

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0674, Whittier Communications, Inc. v. Town of Wakefield, the court on December 12, 2025, issued the following order:

The court has reviewed the written arguments and the record submitted on appeal, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(3). The plaintiff, Whittier Communications, Inc., appeals an order of the Superior Court (Klass, J.) affirming decisions of the Planning Board (Planning Board) and the Zoning Board of Adjustment (ZBA) for the defendant, the Town of Wakefield (Town), which granted site plan approval for the intervenor, Vertex Tower Assets, LLC, to construct two personal wireless service facilities (hereinafter, cell towers) in the Town. We affirm.

I. Background

The record reflects the following facts. In August 2021, the intervenor submitted applications to the Planning Board for site plan approval to construct two cell towers (the Vertex Towers) in the Town. The intervenor submitted various supporting materials with its applications, including several radio frequency coverage maps for each site, and an affidavit from a radio frequency engineer representing that the Vertex Towers were needed to fill certain wireless coverage gaps in the Town. The plaintiff owns a cell tower (the Whittier Tower) which is 1.9 miles away from one proposed Vertex Tower and 2.25 miles away from the other proposed Vertex Tower. At the time of the intervenor's applications, the Whittier Tower was under construction.

The Planning Board denied the intervenor's applications, concluding that because the Whittier Tower was an "existing" structure within four miles of the proposed Vertex Towers, the intervenor failed to satisfy Article 24, Section E.5 of the Wakefield Zoning Ordinance (Ordinance). See Ordinance Art. 24, § E.5 (providing that, "[i]f the applicant is proposing a new personal wireless service facility," the applicant must submit "written evidence demonstrating that no existing facility within four miles of the proposed personal wire service facility can accommodate the applicant's needs"). The Planning Board also concluded that the intervenor had not met its burden under Article 24, Section F of the Ordinance. See id. Art. 24, § F (providing that, "[w]hen applying for construction of a new tower, mast, monopole, or similar structure, the applicant shall have the burden of proving that there are no existing structures available and suitable to locate its personal wireless service facility").

The intervenor appealed the decisions to the ZBA. After a hearing, the ZBA concluded that, contrary to the Planning Board's determination, the Whittier Tower was not "in existence" when the Planning Board denied the intervenor's applications. Accordingly, the ZBA remanded the matters to the Planning Board for further consideration consistent with its decision.

After the ZBA remanded the matters to the Planning Board, and before the Planning Board issued its subsequent decisions, construction of the Whittier Tower was completed. On remand, the Planning Board approved the intervenor's applications subject to certain conditions. The Planning Board found that the proposed Vertex Towers "would provide coverage where none is presently available assuming that the Whittier tower location was operational with a carrier," and that the intervenor had therefore satisfied Article 24 of the Ordinance.

The plaintiff appealed the Planning Board's decisions to the ZBA, arguing, in part, that the intervenor failed to satisfy the requirements of the Ordinance because it failed to: (1) prove that locating the Vertex Towers within four miles of the Whittier Tower was necessary; (2) prove that there were no suitable and available existing structures to locate its personal wireless service facility; and (3) provide evidence in its applications that it contacted the plaintiff to inquire whether the Whittier Tower was a suitable and available structure to locate its personal wireless service facility. See id. Art. 24, §§ E.5, F. After a hearing, the ZBA affirmed the Planning Board's decisions, finding that "even if the Whittier Tower is 'existing' as that term is used in the Town ordinance, [the intervenor] presented sufficient evidence in support of its applications." The plaintiff moved for rehearing, which the ZBA granted. After a rehearing, the ZBA again affirmed the Planning Board's decisions.

The plaintiff appealed the Planning Board's and the ZBA's decisions to the trial court. The trial court affirmed, determining that neither the Planning Board nor the ZBA erred by finding that the intervenor met its burden under the Ordinance. The plaintiff unsuccessfully moved for reconsideration. This appeal followed.

II. Analysis

This appeal requires us to review the superior court's order in an appeal from decisions of the Planning Board and the ZBA. The superior court was obligated to treat the factual findings of both boards as prima facie lawful and reasonable and could not set aside their decisions absent unreasonableness or an identified error of law. Monadnock Rod and Gun Club v. Town of Peterborough, 177 N.H. 70, 74 (2024), 2024 N.H. 61, ¶10; see RSA 677:6, :15, V (2016). We will uphold the superior court's decision unless it is unsupported by the evidence or is legally erroneous. Monadnock, 177 N.H. at 74, 2024 N.H. 61, ¶10.

The plaintiff argues that the trial court erred in upholding the decisions of the Planning Board and the ZBA because the intervenor failed to provide sufficient evidence that it satisfied the requirements of Article 24, Section E.5 of the Ordinance. Article 24, Section E.5 provides that, if an applicant is proposing a new cell tower, the applicant must submit “written evidence demonstrating that no existing facility within four miles of the proposed personal wire service facility can accommodate the applicant’s needs.” This proof can consist of substantial evidence that: (a) “no existing structures are located within the geographic area”; (b) “existing facilities are not of sufficient height to meet the applicant’s engineering requirements or do not have sufficient structural strength to support [the] applicant’s proposed equipment”; (c) “existing facilities have no additional capacity”; or (d) “co-location on an existing facility would cause electromagnetic interference at the existing facility, or vice-versa.” Ordinance Art. 24, § E.5(a)-(d). The applicant can also submit “[o]ther substantial evidence as may reasonably be required.” Id. Art. 24, § E.5(e).

The trial court ruled that the Planning Board and the ZBA did not err in concluding that the intervenor submitted sufficient evidence to meet its burden of proof under Article 24, Section E.5 of the Ordinance. We agree. The intervenor submitted multiple sets of radio frequency coverage maps showing the wireless coverage provided by existing and approved cell towers, including the Whittier Tower, and the additional coverage that would be provided if the Vertex Towers were constructed. A radio frequency engineer, in his capacity as an independent consultant for the intervenor, submitted an affidavit in which he stated that, based upon his analysis of the attached radio frequency studies, reports and computer models prepared in connection with the project, “there is a gap in wireless coverage and inadequate network service” in the areas of the proposed Vertex Towers, and that wireless carriers would “be unable to close this gap in coverage” without the Vertex Towers. Accordingly, the Planning Board concluded that “the proposed towers would provide coverage where none is presently available assuming that the Whittier tower location was operational with a carrier.” In other words, notwithstanding the existence of the Whittier Tower, the Planning Board found that the intervenor had satisfied the Ordinance because the proposed Vertex Towers would provide coverage to areas that the existing facilities could not reach.

The plaintiff counters that the evidence submitted by the intervenor was “inaccurate and lacked credibility,” citing comments from the public and members of the Planning Board “questioning the credibility of Vertex’s evidence.” However, it is for the Planning Board and the ZBA to assess credibility and weigh the evidence, not this court. See N.H. Alpha of SAE Trust v. Town of Hanover, 172 N.H. 69, 77 (2019). Simply because the Planning Board and the ZBA rejected evidence that the plaintiff cites and relied upon contrary evidence does not mean that they acted unreasonably in reaching their decisions. See id. In turn, the trial court was not obligated to second

guess the Planning Board or the ZBA or make contrary factual findings, as the court was acting in an appellate capacity and not as a fact finder. See id. On this record, we agree with the trial court that the Planning Board and the ZBA did not act unreasonably when they concluded that the intervenor met its burden of proving that there was “no existing facility within four miles of the proposed personal wire service facility [that] can accommodate the [intervenor’s] needs.” Ordinance Art. 24, § E.5.

The plaintiff also argues that the intervenor failed to meet its burden under Article 24, Section F of the Ordinance. Article 24, Section F provides that, “[w]hen applying for construction of a new tower, mast, monopole, or similar structure, the applicant shall have the burden of proving that there are no existing structures available and suitable to locate its personal wireless service facility.” To meet that burden, “the applicant shall take all appropriate actions as may be required from the applicant, which may include but not necessarily [be] limited to . . . submit[ting] a list of all contacts made with owners of potential sites regarding the availability of potential space for a personal wireless service facility” and “provid[ing] copies of all letters of inquiry made to owners of existing structures and letters of rejection.” Id. Art. 24, § F(1)-(2).

Here, the Planning Board and the ZBA found that the intervenor submitted sufficient evidence to meet its burden under Article 24, Section F. The trial court affirmed those findings. We conclude that those findings were not unlawful or unreasonable. As explained above, the evidence supports that there were no existing structures, including the Whittier Tower, capable of filling the coverage gaps that the proposed Vertex Towers aim to fill. Thus, there was sufficient evidence for the Planning Board and the ZBA to conclude that “there are no existing structures available and suitable to locate [the intervenor’s] personal wireless service facility.” Id. Art. 24, § F.

The plaintiff nonetheless argues that the intervenor failed to strictly comply with the requirements of Article 24, Section F of the Ordinance because the intervenor did not submit either a list of contacts it made with owners of potential sites in the area, or copies of letters of inquiry to and rejection by owners of existing structures, regarding the availability of space for its personal wireless service facility. Id. Art. 24, § F(1)-(2). To the extent that the Ordinance has such a requirement, we need not decide this issue because the plaintiff has failed to demonstrate material prejudice. See Patenaude v. Town of Meredith, 118 N.H. 616, 621 (1978) (“[N]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown.”).

The plaintiff participated in the application process for the Vertex Towers. Further, the Planning Board and the ZBA expressly considered the existence of the Whittier Tower and other existing structures in the area in

reaching their decisions, and found that the intervenor met its burden under the Ordinance regardless of the existence of those structures. Thus, the plaintiff has failed to show that any lack of notice affected the Planning Board's or the ZBA's decisions.

In sum, the plaintiff has failed to demonstrate that either the Planning Board or the ZBA acted unlawfully or unreasonably in reaching their decisions, or that the trial court erred in affirming those decisions. See Monadnock, 177 N.H. at 74, 2024 N.H. 61, ¶10. We have considered the plaintiff's remaining arguments, and we conclude that they do not warrant further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Affirmed.

MACDONALD, C.J., and DONOVAN and GOULD, JJ., concurred.

**Timothy A. Gudas,
Clerk**