

COUNTY OF ROCKINGHAM  
STATE OF NEW HAMPSHIRE

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In the Matter of the Application of:

**Vertex Towers, LLC**

For Site Plan Approval, and Conditional Use Permit

Premises: 70 Moulton Ridge Road  
Kensington, New Hampshire

Tax Assessors: Map 10 Lot 1  
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**MEMORANDUM IN OPPOSITION**

Respectfully submitted,

Concerned Citizens of Kensington

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## Preliminary Statement

This memorandum is submitted in opposition to the application of Vertex Towers LLC, (*Vertex*) which seeks to obtain site plan approval and a conditional use permit for the installation of a telecommunications tower. *Vertex* is a commercial site development company<sup>1</sup> which seeks to construct a 150-foot fifteen (15) story monopole cell tower at 70 Moulton Ridge Road, Kensington, New Hampshire 03833 in the heart of a rural/agricultural zoned neighborhood. It should immediately be noted that this is a “spec” project with no cell provider contracted to make use of the proposed tower.

As set forth herein, granting *Vertex*'s application would be contrary to both the letter and the spirit of the Town's Zoning Ordinance. In addition, *Vertex* has not submitted proper evidence that the proposed tower is necessary, nor that the community would derive any benefit whatsoever from its installation as no significant gap in service has been proven by *Vertex*.

As set forth below, *Vertex*'s application must be denied because:

- (a) *Vertex* has failed to establish that granting the application would be consistent with requirements of the Town Zoning Ordinance;
- (b) granting the application would violate both the Ordinance and its legislative intent;
- (c) the applicant has failed to establish that the proposed facility: (i) is actually necessary for the provision of personal wireless services within the Town or (ii) that it is necessary that the facility be built at the proposed site.<sup>2</sup>
- (d) the irresponsible placement of the proposed facility would inflict upon the nearby homes and community the precise types of adverse impacts which the Ordinance was enacted to prevent; and

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<sup>1</sup> As is evidenced by its website (See Exhibit “A”), *Vertex* is a *site development company*. Unlike *wireless carriers* such as *Verizon*, *AT&T* and *T-Mobile*, site development companies do not actually provide any personal wireless services to end-use consumers. Site development companies, such as *Vertex* are commercial for-profit companies which build cell towers and other wireless facilities, and then lease space and/or capacity on those structures, to the carriers.

<sup>2</sup> See Point III, *infra*.

- (e) *Vertex* has not established how the denial of its current application would amount to an effective prohibition under the Telecommunications Act of 1996.

As such, it is respectfully submitted that *Vertex's* application should be denied in a manner that does not violate the Telecommunications Act of 1996 ("TCA").

## POINT I

### Granting *Vertex's* Application for Its Proposed Wireless Telecommunication Facility at the Proposed Location Would Violate Both the Requirements of the Zoning Ordinance and the Legislative Intent Upon Which Those Requirements Were Enacted

As set forth below, *Vertex's* application should be denied because granting the application would violate the requirements of the Town Zoning Ordinance, in particular those sections relating to telecommunications facilities and requirements for conditional use permits.

#### A. Local Authority to Regulate Telecommunications Facilities

The proliferation of cell towers has resulted in the need for municipalities to pass legislation to regulate their construction. Although many site developers and cellular service providers will argue that the Telecommunications Act of 1996 (TCA) prohibits local governments from regulating telecommunications facilities, this is simply untrue. The TCA, 47 U.S.C. §332(c)(7) preserves local zoning authority. Subsection (A) provides for general authority:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter 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.

While subsection (B) forbids a municipality from “unreasonably discriminat[ing] among providers” and from “prohibiting the provision of personal wireless services” altogether, the fact remains that a Town may restrict the placement, location, construction and modification of cell towers in their community through zoning regulations. *See, T-Mobile South, LLC v. Roswell*, 135 S.Ct. 808 (2015); *Petition of Cellco Partnership d/b/a Verizon Wireless*, 2022 WL 18825861 (N.H. 2022); *Cellco Partnership v. Town of Clifton Park, NY*, 365 F.Supp. 3d 248 (N.D.N.Y. 2019).

**B. General Purpose and Legislative Intent**

The clear purpose and legislative intent of the Town’s Zoning Ordinance is stated in Article I of the Ordinance, Authority and Purpose, declaring that the goal of the Town’s land use regulations is “to promote the health, safety, prosperity, appearance, convenience, economy and general welfare of the community” of Kensington.

More particularly, the purpose and goals of the Telecommunications Facility regulations contained within Article V: Special Use Regulations are specifically set forth in Section 5.1.3 as follows...

- B. Reduce adverse impacts such facilities may create, including, but not limited to: impacts on aesthetics, environmentally sensitive areas, historically significant locations, flight corridors, health and safety by injurious accidents to person and property and prosperity through protection of property values.
- C. Provide for co-location and minimal impact siting options through an assessment of technology, current locational options, future available locations, innovative

siting techniques and siting possibilities beyond the political jurisdiction of the Town.

- D. **Permit the construction of new towers *only where all other reasonable opportunities have been exhausted*** and to encourage the users of towers and antennas to configure them in a way that minimizes the adverse visual impact of the towers and antennas.
- E. Require cooperation and co-location, to the highest extent possible, between competitors in order to reduce cumulative negative impacts upon Kensington...

*(emphasis supplied)*

A telecommunications tower in a residential/agricultural zone community is antithetical to the peaceful, unique character of Kensington. It would rise far above the height of the houses and the trees in the neighborhood and would “stick out like a sore thumb.” It can hardly be said to be consistent with the residential/agricultural use of the area, particularly when the tower would be adjacent to hundreds of acres of conservation land which was donated for the express purpose of preserving the natural beauty and pristine environment of Moulton Ridge. The Town has rightly sought to regulate the construction of telecommunications facilities. Now the Town must wisely apply the relevant provisions of the Zoning Ordinance and reject *Vertex*’s application.

Again, it must be remembered that there is no cellular service carrier associated with this proposed tower. It is merely a “spec” tower with no guarantee that any carrier will find it suitable or useful. This proposed tower is simply a gamble by *Vertex* - a gamble to which the residents of Kensington should not be subjected.

The purpose and goals of the Telecommunications Facility regulations coupled with the purpose and legislative intent of the Zoning Ordinance in general, can lead to only one

conclusion – that *Vertex*'s application for site plan approval and conditional use permit must be denied as the proposed tower does not conform to the purpose, nor legislative intent of the applicable zoning regulations.

C. *Vertex*'s Application Does Not Comply with the Requirements to Grant a Conditional Use Permit

The regulations governing issuance of a conditional use permit (§5.1.8) provide the factors to be considered in order to grant the permit. These factors include:

- b. Proximity of tower to residential development or zones.
- c. Nature of uses on adjacent and nearby properties.
- ...
- h. Availability of suitable existing towers and other structures....
- j. Availability of alternative tower structures and alternative siting locations....

One has only to consult a map or drive through the area to see that the proposed tower would be located in a residential neighborhood thus triggering concern about the tower's "proximity...to residential development or zones" and the "nature of uses on adjacent and nearby properties." (See §5.1.8 b and c). Clearly, the installation of a telecommunication facility is out of character for this neighborhood and should not be considered. This alone gives the Board sufficient reason to deny *Vertex*'s application.

Next, *Vertex* has not adequately demonstrated compliance with §5.1.8 h and j, pertaining to investigating and evaluating alternative structures and site locations. A chart submitted with *Vertex*'s application lists merely 5 sites which were purportedly investigated. The statement of Brendan M. Gill, on behalf of the applicant, claims "all possible locations in the Commercial District fail to provide the coverage needed, due lower elevation" but doesn't identify any of these sites by address. He then makes the bald statement that the proposed site "is the least intrusive and only available and viable alternative to adequate [*sic*] meet the coverage

objective” without elaboration. *Vertex* expects the Board simply to accept his statement without the required detailed supporting documentation.

Recent case law analyzing an applicant’s diligence in investigating alternative sites have involved investigation of 16 sites, *T-Mobile Northeast, LLC v. Town of Bedford, NH*, 2018 WL 6201717 (D. N.H. 2018); and 10 sites *Sprint Spectrum, L.P. v. Town of Ogunquit*, 175 F. Supp. 2d 77, (D. Me. 2001). In light of the efforts undertaken and subsequently examined by the Courts in these cases, *Vertex*’s “investigation” of 5 sites seems wholly inadequate.

It should also be pointed out that *Vertex* was recently granted permission to erect a tower a 184 South Road in Kensington which is just more than 2 miles from this proposed site. Nowhere in the application is this tower addressed. Was this tower considered as an alternate site? If not, why not?

§5.1.3 D of the Telecommunications Facility regulations allows the Board to grant an application and “[p]ermit the construction of new towers ***only where all other reasonable opportunities have been exhausted.***” (*emphasis supplied*) *Vertex* has not exhausted all other reasonable opportunities to locate a new telecommunication facility and, therefore, construction cannot be permitted.

See also, §5.1.8 C which requires each applicant to provide a written inventory of its existing towers within the jurisdiction together with specific and detailed information about each tower. *Vertex* has failed to submit this detailed information.

D. *Vertex* Has Failed to Comply with Town and Federal NEPA Requirements

§5.1.8 C (2) requires an applicant to submit written proof that an environmental evaluation which satisfies the requirements of the National Environmental Policy Act (NEPA)

has been conducted in compliance with federal FCC rules. This provision necessitates consideration of whether an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) is required. FCC rules are clear that construction of towers and facilities are major actions that trigger NEPA obligations. New Hampshire is home to many endangered or threatened species, including the Northern Long Eared Bat, the Little Brown Bat, the Roseate Tern, the Monarch Butterfly and many others. The federal government recognizes the importance of protecting these creatures and inasmuch as this is a strict requirement, the applicant must respect and comply with these regulations. The Town cannot waive federal requirements. Moreover, the Town cannot make an informed decision without all the required information including any and all documents required under NEPA.

In addition, not only are the applicant's claims of hardship disingenuous, the overriding intent of the waiver provisions still require consideration of the public interest and compliance – overall – with the Zoning Ordinance's "objectives, standards and requirements..." *Vertex's* request for a waiver does not meet the requirements to obtain any waiver.

## POINT II

### §6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Allows *Vertex* to Increase the Height of the Facility Without Further or Prior Zoning Approval

Once the tower is built, *Vertex* could ***unilaterally*** choose to increase the height of the tower to as much as one hundred seventy (170) feet, and the Town would be legally prohibited from stopping them. This is due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

§6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 provides that notwithstanding §704 of the Telecommunications Act of 1996 or any other provision of law, a

State or local government may not deny, and *shall approve*, any eligible request for a modification of an existing wireless facility or base station where it does not substantially change the physical dimensions of such facility or base station. *See* 47 U.S.C. §1455(a).

Under the FCC’s reading and interpretation of §6409(a) of the Act, local governments are prohibited from denying modifications to wireless facilities unless the modifications will “substantially change” the physical dimensions of the facility, pole, or tower.

The FCC defines “substantial change” to include any modification that would increase the height of the facility by more than ten (10%) percent of the height of the tower, plus the height of an additional antenna, plus a distance of ten (10) feet to separate a new antenna from the pre-existing top antenna, up to a maximum height increase of twenty (20) feet.

As set forth in Point III below, *Vertex* has not even established that the proposed 150-foot tower is actually needed to provide wireless coverage within the Town, let alone a tower that is 170 feet high.

Thus, *Vertex*’s application should be denied.

### POINT III

*Vertex* Has Failed to Proffer Probative Evidence  
Sufficient to Establish a Need for the Proposed  
Wireless Facility at the Location Proposed, Or That  
the Granting of Its Application Would Be Consistent  
With the Smart Planning Requirements Of  
the Town’s Zoning Ordinance

The intent behind the provisions of the Town’s Zoning Ordinance is to promote “smart planning” of wireless infrastructure within the Town.

Smart planning involves the adoption and enforcement of zoning provisions that require wireless telecommunication facilities to be *strategically placed* so as to minimize the

number of facilities needed while still saturating the Town with complete wireless coverage (i.e., they leave no gaps in wireless service) while avoiding any unnecessary adverse aesthetic or other adverse impacts upon homes and communities situated in close proximity to such facilities.

To determine if a wireless telecommunications facility would be consistent with smart planning requirements, sophisticated Boards require wireless carriers and/or site developers to provide direct evidentiary proof of:

- (a) the *precise locations, size, and extent of any geographic gaps in personal wireless services* that are being provided by a specifically identified wireless carrier, which provides personal wireless services within the respective jurisdiction, and
- (b) the *precise locations, size, and extent of any geographic areas* within which that identified wireless carrier suffers from a capacity deficiency in its coverage.

The reason such information is important to local boards is that without it, those boards are incapable of knowing: (a) if, and to what extent, a facility will remedy any actual gaps or deficiencies which may exist and (b) if the placement is in such a poor location that it would all but require that more facilities be built because the facility did not actually cover the gaps in service which actually existed, thereby causing a redundancy in wireless facilities within the Town.

In the present case, *Vertex* is proposing to build this tower “*on spec.*” *Vertex* is *not* proposing to construct a tower on behalf of any wireless carrier. *Vertex* hopes to build the tower and then entice a carrier to place its wireless equipment on that tower. *Vertex* is a site developer, not a wireless carrier. They do not provide wireless service and ***thus cannot prove a gap in their service!*** Therefore, *Vertex* has failed to provide actual probative evidence to

establish: (a) the *actual location of gaps* (or deficient capacity locations) in personal wireless services *they provide* within the Town and (b) why or how the proposed facility is the best and/or least intrusive means of remedying those gaps. Even in the event *Vertex* were to amend their application and were to obtain a contract with a wireless carrier, the maps annexed hereto as **Exhibit “A”** and discussed further below, show that there are no coverage gaps. *See* coverage maps posted on the websites of AT&T, Verizon and T-Mobile, which highlight the areas of their coverage. Based upon these maps, there is full wireless coverage in the area of the proposed tower.

A. The Applicable Evidentiary Standard

Under the applicable law, in order to obtain the necessary approvals to erect their proposed tower, *Vertex* must satisfy two prongs of evidence:

1. that there is a significant gap in a specific wireless carrier’s service
2. that the proposed tower is the only feasible plan

*See Omnipoint Holdings, Inc., v. City of Cranston, et al*, 586 F.3d 38 (1<sup>st</sup> Cir. 2009); *Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40 (1<sup>st</sup> Cir. 2012); *T-Mobile Northeast, LLC et al v. Town of Bedford, NH, et al, supra*; *New Cingular Wireless PCS, LLC v. City of Manchester, NH* 2014 WL 799327 (D. N.H. 2014).

It therefore follows that where an applicant claims that a Board’s decision amounts to an “effective prohibition” under the federal Telecommunications Act, 47 U.S.C.

§332(C)(7)(b)(i)(II), the applicant will only prevail if it shows *both* that a significant gap exists in wireless coverage *and* that its proposed facility is the only feasible plan to close that gap. *See Omnipoint Holdings, supra*; *Green Mountain Realty, supra*; *T-Mobile Northeast, supra*; *and see Sprint Spectrum L.P. v. Willoth*, 996 F. Supp. 253 (W.D.N.Y. 1998) (*quoting*

*T-Mobile Northeast, LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 456 (S.D.N.Y. 2009)).

Notably, with regard to the “significant gap” requirement, the gap must be

“large enough in terms of physical size and number of users affected” to distinguish it from a “mere, and statutorily permissible, dead spot.” [quoting *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1<sup>st</sup> Cir. 2002)] Indeed, “[f]ederal regulations contemplate that areas enjoying adequate coverage will still include spots without reliable service.” *Id.* (citing *360° Commc ’ns Co. v. Bd. Of Supervisors of Albemarle Cnty.*, 211 F.3d 46 (4<sup>th</sup> Cir. 2000)). Dead spots are defined as “[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service,” 47 C.F.R. §22.99, and the presence of dead spots does not mean that service is per se inadequate, *see id.* §22.911(b).

*Green Mountain, supra.*

As noted above, *Vertex* cannot prove a significant gap in service, and they must in order to gain approval of their application. Even if “dead spots” exist, that is not sufficient to warrant the installation of the proposed tower. Additionally, *Vertex* has not submitted sufficient evidence that the proposed site is the only feasible plan. Such proof must necessarily include evidence “that they ‘investigated thoroughly the possibility of other viable alternatives’ before concluding no other feasible plan was available.” *City of Cranston, supra* (citations omitted).

B. *Vertex* Has Failed to Submit Any Probative Evidence to Establish the Need for the Facility at the Proposed Height and Location

*Vertex*’s application presents absolutely no hard data. Hard data is *probative evidence* that would establish a significant gap in coverage and that the proposed facility is the only feasible alternative.

Without the proper data, it is impossible for the Town to comply with the smart planning requirements set forth in its own Zoning Ordinance. Furthermore, it severely hampers the Town's ability to determine if the proposed location is the only feasible plan for providing personal wireless service to the community. Finally, without having the necessary information regarding where possible coverage gaps may or may not exist, it would be entirely irresponsible and illogical for the Town to make a determination on *Vertex's* application, as they do not even know where, or whether, such facility is needed.

(i) The FCC Deems Propagation Maps to Be Unreliable

Recently, both the FCC and the California Public Utilities Commission (PUC) have recognized the absolute need for hard data rather than the commonly submitted propagation maps, which can easily be manipulated to create over-exaggeration in need and significant gaps.

As is discussed within the FCC's July 17, 2020, proposed order, FCC-20-94, "[i]n this section, we propose requiring mobile providers to submit a statistically valid sample of on-the-ground data (i.e., both mobile and stationary drive-test data) as an additional method to verify mobile providers' coverage maps."<sup>3</sup> The FCC defines drive tests as "tests analyzing network coverage for mobile services in a given area, i.e., measurements taken from vehicles traveling on roads in the area."<sup>4</sup> Further within the FCC's proposed order, several commenting entities also agree that drive test data is the best way to ascertain the most reliable data. For example:

(i) "City of New York, California PUC, and Connected Nation have asserted that on-the-ground data, such as drive-test data, are critical to verifying services providers' coverage

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<sup>3</sup> See page 44 paragraph 104 of proposed order FCC-20-94.

<sup>4</sup> See page 44 fn. 298 of proposed order FCC-20-94.

data...;”<sup>5</sup> (ii) California PUC asserted that ‘drive tests [are] the most effective measure of actual mobile broadband service speeds’;<sup>6</sup> and (iii) “CTIA, which opposed the mandatory submission of on-the-ground data, nonetheless acknowledged that their data ‘may be a useful resource to help validate propagation data...’”<sup>7</sup>

California PUC has additionally stated that “the data and mapping outputs of propagation-based models will not result in accurate representation of actual wireless coverage” and that, based on its experience, “drive tests are required to capture fully accurate data for mobile wireless service areas.”<sup>8</sup>

Moreover, proposed order FCC-20-94, on page 45, paragraph 105, discusses provider data. Specifically, the FCC states:

*“The Mobility Fund Phase II Investigation Staff Report, however, found that drive testing can play an important role in auditing, verifying, and investigating the accuracy of mobile broadband coverage maps submitted to the Commission. The Mobility Fund Phase II Investigation Staff Report recommended that the Commission require providers to “submit sufficient actual speed test data sampling that verifies the accuracy of the propagation model used to generate the coverage maps. Actual speed test data is critical to validating the models used to generate the maps.”*

Of greatest import, on August 18, 2020, the FCC issued a final rule in which the FCC found that requiring providers to submit detailed data about their propagation models will help the FCC verify the accuracy of the models. Specifically, 47 CFR §1.7004(c)(2)(i)(D) requires “[a]ffirmation that the coverage model has been validated and calibrated at least one time using

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<sup>5</sup> See page 45 fn. 306 of proposed order FCC-20-94.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> <https://arstechnica.com/tech-policy/2020/08/att-t-mobile-fight-fcc-plan-to-test-whether-they-lie-about-cell-coverage/>

on the ground testing and/or other real-world measurements completed by the providers or its vendor.”

The mandate requiring more accurate coverage maps has been set forth by Congress. “As a result, the U.S. in March passed a new version of a bill designed to improve the accuracy of broadband coverage maps.”<sup>9</sup> “The Broadband Deployment Accuracy and Technological Availability (DATA) Act requires the FCC to collect more detailed information on where coverage is provided and to ‘establish a process to verify the accuracy of such data, and more.’”<sup>10</sup>

“The project – required by Congress under the Broadband DATA Act – is an effort to improve the FCC’s current broadband maps. Those maps, supplied by the operators themselves, have been widely criticized as inaccurate.”<sup>11</sup>

If the FCC requires further validation and more accurate coverage models, there is no reason the Town of Kensington should not do the same. For the foregoing reasons, dropped call records and drive test data are essential to the Board’s ability to render an informed decision on *Vertex’s* application.

(ii) Hard Data And The Lack Thereof

Across the entire United States, applicants seeking approvals to install wireless facilities provide local governments with *hard data*, as both: (a) actual evidence that the facility they seek to build is necessary and (b) actual evidence that granting their application would be consistent with smart planning requirements.

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<sup>9</sup> <https://www.cnet.com/news/t-mobile-and-at-t-dont-want-to-drive-test-their-coverage-claims/>

<sup>10</sup> *Id.*

<sup>11</sup> <https://www.lightreading.com/test-and-measurement/Vertex-t-mobile-atandt-balk-at-drive-testing-their-networks/d/d-id/763329>

The most accurate and least expensive evidence used to establish the location, size, and extent of both *gaps* in personal wireless services, and areas suffering from *capacity deficiencies*, are two specific forms of *hard data*, which consist of: (a) dropped call records and (b) actual drive test data. Both local governments and federal courts consider hard data to ascertain whether a significant gap in wireless coverage exists at an exact location.

In fact, unlike “expert reports,” RF modeling, and propagation maps, all of which can easily be manipulated to reflect whatever the preparer wants them to show, *hard data* is straightforward and less likely to be subject to manipulation, unintentional error, or inaccuracy.

Dropped call records are generated by a carrier’s computer systems. They are typically extremely accurate because they are generated by a computer that already possesses all of the data pertaining to dropped calls, including the number, date, time, and location of all dropped calls suffered by a wireless carrier at any geographic location and for any chronological period.

With just a few keystrokes, each carrier’s system can print out a precise record of all dropped calls for any period of time at any geographic location. Thus, it is highly unlikely that someone could enter false data into a carrier’s computer system to alter that information materially.

In a similar vein, actual drive test data does not typically lend itself to the type of manipulation that is almost uniformly found in “computer modeling,” the creation of hypothetical propagation maps, or “expert interpretations” of actual data, all of which are so easily manipulated that they are essentially rendered worthless as a form of probative evidence.

Actual raw drive test data consists of actual records of actual recorded strengths of a carrier’s wireless signal at precise geographic locations.

(iii) *Vertex Cannot Prove A Significant Gap In Coverage Because They Do Not Provide Cellular Service*

Initially, as already noted above, *Vertex* is a *site developer*, not a wireless carrier. As such, they cannot prove a significant gap in service, because they do not provide service in the first place.

As is a matter of public record, AT&T, Verizon and T-Mobile maintain internet websites. In conjunction with their ownership and operation of their websites, these carriers maintain a database containing geographic data points that cumulatively form a geographic inventory of their *actual current coverage* for their wireless services.

True copies of records obtained as screenshots from each of the carrier's websites<sup>12</sup> on May 16, 2023, are attached as **Exhibit "A."** This Exhibit depicts AT&T's, Verizon's and T-Mobile's actual wireless coverage in the Town of Kensington at or near 70 Moulton Ridge Road and reflects their own data showing no coverage gap in the Town.

The stark contrast between the maps the three carriers provide to their potential customers to sell them services and the uncorroborated propagation maps submitted with this application in order for *Vertex* to sell its proposed tower, illustrates the ease with which data can be manipulated to achieve a particular objective. Hard data is not susceptible to such manipulation.

*Vertex's* submissions are entirely void of any probative hard data establishing any significant gaps in coverage and as such, it is beyond argument that *Vertex* has completely failed to "demonstrate and prove" that its facility is necessary to remedy a significant gap in cellular service.

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<sup>12</sup> <http://www.verizon.com>; <http://www.att.com/wireless>; <http://www.t-mobile.com>

(iv) *ExteNet Systems, Inc. v. Village of Flower Hill  
And Flower Hill Board of Trustees*

On July 29, 2022, the Federal District Court for the Eastern District issued a decision that reiterates the holding in *Willoth*. While noting that “improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, ... they are not protected by the [TCA].” *ExteNet Systems, Inc. v. Village of Flower Hill*, No. 19-CV-5588-FB-VMS (E.D.N.Y. July 29, 2022). In the *ExteNet v. Flower Hill* case, the Board found significant adverse aesthetic and property values impact and, most importantly, no gap in wireless coverage and, therefore, no need to justify the significant adverse impacts. The Court found that the cellular service provider must demonstrate that there was a gap in cell service, and that building the proposed facility was more feasible than other options. *Id.* Further, the Judge held that “as with the effective prohibition issue, the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial...And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons.” *Id.*

The applicant bears the burden of proof and must show that there is a significant gap in service – not just a lack of 5G service. A cell phone is able to “downshift” – that is, from 5G to 4G or from 4G to 3G, etc. – if necessary, to maintain a call throughout coverage areas. Unless there is an actual gap, the call will continue uninterrupted. Therefore, there’s only a significant gap when there is no service at all, at *any* frequency.

Similarly, in this instance, where *Vertex* has failed to produce any evidence of a true significant gap in wireless service, there is substantial evidence and sufficient cause for the Board to deny this application. *Vertex* has failed to meet its burden and thus its application should be denied.

## POINT IV

### To Comply With the TCA, and the Town's Zoning Ordinance, *Vertex's* Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

The Telecommunications Act of 1996 requires that any decision denying an application to install a wireless facility: (a) be made in writing and (b) be made based upon substantial evidence, which is discussed in the written decision.

*See* 47 U.S.C.A. §332(c)(7)(B)(iii).

#### A. The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. *See, e.g., Nat'l Tower, LLC v. Plainville Zoning Board of Appeals*, (1<sup>st</sup> Cir. 2002); *Metro PCS v. City and County of San Francisco*, 400 F.3d 715 (9<sup>th</sup> Cir. 2005).

§ 5.1.8 B(2) of the Town Zoning Ordinance also requires that all decisions made by the Board shall be in writing, and following the federal example, the regulation requires that “a Denial shall be in writing and based upon substantial evidence contained in the written record.”

#### B. The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. “Substantial evidence” means “less than a preponderance, but more than a scintilla.”

Review under this standard is essentially deferential, such that Courts may neither engage in their own fact-finding nor supplant a local zoning board's reasonable determinations. *See, e.g., Varsity Wireless, LLC v. Town of Boxford*, 2018 WL 3970677 (D. Mass. 2018) (“the substantial evidence test is highly deferential to the local board” (*citations omitted*)); *Industrial Tower and Wireless, LLC v. Haddad*, 109 F.Supp.3d 284 (D. Mass 2015); *T-Mobile Northeast LLC v. City of Lowell*, 2012 WL 6681890 (D. Mass. 2012).

To ensure that the Town's decision cannot be challenged under the Telecommunications Act of 1996, it is respectfully requested that the Town deny *Vertex's* application in a separate written decision, wherein the Town cites the evidence upon which it based its final determination.

C. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers seek to intimidate local zoning officials with either open or veiled threats of litigation. These threats of litigation under the TCA are, for the most part, entirely hollow.

This is because, even if they file a federal action against the Town and win, the TCA does not allow them to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as civil rights claims under 42 U.S.C. §1983.<sup>13</sup>

This means that if they sue the Town and win, the Town does not pay them anything in damages or attorneys' fees under the TCA.

Typically, the only expense incurred by the local government is its own attorneys' fees. Since federal law mandates that TCA cases proceed on an “expedited” basis, such cases are

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<sup>13</sup> *See City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453 (2005), *Network Towers LLC v. Town of Hagerstown*, 2002 WL 1364156 (2002), *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803 (9<sup>th</sup> Cir 2007), *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3<sup>rd</sup> Cir 2002).

typically much shorter in duration. As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are usually quite small, especially compared to virtually any other type of federal litigation.

### **Conclusion**

In summary, a responsible service provider or site developer must document a gap in service through hard data, *i.e.*, drive test data or actual dropped call data. Next, based on topography, geography and other factors a determination should be made regarding the level of dBm, or signal strength, necessary to provide service coverage over a particular area. Knowing the appropriate signal strength, a carrier could demonstrate the degree of service coverage achieved by placing a tower at various locations, ultimately coming up with the best location for the best service coverage.

The foregoing is the strategy that a responsible service provider or site developer would employ, and would provide evidence of the methods employed and the result achieved. It is *not* what was done in this instance.

Most importantly, *Vertex* has not proven a significant gap in coverage. They have not proven that the proposed location is the only feasible site, and they have not presented any hard data in support of their application.

In view of the foregoing, it is respectfully submitted that *Vertex's* application for site approval and a Conditional Use Permit be denied in its entirety.

Dated: Kensington, New Hampshire  
May 16, 2023

Respectfully Submitted,

Concerned Citizens of Kensington

COUNTY OF KENSINGTON  
STATE OF NEW HAMPSHIRE

-----X  
In the Matter of the Application of:

**Vertex Towers, LLC**

For Site Plan Approval, and Conditional Use Permit

Premises: 70 Moulton Ridge Road  
Kensington, New Hampshire

Tax Assessors: Map 10 Lot 1  
-----X

**EXHIBITS IN OPPOSITION**

Respectfully submitted,

Concerned Citizens of Kensington

## **Exhibit List**

- A Website Wireless Coverage Maps – AT&T, Verizon and T-Mobile Coverage Maps



# Wireless coverage map



70 Moulton  
 Ridge Rd NH  
 03833  
 5G, 4G LTE  
 Coverage



5G+ Locations

5G+

5G

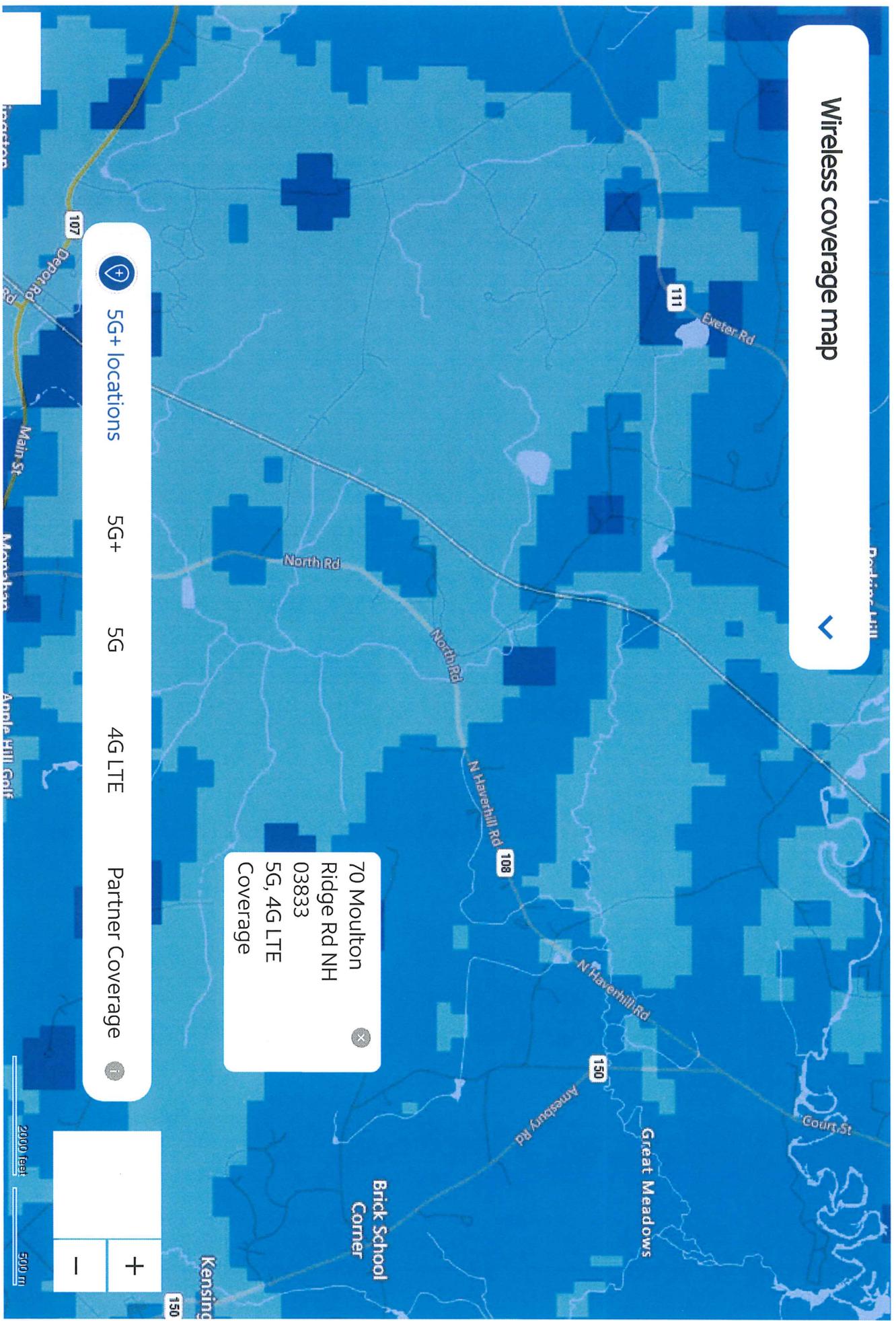
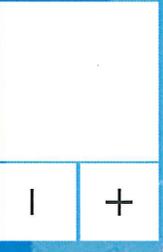
4G LTE

Partner Coverage



2000 feet

500 m





Shop Why Verizon Support

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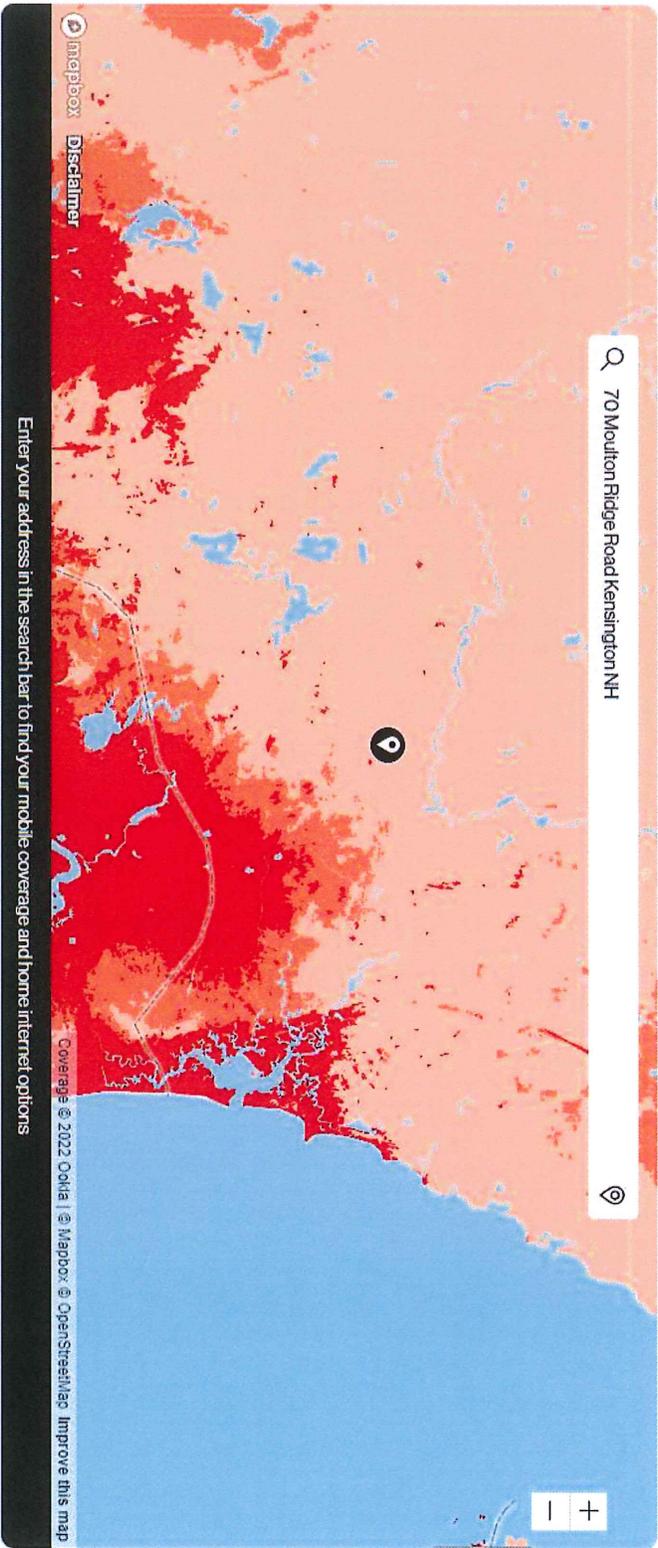
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70 Moulton Ridge Road Kensington NH



Verizon has voluntarily limited our 5G C-band deployment around select airports. Actual coverage at airports may vary.

This map shows approximate outdoor coverage and is not a guarantee of service. Actual coverage may vary and is subject to change. To learn more, see our disclaimer above. 4G phone users can access 4G LTE in areas where 5G Nationwide and 5G Ultra Wideband is shown.

Feedback

