

# DRAFT—NO LEGAL VALUE

## Zoning Board of Adjustment Meeting

March 6, 2020

Members present: Susan Arnold, Chair, Charles Burnham, Jean Chartrand Ewen, and Ashley Rowe, Alternate member.

The Chair called the meeting to order at 5:55 PM and introduced the Board members. Notice for Case Number #418 was originally published in Foster's Daily Democrat on or before January 2, 2020. Discussion of this case was continued forward from the January 8, 2020 ZBA meeting, then continued to the February 6, 2020 Joint Board Meeting and from that meeting to tonight's meeting; notices for tonight's meeting were posted at the Strafford Post Office and the Strafford Town Hall on February 10, 2020.

### Case Number #418

Petitioner: Vertex Tower Assets, LLC have applied for Variances for a telecommunications facility in which they seek approval to place a 140-foot monopole telecommunications tower (146' to top of highest appurtenance) on the property of Bertha L. Huckins, Trustee for the Bertha L. Huckins Revocable Trust, 22 Hillside Drive (Tax Map 11, Lot 4) in Strafford. The applicants are requesting Variances to Article 1.4.2, Section C, Paragraph (b) of the Zoning and Land Use Ordinances which allows new ground mounts if disguised facilities are utilized and the facilities are no higher than 20 feet above the average tree canopy height. The proposed tower would be up to approximately 60 feet higher than the calculated average tree canopy and would not be disguised. Authorized agent representing this case is Francis D. Parisi, Esq.

Atty. Francis Parisi, Agent for the applicants, was present. Lester Huckins was present representing the landowner. Atty. Keriann Roman was present as a consultant to the Board on this case. Scott Schroeder (member of the public) was also present.

Susan Arnold addressed the applicant and advised that there are only four Board members present this evening, noting that she is designating Alternate member Ashley Rowe as a voting member to get to four members. Although four members present is enough to constitute a quorum, the petitioners would have the option of postponing discussion until a full Board can be present. If the applicant wishes to proceed, they are advised that the lack of a five-member Board cannot be cited as grounds for a rehearing in the event that the application is denied. Atty. Parisi advised the Board that he wished to go forward.

Atty. Parisi began by thanking the Board for convening this special meeting and noting that unfortunately his civil engineer had a scheduling conflict for this evening. He summarized his application to the Board; he is seeking variance(s) to one or two things. First, a variance to the requirement that towers only extend 20 feet above the tree canopy, and secondly, the requirement that towers be camouflaged. He noted that he has maintained throughout that the proposed tower would be camouflaged by the terrain and surrounding trees. He said that he has nothing new to add. He said that he knows that David Maxson, the consultant for the town, has come up with information on two alternative locations. He said that they have never thought of those locations as viable alternatives—only radio frequency engineers would want a tower on the top of Parker Mountain, he said, but land use restrictions, constructability concerns, and zoning restrictions on visibility all impact the suitability of the site. He noted that during the balloon test, the Planning Board had wanted photos from the Parker Mountain trail, and that they found that their proposed tower would not be visible from the ridge trail. In other words, Parker Mountain would be a better site but is not a viable alternative. He noted that there would also be no way to build a road to a site on the mountain and there are no utilities. The other site, Austin-Cate Academy (NHANG training site) would also pose problems, as they do not know if the State of NH would be a willing landowner, if they could get 24 hour access to the facility for maintenance, and he said that he feels that it would also be too visible as it is closer to residential properties and public buildings.

Noting that he had previously gone through the criteria for variance, Atty. Parisi summarized the applicant's responses to the questions posed.

- 1) Telecommunications are in the public interest, for business, pleasure, and safety.
- 2) The tower would not be visible, so the spirit of the ordinance would be observed—the site would have minimal impact, and is amply set back from property lines and there would be no lighting. In summary, the variance is justified based on the proposed location.
- 3) Substantial justice would be done because this is one of the shorter towers that they have developed—there are many taller lit towers in neighboring towns, and it would not make sense for Strafford to deny a shorter unlit structure.
- 4) There will be no effect on property values—the property has a large acreage and the nearest property is undevelopable conservation land. There is a NH Supreme Court case where they did an analysis on property values and found that telecommunications really has no impact on property values.
- 5) The hardship is that the extra height will facilitate colocation and reduces the need for other towers in town or other higher towers. Keeping to the height allowed under the ordinances would be a technical impossibility, he said; trees continue to grow and will get higher, and they will need to be up above the tree canopy enough to provide signal.

Finally, Atty. Parisi said that the Federal Telecommunications Act says that the Board cannot say 'no'. The Board must have substantial reasons. He said that the Board cannot say that they do not want a co-locatable facility just because they do not want one. There are a lot of cases, he said. The technology itself is a technical hardship of the terrain. In summary, he said, we respectfully request that you grant the variances.

The Chair then called on the public. Scott Schroeder began by saying that he has a tremendous respect for Lester Huckins and what he has done for the community. He said that his comments will be about the design of the tower, not the landowners. He noted his 32 years of experience in the telecommunications industry, including responsibility for the building of many cell towers, and said that he feels that this solution does not offer the community the benefit that they should be seeking. The location is backed up against the mountain which blocks a significant amount of the footprint of the tower. Right now, the proposed tower would cover more deer than people, he suggested. He said that he feels that the Board has the right to say 'no', that it is not a hardship. He said that a tower can still be built and nothing says that the applicants cannot ask for a variance in the future if they get a second carrier. In the meantime, he urged that the community work together to come up with a communication plan that serves the whole town. Susan Arnold asked Mr. Huckins if he had any comments before she closed the public hearing. Mr. Huckins said that the project should proceed where it is proposed. The Chairman then closed the public hearing.

The Board then turned to deliberations. It was agreed to turn first to the request for variance to the requirement that a telecommunications tower be disguised. Board members agreed to work through each of the criteria for variance and to vote on each of the criteria in turn.

Variance #1 – Article 1.4.2 (H)(1)(b) to locate a non-disguised wireless services facility monopole tower.

I. The applicant suggests that a Variance will not be contrary to the public interest and the spirit of the ordinance is observed if the variance is granted.

Ashley Rowe said that people do not want to see a 'pineapple tree'. Charles Burnham agreed that the disguised trees are worse. Jean Ewen asked for a definition of 'disguise'. Susan Arnold noted the difference between disguise and conceal. Ms. Ewen asked if there are any options for disguise other than the pine trees, etc. Susan Arnold noted that painting had been discussed at the last meeting. Atty. Parisi advised the Board that during the joint meeting, he had said that he could not accommodate the rust brown color that was discussed, but that he has since spoken with the tower manufacturers who have said that they can do the COR-TEN rust brown color treatment—this is a pre-applied rust brown coating and the antennas can be painted to match. If the town were inclined to require this, he said, the applicants would agree.

Atty. Roman advised board members that the question of public interest and spirit of the ordinance can be treated together as they are similar and the analysis would apply to both. The Chair then turned to Board members who agreed that a Variance will not be contrary to the public interest because:

- a. Disguising the proposed tower as a tree will create a worse visual effect.
- b. The applicant is willing to have the color of the tower and any antennae/attachments be brown to diminish negative visual effect (a/k/a "COR-TEN" brown rust color).

Vote (public interest): 4 yes; 0 no

Board members agreed that the same analysis applies to the question of the spirit of the ordinance, and the spirit of the ordinance is observed for the same reasons as above.

Vote (spirit of the ordinance): 4 yes; 0 no

II. The applicant suggests that Substantial Justice is done if the variance is granted.

Atty. Roman advised Board members to consider the question of whether there is a general public gain from a denial, and whether a denial would mean a loss to the applicant and that the Board must weigh the two. Board members agreed that a 'disguised' tower such as a pine tree would be an uglier tower that the town would not like. The Chair then turned to Board members who agreed that substantial justice would be done because:

- a. There is no gain to the public if the variance is denied because disguising the proposed tower as a tree will create a worse visual effect.

Vote: 4 yes; 0 no

III. The applicant suggests that the values of surrounding properties will not be diminished if the variance is granted.

Board members agreed that a 'disguised' pine tree type tower is uglier, so granting the variance does not diminish the value of surrounding properties. The Chair then turned to Board members who agreed that the value of surrounding properties would not diminish because:

- a. The affected properties include the land owner and the Town forest. No abutters have objected.

Vote: 4 yes; 0 no

IV. Would literal enforcement of the provisions of the ordinance result in an unnecessary hardship which owing to the special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of the provision of the property and the proposed use is a reasonable one?

Atty. Roman noted that under the Federal TCA, the question is whether the telecommunications facility is suitable to this parcel. Susan Arnold suggested that if the variance was denied, the tower would be more visually intrusive on this property. Ashley Rowe agreed. The Chair then turned to the Board who agreed that:

- a. Disguising the proposed tower in this instance will create a worse visual effect.

- b. The property is large and the tower is set back; the property is uniquely suited to a non-disguised tower.

Vote: 4 yes; 0 no

For all of the reasons set forth above, Ashley Rowe made a motion, seconded by Charles Burnham, to **APPROVE** the Variance requested by Vertex Tower Assets, LLC, regarding property located at 22 Hillside Drive, Tax Map 11, Lot 4, from Article 1.4.2 Paragraph (H)(1)(b) of the Zoning and Land Use Ordinances where the applicant requests permission to locate a non-disguised wireless services facility monopole tower where the Zoning Ordinance allows only “disguised facilities” because if the variance was denied, the tower would be more visually intrusive on this property, subject to the following condition:

- A. The applicant/owner of the facility shall paint/color the monopole to match the natural surroundings; the monopole and appurtenances shall be installed painted “COR-TEN” brown and shall maintain the “COR-TEN” paint/coloring.

All voted in favor of the Motion to approve the variance.

Board members then turned to the second of the requested variances. Board members agreed to work through each of the criteria for variance and to vote on each of the criteria in turn.

Variance #2 –Article 1.4.2, paragraph H(1)(b) to locate a wireless services facility monopole tower extending 60 feet above the height of average tree canopy where the Zoning Ordinance limits the height to “no higher than 20 feet above the average tree canopy.”

I. The applicant suggests that the Variance will not be contrary to the public interest and the spirit of the ordinance is observed if the variance is granted. The Chair then turned to Board members who agreed that a Variance will not be contrary to the public interest because:

- a. The Strafford Fire Chief said the tower would help public safety by covering a gap in wireless service.
- b. The tower is tucked away on a large parcel and would not alter the essential character of the current neighborhood.
- c. Granting the variance satisfies most of the basic zoning objectives of the Zoning Ordinance including protecting the health, safety and general welfare of the community, providing adequate areas between buildings and various rights of ways, protecting property values, providing adequate public utilities and other public requirements. Zoning Ordinance, Article 1.1, Preamble.

Vote (public interest): 4 yes; 0 no

Board members agreed that the same analysis applies to the question of the spirit of the ordinance, and the spirit of the ordinance is observed for the same reasons as above.

Vote (spirit of the ordinance): 4 yes; 0 no

II. Substantial Justice is done if the variance is granted.

The Chair then turned to Board members who agreed that substantial justice would not be done because:

- a. There is a gain to the public if the variance for an additional 40 feet above what is allowed by the Zoning Ordinance is denied because it will be seen from the Town Forest and the hilltop and denying this variance protects the viewshed.
- b. The only identifiable loss to the applicant is financial as the primary reason for requesting additional height is to accommodate co-locations.
- c. If this variance is denied, the tower can still be built, but capped at 100 feet per the ordinance. The applicant's coverage maps show substantially the same coverage at 95 feet as it does at 140 feet; coverage at 140 feet is only marginally better.

Vote: 0 yes; 4 no

III. The values of surrounding properties will not be diminished if the variance is granted. The Chair then turned to Board members who agreed that the value of surrounding properties would not diminish because:

- a. The affected properties include the land owner and the Town Forest. No abutters have objected.

Vote: 4 yes; 0 no

IV. Would literal enforcement of the provisions of the ordinance result in an unnecessary hardship which owing to the special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of the provision of the property, and the proposed use is a reasonable one? The Chair then turned to the Board who agreed that:

- a. The applicant did not present sufficient evidence to show any meaningful increase in coverage from the allowed 100-foot height to the requested 140 feet.
- b. A 100 foot tower, which is allowed by right under the Ordinance, still significantly fills the area of the coverage gap the applicant is seeking to fill, based upon the coverage maps presented by the applicant.
- c. The Zoning Ordinance does not have a co-location requirement or preference.
- d. The only evidence presented to support the request for the height variance is purely financial for the applicant to facilitate additional co-locations on the tower.
- e. There is no hardship necessitating an increase in height.
- f. A tower within the 100-foot allowed height fits the needs of the applicant to significantly cover the service gap.

Vote: 0 yes; 4 no

For all of the reasons set forth above, it is moved by Ashley Rowe, seconded by Jean Ewen to **DENY** the Variance requested by Vertex Tower Assets, LLC, regarding property located at 22 Hillside Drive, Tax Map 11, Lot 4, from Article 1.4.2, Paragraph H (1) (b) of the Zoning and Land Use Ordinances where the applicant requests 60 feet above the average tree canopy height where the Zoning Ordinance limits tower

height to “no higher than 20 feet above the average tree canopy” because at this time the Board finds insufficient evidence of a hardship based on the facts as presented, and granting the variance would not result in substantial justice because there is no significant net gain from the additional height, and for the other reasons discussed. The evidence in the application materials shows that additional height has no significant impact on coverage and the height is only for additional carriers.

All voted in favor of the Motion to deny the variance.

There being no further business before the Board, a motion to adjourn was made by Susan Arnold and seconded by Ashley Rowe. There was no further discussion, and the vote was unanimous in the affirmative. The meeting adjourned at 7:15 PM.

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