

**Zoning Board of Adjustment
27 School Street
HILLSBOROUGH, NH
November 08, 2021**

DATE APPROVED: December 13, 2021

TIME: 7:00 p.m. – 8:00 p.m.

CHAIRPERSON: Robert Hansen

VICE CHAIRPERSON: Meg Curtis-Sauer

MEMBERS: Russell Galpin, Roger Racette, Lucy Pivonka

PLANNING DIRECTOR: Robyn Payson

ALTERNATES: Mark Bodanza

EXCUSED Mark Bodanza

Public Present: Leigh Bosse, Francis Parisi, Steve Ellis, John Segedy, Fred Sprague, Zach & Tia Whitney, Jesse Lucas, Riche' Colcombe, Christopher Boldt, Town Land Use Counsel

CALL TO ORDER:

Chairman Robert Hansen called the meeting to order at 7:00 p.m.

Pledge of Allegiance

Minutes 10/18/2021

Roger Racette made a motion to approve the minutes. Meg Curtis seconded the motion. The motion carried with Lucy Pivonka abstaining. The minutes were approved.

Public Hearings

Variance

Dascomb Road (Map 11P Lot 191)
Vertex Rowers/Dascomb Associates

Chairman Hansen read the Public Hearing Notice.

Mr. Hansen made a motion:

I move that we find that the ZBA does not have jurisdiction over the Variance Application concerning the Use Provision of Section 229-75B in Article 12 because Section 229-79 of Article 12 vests the jurisdiction to waive such Use Provision and other terms with the Planning Board.

Roger clarified that this motion would only address the frontage variance. Mr. Hansen said that was correct.

Roger Racette seconded the motion.

Roll Call Vote: Russ Galpin-Y, Lucy Pivonka-Y, Roger Racette-Y, Meg Curtis-Y, Chairman Robert Hansen-Y

Mr. Parisi introduced himself and the project he said Vertex is a company that builds telecommunications towers in underserved areas. They work with T-Mobile and other carriers like ATT and Verizon typically co-locate on their towers. They built a similar facility in Antrim and are approved to build one in Henniker.

They are not there to discuss the telecommunications facility itself but to address the frontage issues.

The lot is approximately 10 acres with 40 feet of frontage on Dascomb Road. The landowner has acquired the rights to purchase 60 feet of frontage on Myrtle Street. When the facility is built, the Myrtle Street access will be used to access the cell tower.

They are building a small telecommunications facility. There will be a 12 foot driveway on Myrtle St. to access the facility and bring in utilities. The facility will be unmanned. But will periodically be maintained. The driveway will not be paved.

Mr. Hansen invited Mr. Frank Parisi to present the application. (see attached)

A. Granting the proposed Variance will not be contrary to the public interest because:

Improving telecommunications is a benefit to the Public Interest. The demand is there with ample statistics. Over 50% of the state of NH have gotten rid of their landlines and are using telecommunications 75% of 911 calls are made by cell phones. Wireless networks are used for working from home and educating remotely. The demand is there and the public interest from a public safety and convenience.

B. Granting of the proposed Variance will observe the spirit of the Hillsborough Zoning Ordinance because:

This is previously existing non-conforming lot. They are building a 12 foot driveway on a 60 foot wide access. There is no detriment to the neighborhood and the Zoning Ordinance encourages telecommunications

C. Granting the proposed Variance will do substantial justice because:

There are additional telecommunications facilities in town and there are other telecommunications facilities throughout the area and the state. There is demand for the service and increasing public safety justifies the variance.

D. Granting the proposed Variance will not diminish the values of the surrounding properties because:

There is ample state law and a Supreme Court case with the Town of Londonderry that proves telecommunications facilities do not have an impact on abutting property values. In fact, the opposite is true. The lack of telecommunications lowers property values. People do not want to buy a house where the telecommunications is lacking. In this case putting in a 12ft wide access driveway that is not going to be a public right of way is not going to have an affect on property values.

E. Literal enforcement of the provisions of the ordinance will result in an “unnecessary hardship” because:

That is really defined by the need for telecommunications. The Zoning ordinance requires the use of larger parcels and tower height setback which requires a larger parcel. Wireless communications are becoming more of a residential service. It is being used in homes, places of business and in the schools. They are trying to get closer to the schools and improve telecommunications inside the schools. There is existing technology on the periphery of Hillsborough but as you get inside buildings and with commercial activity on West Main Street you need a better-quality signal. If you make a 911 call, dispatch can locate where that call is coming from. This facility is designed to provide coverage in the densely populated area of Hillsborough. The majority of lots in the densely populated areas of Hillsborough are small. To find a lot of this size and to be able to use it and to use 2500-3500 square feet is difficult. The hardship is created by the need to be here and the lack of alternatives and the limits by all of the other land use developments in town.

Mr. Hansen thanked Mr. Parisi for his presentation and opened up the public session.

Roger Racette asked Mr. Parisi asked how he went about establishing that there were gaps in coverage.

Mr. Parisi said in this case they partnered with T-Mobile to determine gaps and directed Mr. Racette to the data in the packet that the Planning Board will be reviewing at their hearing.

Mr. Racette said that he understood a “fall zone” needed to be established. In order to achieve that, it is necessary to purchase the lot to the west of this lot, he asked where that stood.

Mr. Parisi said if this gets approved, that will be exercised, and the lot will be acquired by the landowner. The “Tower Hight Setback” is required, and Dascomb Associates has contracted to acquire that land.

Roger Racette asked about the lot to the north that will have to be acquired for Myrtle St access. He asked if that lot was going to be purchased or if it would be an easement?

Mr. Parisi said Dascomb Associates is going to purchase it and grant them an easement over the property. They area going to be leasing a “postage stamp” 50x50 feet, 75x75 feet in the middle of the woods with an access easement to the public right of way.

Mr. Racette asked if anything else can go on, on that property?

Mr. Parisi said that is going to be between the landowner and the Town, there are no restrictions.

Mr. Hansen asked if the tower facility will be secure.

Mr. Parisi said it would be gated and fenced.

Roger Racette said basically you will be leasing the location of the tower, the “tower height setback”, the easement and the rest of the lot you have no involvement with.

Mr. Parisi said none of this restricts the landowner from doing anything on the lot. The only thing they would be concerned about would be creating radio interference.

Roger Racette asked if the easement has been established yet.

Mr. Parisi said they require the Zoning Board frontage variance and then the Planning Board approval and then all of the land purchases will be made.

Mr. Hansen asked for comments from the public.

Zach Whitney of 84 Myrtle Street said this small piece of land for the access road is in between his and his neighbor’s property and this road will be going through the property that separates the two. He said this would be taking away the privacy of their lot and the construction will be very intrusive. He said he has spoken with many of the neighbors who are not on board with this. Mr. Hansen asked who owned the property the access road would be going down. Mr. Whitney said he did not know. Mr. Hansen said that this was a private piece of property.

Mr. Whitney said they moved to Hillsborough for privacy and quiet and this doesn’t seem to be consistent with the area. He said this would have a high impact on the neighborhood.

Mr. Racette asked him what that would be.

Tia Whitney said their children play down at that area of the street and it would disrupt the community of the area. She said she was disappointed to see a cell tower moving in and would not have bought their house if they had known. Mr. Whitney said there have been studies that show devaluation of property that is within 600 feet of a cell tower.

Roger Racette asked what evidence Mr. Whitney had that demonstrated property was devalued by a cell tower.

Mr. Whitney said he didn’t bring the research with him but it had been done.

Cheryl Sprague, who is an abutter, said she would have to go do her own research about whether a cell tower lowers property values. She said she would like to see how Antrim and in Henniker’s property values were affected.

Mr. Hansen said he wanted to make things very simple and straight forward. He said at the ZBA is here to discuss the 200ft frontage variance. He said he appreciated the concern, but Article XII Telecommunications Ordinance is dealt with by the Planning Board. The Zoning Board is there to address the variance for less than 200ft of frontage for a Commercial use in the Village Residential Zone.

John Segedy said the abutters want to address the validity of some of the statements the applicant has made. All of these things are addressed in the application under “public benefit” and that is one of the five criteria. So they have every right to address these questions.

Mr. Hansen said they can make any comment they want but the ZBA cannot make any call that has to do with the construction of this facility.

Fred Sprague said they are not direct abutters, they live on Dascomb Road. He said Mr. Parisi said they needed a large lot to put this on and yet he said it does not preclude any future development of the 10 acre lot. If further development takes place would that not affectively reduce the lot size that was required for the cell tower?

Roger Racette said if we grant this with less than 200 feet of frontage it is because the use is very passive. It does not restrict what additional development might be. If the remainder of that lot becomes residential then we will probably have to revisit that 40ft of frontage because it would have a different impact.

Mr. Hansen said that what they were looking at was this facility and the impact that is needed for this facility. Anything else going on this property will be addressed at another time.

Roger Racette addressed a question to Attorney Chris Boldt. His question was, if we grant this variance based on this use and we don’t know what additional development may be coming. The frontage might be insufficient. Atty Boldt said he understood the question but informed the Chairman that answering the question in public waives the attorney client privilege.

The ZBA recessed and went in to a “non-meeting” to confer with Town Counsel at 7:45pm
The ZBA entered back into session. 7:50 pm

Bob Hansen asked for any other concerns from the public.

Stephen Ellis of 76 Myrtle Street said the tower would be right next to his house. He said he looked up studies that stated living within ¼ mile of a cell tower is a health hazard. He said you are three times more likely to get some form of cancer within the first 10 years you live there. He said he has also looked it up and that it devalues your property.

Roger Racette asked if he was questioning why that spot was picked.

Mr. Parisi said that he would be prepared to answer these questions with the Planning Board and that this hearing was about the frontage variance.

Mr. Hansen agreed.

Riche' Colcombe asked if the decision would be made at this meeting.

Mr. Hansen said it would be.

John Segedy called attention to the top of form "C" and said the "Variance when reasonable accommodations are necessary for those with recognized physical disabilities" was checked off. That was an error and was stricken from the application.

Mr. Segedy said he wanted to talk about co-location. He said part of the federal law is supposed to address trying to use co-location on other towers and or other possible locations that might be more appropriate. The applicant did provide a series of places they tried. He said they did not address some of the most obvious places they should have like the library, the three churches with steeples, the Dutton towers, and the tower that already exists on Bible Hill. They aren't talking about putting it up for one particular owner they are looking to put it up so all of these companies can hook up to them. But if there is a company that wants to improve service, why can't they put it on a tower that already exists? There may be a good reason, but it is not addressed in the application.

Mr. Hansen said it is addressed in the engineering and that is for the Planning Board.

Roger Racette said his understanding was that it was not the antennas, just the tower being put up.

Mr. Parisi said that was true. They have one customer right now which is T-Mobile. Mr. Parisi said to think of it as a "vertical strip mall" they build the tower for one company but there is room for others to be there too. He said they were quite confident that the tower will get filled up over time. One of the things that you want is to have structures that are co-locatable. The other things discussed like the library and church steeples are not designed for telecommunications. Using those structures has been done in the past but they find it is more limiting because they don't have the space or capacity for multiple technologies.

Mr. Hansen asked Mr. Segedy if that answered his question.

Mr. Segedy said it did to the extent that they said they did not look into the structures in town but he didn't answer why they didn't do that.

Roger Racette said they are building this structure to support the antennas, so how would the company get involved with the church?

Mr. Segedy said the company that wants to put the antenna up can check with the towers that already exists. And maybe they would say no or maybe there would be specific problems with them but it seems that those options should be addressed.

Mr. Segedy went on to discuss the balloon study, he suggested a condition that no trees other than those necessary to build the tower be cut.

Mr. Hansen said they could not put a condition like that on the approval.

Mr. Segedy said it had to do with the first condition having to do with the public interest.

Mr. Segedy wanted to talk about service. He said he has a simple Track Phone and he has service in the Town Office. His opinion was that they didn't need this tower.

Ms. Lucas who is an interested citizen and whose son is an abutter had a question about a residential piece of property that they are putting a commercial tower on. Does that change the zoning of the property?

Mr. Hanson said it did not, and he read the table that described frontage of a commercial use being 200ft.

Abutter Jesse Lucas said he was concerned about this is a big commercial structure that emits radiation in a residential area.

Roger Racette asked if the structure emitted radiation.

Mr. Parisi said it emits radio frequency energy. There is a radio spectrum that starts with AM radio and FM radio, cellular communications and Wi-Fi, microwave ovens, and baby monitors and there is a spectrum of radio frequency energy. This is on that spectrum. It is really no different from Wi-fi or AM radio. It's a very low power, its designed to cover a few square miles. WBZ in Boston emits 50,000 wats. This facility will generate 100 watts because it is only covering a few square miles.

Roger asked if there are any plans to remove any trees outside the scope of the cell tower build.

Mr., Parisi said there was not. The only trees that will be taken down are those in the 75'x75' area.

Mr. Hansen thanked everyone for their comments and concerns and said that their concerns will be addressed with the Planning Board.

Russ Galpin asked what the width of the access point would be odd Myrtle Street. Mr. Parisi said the driveway will be between 12 and 20 feet. The lot is 60 feet wide.

Mr. Hansen closed the public comment section and moved on into deliberation of the Board.

Russ Galpin said this property was before the Zoning Board before for a residential use. It was turned down because it didn't have a proper entrance. It seems they have a piece of property in the middle of town you can't do anything with. This type of use is not invasive, and he does not think it is going to be bad for the area. He said he would like to see the owner use the property.

His concern has been accessed to the property. The access over the 60' piece of property is more reasonable than the previous access.

Roger Racette said frontage and setbacks is generally to address the overcrowding of land and density. This particular use is very passive. He did not see how this would defeat the purpose of the zoning ordinance.

The Board moved on to discuss how the applicant met the criteria.

A. Granting the proposed Variance will not be contrary to the public interest because:

Roger said it is in the public interest to have improved telecommunication service for public safety and improved cell service. He could not see how that would be contrary to the public interest.

B. Granting of the proposed Variance will observe the spirit of the Hillsborough Zoning Ordinance because:

Bob Hansen said it is justifiable to have less than the 200 ft of frontage when accepted with conditions.

C. Granting the proposed Variance will do substantial justice because:

Roger said because the property owners have a right to utilize the property and by doing this could fill in a gap in cell service.

D. Granting the proposed Variance will not diminish the values of the surrounding properties because:

Roger said that there has been some testimony that it will lower property values but no evidence that it will. He said without proof the ZBA could not base its decision on anything without any evidence.

E. Literal enforcement of the provisions of the ordinance will result in an “unnecessary hardship” because:

Bob Hansen said a property owner can have the expectation to be able to reasonably use their property. This is a reasonable use on a non-conforming lot.

Roger Racette said without a variance the use of this property is very limited making it almost unbuildable. If we don't allow any access to it by reducing the required frontage this lot is almost useless.

Lucy Pivonka made a motion to approve the appeal of Vertex Towers LLC for a variance on property located on Dascomb Road (Map 11P Lot 191), from section 229 Attachment 2 Lot Area and Frontage Requirements to permit a commercial use on a property with less than 200 feet of frontage in accordance with the plan dated 10/04/2021 as submitted by Vertex Towers LLC as a part of this hearing.

Roger said he wanted to amend the motion to add the following conditions:

1. Subject to the purchase of Map 11P Lot 400 which is to the west of the subject property
2. The execution of an easement over Map 23 Lot 113

Roger Racette seconded the motion.

Roll Call Vote: Russ Galpin-Y, Lucy Pivonka-Y, Roger Racette-Y, Meg Curtis-Y, Chairman Robert Hansen-Y

There being no other business before the Board,

Meeting Adjourned 8:38 p.m.

Respectfully Submitted,

Robyn Payson
Planning Director

COMPLAIN CE WITH CRITERIA FOR A VARIANCE

Section 229-50 of the Zoning Ordinance grants the Zoning Board of Adjustment the authority to grant variances as by RSA 674:33 I (b) [SIC]

674:33 Powers of Zoning Board of Adjustment. -

I. (a) The zoning board of adjustment shall have the power to:

(1) Hear 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; and

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(b)(I) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

The construction of the Applicant's Facility will enhance wireless communications service coverage in the Town and surrounding communities. The enhancement of service coverage in the Town is desirable to the public convenience for personal use of wireless services and for community safety in times of public crisis and natural disaster. Wireless communications service also provides a convenience to residents and is an attractive

feature and service to businesses. In addition, the requested use at this location will not result in a change in the appearance of the surrounding neighborhoods. The use is passive in nature and will not generate any traffic, smoke, dust, heat, glare, discharge of noxious substances, nor will it pollute waterways or groundwater. Once constructed, the facility will comply with all applicable local, state and federal safety regulations.

The spirit of the Town's ordinance is clearly observed in that the proposed Facility has been designed to satisfy the Town's Zoning Ordinance regulating telecommunications facilities as much as possible. The Property is a large, approximately 10 acre wooded parcel in the Village Residential Zoning District, but abutting the Commercial Zoning District and other commercial uses. As a wireless infrastructure developer, Vertex encourages co-location and has relationships with all of the existing wireless telecommunications carriers licensed in this market and intends to provide space on the proposed Facility at commercially reasonable rates, which will minimize the total number of towers in the community. Once constructed, the proposed Facility will facilitate the provision of telecommunications services throughout the municipality and enhance the ability of wireless carriers to provide telecommunications services to the community quickly, effectively and efficiently, without minimal or no adverse visual, environmental, historical, flight corridors, health, safety and prosperity impacts. Moreover, the proposed Facility has been designed to mitigate the visual and other impacts of the facility as much as possible.

The proposed Facility will promote and serve the convenience and general welfare of the inhabitants of the Town by enhancing telecommunications services within the Town. The proposed Facility will lessen the danger from fire and natural disasters by providing emergency communications in the event of such fires and natural disasters. The proposed Facility will preserve and increase the amenities of the Town by enhancing telecommunications services. The proposed Facility will facilitate the adequate provision of transportation by improving mobile telecommunications for business, personal and emergency uses. See *New Cingular Wireless PCS, LLC v. City of Manchester, NH*, 2014WL799327 (D.N.H.2014) (the board must take into account the "substantial benefits the public will obtain if the tower is built as proposed", including advancing the significant public purposes of the TCA; improving advanced, seamless, state-of-the-art wireless communication coverage in the target area; enhancing public safety and economic development; and providing opportunities for collocation, which would diminish the need for other carriers to build their own towers in the vicinity). "Perhaps the only guiding rule [on the issue of substantial justice] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." *Ma/achy Glen Associates v. Town of Chichester*, 155 N.H. 102 (2007), citing 15 P. Loughlin, New

Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, The Board of Adjustment in New Hampshire, A Handbook for Local Officials (1997)).

With respect to the proposed Facility, any potential detriment is clearly outweighed by the gain to the general public with improved wireless telecommunications coverage by multiple wireless telecommunications carriers. There are already other similar towers located in the Town and surrounding communities, all comparative in height to the proposed Facility. Moreover, the proposed Facility has been designed to mitigate the visual and other impacts of the facility as much as possible. Given the great public benefit and the minimal if any impact on the surrounding area, it would be a substantial injustice if the requested variance is denied.

The Facility will be amply set back from all abutting properties and surrounded by a substantial vegetative buffer. There are already other similar towers located the Town and surrounding communities, all comparative in design and height to the proposed Facility. The proposed location meets all of the other requirements for a wireless tower, and the proposed Facility has been designed to mitigate the visual and other impacts of the Facility as much as possible. In *Daniels v. Londonderry*, 953 A.2d 406 (N.H. 2008), the New Hampshire Supreme Court considered a proposal involving a substantially similar facility. The record appendix in the Daniels case included numerous reports that analyze the question whether wireless towers (such as the proposed Facility) diminish the value of surrounding residential properties as to other towers in similar settings. The conclusions of the Daniels case and of these reports underscore that wireless towers do not diminish the value of surrounding residential properties.

The following conditions exist pertaining the Property such that literal enforcement of the Ordinance will exact undue hardship:

- (i) the location of the tower relative to the surrounding neighborhoods and other existing telecommunication sites in and around the Town;
- (ii) the topography of the surrounding area;
- (iii) the lack of viable alternatives in the area;
- (iv) the State's, the federal government's, the Town's and the public's desire to accommodate multiple wireless communications companies;
- (v) the demand for robust and reliable telecommunications coverage; and
- (vi) the requirement to accommodate rapidly evolving technologies.

Accordingly, the Applicant requires the requested Variance to permit construction of the Facility as proposed.

As the Plans indicate, the proposed Facility has been designed to accommodate the antennas of at least 4 wireless broadband co-locators. The Facility has been situated on the Property in such a way to achieve the objectives of the Ordinance AND minimizing visibility of the Facility. The wireless communications systems being developed by the various telecommunications carriers operating in the area have been designed employing the most sophisticated radio frequency engineering methods available. Radio frequency engineers determine the placement of network points-of-presence using computer engineering models that simultaneously evaluate topography and population patterns to identify specific geographic areas to be serviced by each antenna facility in the network. As a result of this modeling, combined with actual coverage data provided by existing "on air" facilities, radio frequency engineers have identified a limited geographic area as a necessary location for a communications facility to remedy an existing gap in reliable service coverage in the general vicinity of the Property. Without the requested relief, there would remain a substantial "gap" in reliable service coverage. Radio frequency coverage maps confirm that a telecommunications facility located at the Property is required to remedy the existing gap in the wireless network coverage in the area. The location of the proposed Facility has been determined by engineers to be necessary to connect coverage from the proposed Facility with coverage from adjacent cell sites in the carriers' respective networks (i.e. to remedy the existing "gap" in service and to effect reliable handoffs between adjacent cell sites as a subscriber travels through the area). The requested height and design will allow future carriers to co-locate on the Facility hereby minimizing the number of new facilities needed to provide coverage to the Town.

As noted in *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland*, 231 F.Supp. 2d 396, 406-407 [D. Mass. 2002], the "need for closing a significant gap in coverage, in order to avoid an effective prohibition of wireless services, constitutes another unique circumstance when a zoning variance is required." Accordingly, a hardship exists which is inherent in the land in question; no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision of the property, and the proposed use is a reasonable one.

For the reason set forth above, the Applicant believes that the criteria in subparagraph (b)(1) are readily established. However, to the extent that the Zoning Board believes that the criteria in subparagraph (b)(I) have not been established, the Applicant notes, as indicated above, the wireless communications systems being

developed by the various telecommunications carriers operating in the area have been designed employing the most sophisticated radio frequency engineering methods available. The location of the proposed Facility has been determined by engineers to be necessary to connect coverage from the proposed Facility with coverage from adjacent cell sites in the carriers' respective networks (i.e. to remedy the existing "gap" in service and to effect reliable handoffs between adjacent cell sites as a subscriber travels through the area). The proposed Facility has been designed to allow future carriers to co-locate on the Facility hereby minimizing the number of new facilities needed to provide coverage to the Town.

The location of the Property, relative to other existing wireless communications service infrastructure and area topography, is a special condition that distinguishes it from the other properties in the area. Given the height and density of the area tree canopy and the area terrain and topography relative to the height and structural capacity of the existing utility infrastructure and as well as the technical requirements and limitations of wireless carriers the property on which the proposed Facility will be located cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

THE TELECOMMUNICATIONS ACT OF 1996

In 1996, the U.S. Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704; 110 Stat. 56 (1996) (the "TCA" or the "Telecommunications Act"). The intent of the TCA as enacted by Congress was to institute a framework to promote competition and innovation within the telecommunications industry. Although this law specifically preserves local zoning authority with respect to the siting of wireless service facilities, it clarifies when the exercise of local zoning authority may be preempted by federal law. Section 704 of the TCA provides, in pertinent part, that

(7) PRESERVATION OF LOCAL ZONING AUTHORITY-

(A) GENERAL AUTHORITY- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) LIMITATIONS-

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

The intent of the TCA enacted by the U.S. Congress was to institute a framework to promote competition and innovation within this telecommunications industry. Under its respective licenses from the FCC, wireless telecommunications carriers are obligated to provide a reliable "product" [i.e. telecommunications service] to the population in northern New Hampshire, which includes the Town of Hillsborough. Likewise, consumer expectations for increasingly robust and reliable service requires competing service providers to identify and remedy existing gaps in reliable network coverage, or gaps that result from increasing subscriber voice and data traffic beyond the limits of existing network infrastructure. A carrier's failure to remedy network gaps in a timely fashion can result in a significant loss of subscribers to competing telecommunications carriers. As demonstrated in the Application and supplemental materials provided by the Applicant, the proposed Facility and corresponding relief requested are necessary to remedy a gap in reliable service coverage within the existing network infrastructure. In *Daniels v. Town of Londonderry*, 157 N.H. 519 (2008), the New Hampshire Supreme Court upheld the grant of use and area variances for the construction of a cell tower in an agricultural-residential zone, noting that the Londonderry ZBA correctly treated the TCA as an "umbrella" that preempted local law under certain circumstances.

In a growing number of cases, the federal courts have found that permit denials violate the TCA, even if such denials would be valid under state law. For example, in *Omnipoint v. Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000), the court found that denial of a variance for a location outside of the town's wireless overlay district violated the TCA and ordered the variance to issue despite an Ordinance provision prohibiting use variances. The court in *Nextel v. Town of Wayland*, 231 F. Supp. 2d 396 (D. Mass. 2002) reached the same result. In that case, the court stated: "Although the Board's statement [regarding its lack of authority to issue a use variance] may be correct statement in Massachusetts regarding variances, it is not controlling in the special case of Telecommunications facilities... Under the Telecommunications Act, the Board cannot deny the variance if in so doing it would have the effect of prohibiting wireless services." *Wayland* at 406-407. Most notably, in *Omnipoint Holdings, Inc. v. Town of Cranston*, No. 08-2491 (1st Cir. Nov. 3, 2009), the United States Court of Appeals for the First Circuit affirmed a judgment of the United States District Court for the District of Rhode Island, which found that the Cranston Zoning Board of Review violated the TCA by effectively prohibiting the provision of wireless services in Cranston when it denied an application for a special use permit and variance to construct a wireless facility in a residential area. The Court noted that "[t]he effective prohibition clause does not stand alone; it is also part of the TCA's larger goal of encouraging competition to provide consumers with cheaper, higher-quality wireless technology.... As cell phone use increases, carriers need to build more facilities, especially in populated areas, to continue providing reliable coverage, and local regulations can present serious obstacles." *Cranston*, p. 25. More recently, in *New Cingular Wireless, LLC v. City of Manchester*, Case No. 11-cv-334-SM (USDC D. NH Feb. 28, 2014), the United States District Court for the District of New Hampshire indicated that the City of Manchester impermissibly denied a variance to construct a telecommunications tower in a (non-permitted) residential zone, in that the tower addressed significant coverage gaps and provided competitive and reliable wireless services and there was no feasible alternative. The Court noted that the City must consider the public benefits of wireless services in determining whether to grant a zoning variance for a tower. *Id.*

The Applicant has investigated alternative sites in and around the defined geographic area within which its engineers determined that a facility must be located to fill the gap in service coverage and to function effectively within the wireless network of existing and planned facilities. No existing structure or property in or near the vicinity of the proposed Facility is feasible to accommodate the wireless network requirements. The proposed Facility is on large undeveloped parcel and provides a substantial vegetative buffer. The wireless communications systems being developed by the various telecommunications carriers operating in the Hillsborough area have been designed employing the most sophisticated radio frequency engineering methods available. Radio frequency engineers determine the placement of network points-of-presence using computer engineering models that simultaneously evaluate are topography and population patterns to identify specific geographic areas to be serviced by each antenna facility in the network. As a result of this modeling, combined with actual coverage data provided by existing "on air" facilities, radio frequency engineers have identified a limited geographic area as a necessary location for a communications facility to remedy an existing gap in reliable service coverage in the general vicinity of the Property. Without the requested relief, there would remain a substantial "gap" in reliable service coverage in the carriers' respective networks. Radio frequency coverage maps

confirm that a wireless tower located at the Property is required to remedy the existing gap in the wireless network coverage in the area. The requested height has been determined by engineers to be the minimum height necessary to connect coverage from the proposed Facility with coverage from adjacent cell sites in the carriers' respective networks (i.e. to remedy the existing "gap" in service and to effect reliable handoffs between adjacent cell sites as a subscriber travels through the area).

Accordingly, denial of a permit to construct the Facility would prevent the Applicant from eliminating an existing gap in reliable service coverage, resulting in a potential loss of subscribers and the inability to effectively compete for subscribers with FCC licensed competitors in the market, contrary to the intent of the Ordinance and the U.S. Congress in enacting the TCA.

SUMMARY

Because (i) the proposed Facility meets all of the siting criteria for a Telecommunications Facility under the Hillsborough Zoning Ordinance except for those provisions for which Variances and/or Waivers have been requested, (ii) the proposed Facility meets all of the requirements for a Variance and/or Waiver under the Hillsborough Zoning Ordinance; (iii) the proposed Facility meets all of the requirements for a Conditional Use Permit under the Hillsborough Zoning Ordinance; (iv) the proposed Facility meets all of the requirements for Site Plan Approval under the Hillsborough Site Plan Review Regulations and (iv) pursuant to §704(a) of the Federal Telecommunications Act of 1996 which provides, among other things, that wireless facilities may not be prohibited in any particular area and that any denial of zoning relief must be based upon substantial evidence, the Applicant respectfully requests that the ZONING BOARD OF ADJUSTMENT GRANT THE REQUESTED VARIANCE(S), the PLANNING BOARD APPROVE THE SITE PLANS and WAIVERS if necessary as proposed and issue a CONDITIONAL USE PERMIT and WAIVERS, and the Town grant such other permits, relief or waivers deemed necessary by the Town of Hillsborough under the cmTent Ordinance and pending Ordinance amendments, if any, so that the Applicant may construct and operate the Facility as proposed.

Respectfully submitted,

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