposed towers would provide coverage where none is presently available assuming that the Whittier Tower location was operational with a carrier," He said no carrier is ever going to say there is a tower there let's put our antennas on it and see what kind of coverage we'll get. They will do RF and other tests. He said their issue is competition. They have not shown any injury to the land. They built their towers and if it's an orphan tower it's because the carriers don't like that position.

Mr. Benson said it's clear to him that it's all about competition.

Mr. Stewart close the public portion of the Public Hearing at 8:00.

Mr. Stewart said the four factors that have to be met is number 1; the proximity. Number 2; the type of change proposed. Number 3; the immediacy of the injury claimed. Number 4; participation in administrative hearings.

#1. Mr. Stewart said that Whittier has not indicated that it has met its burden of showing that its proximity to the proposed sites of the Vertex towers will give it standing.

Mr. Frothingham made a motion, seconded by Mr. Baxter, that Whittier has not met the burden of proximity. Roll call: DesRoches yes, Crowell yes, Baxter yes, Frothingham yes, Stewart yes. (5-0)

#4. Mr. Frothingham made a motion, seconded by Mr. Baxter, that Whittier has met the requirement of number 4, participation. Roll call: DesRoches yes, Crowell yes, Baxter yes, Frothingham yes, Stewart yes. (5-0)

#2. Mr. Stewart said Whittier has not met the burden that the type of change proposed is any different than what Vertex was seeking.

Mr. Frothingham made a motion, seconded by Mr. Baxter, that Whittier has not met the burden for the type of change. Roll call: DesRoches yes, Crowell yes, Baxter yes, Frothingham yes, Stewart yes. (5-0)

#3. The immediacy of the injury claimed. Mr. Stewart that Whittier had not met it's burden of specifying the injury to the land.

Mr. Frothingham made a motion, seconded by Mr. Baxter, that Whittier has not met the burden of condition #3. Roll call: DesRoches yes, Crowell yes, Baxter yes, Frothingham yes, Stewart yes. (5-0)

Mr. Frothingham made a motion, seconded by Mr. Baxter, that the motion to dismiss is granted. Roll call: DesRoches yes, Crowell yes, Baxter yes, Frothingham yes, Stewart yes. (5-0)

Mr. Stewart said the motion indicates that Whittier does not have standing in these matters.

Board Business

Mr. Stewart said Annie Robbins has requested to be an alternate rather than a regular member.

Mr. Frothingham made a motion, seconded by Mr. Crowell, to accept that change and recommend that to the Selectmen for approval. Roll call: DesRoches yes, Crowell yes, Baxter abstain, Frothingham yes, Stewart yes. (4-0-1)

Mr. Baxter said we owe Mrs. Robbins a debt of thanks for her time on the Board. A letter will go out to Mrs. Robbins thanking her for her time and participation.

Mr. Frothingham made a motion, seconded by Mrs. DesRoches, to make a recommendation to the Selectmen to approve Robert Baxter as a permanent member of the ZBA. Roll call: DesRoches yes, Crowell yes, Baxter abstain, Frothingham yes, Stewart yes. (4-0-1)

Mr. Stewart emailed a mission statement to the members and they were all ok with it as written. He will ask Mr. Scala to take it to the Selectmen as an FYI. He said we can consider that a

flexible document that over time may get modified. He thanked the Board members for their input. Mr. Vinagro said in the packet there are the rules of procedure along with the Town Attorneys explanation of his highlights. Town Council and SRPC have made some changes to the document. Mr. Stewart suggested that the Board, at the next meeting, accept the document as modified.

Approval of Minutes

Mr. Baxter made a motion, seconded by Mrs. DesRoches, to accept the minutes of December 19, 2022. Roll Call: DesRoches yes, Crowell yes, Frothingham yes, Stewart yes, Baxter yes. (Vote 5-0)

Correspondence

None

Set Next Meeting Date

None as of yet

Adjournment

Mr. Frothingham made a motion, seconded by Mr. Crowell, to adjourn the meeting at 8:25. (Vote 5-0)

Respectfully submitted for approval at the next ZBA meeting,

Priscilla Colbath, ZBA Secretary