

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

NEW CINGULAR WIRELESS PCS, LLC	:	DOCKET NO. 510
D/B/A AT&T AND TARPON TOWERS II,	:	
LLC APPLICATION FOR A CERTIFICATE	:	
OF ENVIRONMENTAL COMPATIBILITY	:	
AND PUBLIC NEED FOR THE	:	
CONSTRUCTION, MAINTENANCE, AND	:	
OPERATION OF A	:	
TELECOMMUNICATIONS FACILITY	:	
LOCATED AT 92 GREENS FARMS ROAD,	:	
WESTPORT, CONNECTICUT	:	OCTOBER 24, 2022

POST HEARING BRIEF OF INTERVENOR TOWN OF WESTPORT

The Intervenor, Town of Westport (the “Town”), hereby submits its post-hearing brief and respectfully requests that the Connecticut Siting Council (the “Council”) exercise its discretion to deny the present application (the “Application”) without prejudice and require the Applicants to more adequately review available alternatives that could minimize damage to local scenic, historic, and recreational values while still providing adequate and reliable wireless telecommunications service to the area.

I. INTRODUCTION

Although the Town recognizes the benefits of wireless coverage and capacity in Westport, the Applicants have not proven that wireless service in the area is so deficient that it outweighs the adverse environmental effects that would result from a cell tower at the proposed residential location. The Applicants secured the site nearly ten years ago, but never moved forward with a cell tower – the hypothetical “need” for a tower at that location, if any, apparently did not justify the actual costs to construct one. Even today, the submissions by the Applicants fail to demonstrate a present need that is so great that it would require this Council to overlook the fact that the proposed location is an occupied residential property in an old, densely populated neigh-

borhood that serves as a popular gateway into Town. The visual impact of a 124-foot high cell tower, to both residents and visitors alike, cannot be understated, and that is why careful consideration must be given to each and every possible alternative site location.

It is true that after the initial consultation with the Town last year, the Applicants attempted to pursue several locations that the Town believed could be preferable alternatives to the proposed site. However, at this time, one remaining possible alternative – a 15-acre railroad right of way owned by the Connecticut Department of Transportation (“CDOT”) located on Hales Road (the “CDOT Property”) a few hundred feet away from the proposed site – has not yet been fully evaluated by CDOT. Although the Applicants did initiate the review process in the late summer, completion of the process is now critical because a cell tower at the CDOT Property would provide equivalent wireless service compared to the proposed site, but possibly with less impact to scenic views and private property values. The law provides that in order to approve the Application, the Council must first determine that there are no feasible alternative sites; and in order to determine whether the CDOT Property is feasible, more time is needed for CDOT to conduct its internal review. For this reason, the Council should deny the Application and allow the Applicants to reapply after a final determination has been rendered by CDOT as to the feasibility of the alternative Hales Road location.

II. FACTS

Over ten years ago, the predecessor to the Tarpon Towers II, LLC (“Tarpon”) began searching for a possible cell tower site in the Greens Farms area of Westport, a popular gateway into the Town for many travelers and commuters. (Coppins Testimony, 9/22/22 Transcript p. 18). By 2013, Tarpon’s predecessor had secured an option to lease space at 92 Greens Farms Road, an occupied single-family home in a dense residential neighborhood. Yet the sole inter-

ested provider at that time, New Cingular Wireless PCS d/b/a AT&T (“AT&T”), abandoned support for the site after significant opposition by the Town, and nothing occurred there for nearly a decade. (Coppins Testimony, 9/22/22 Transcript p. 20). It was not until last year that Tarpon and AT&T (together, the “Applicants”) once again approached Town leadership with renewed interest in the 92 Greens Farms Road location.

Right at the outset, Town leadership again reiterated that the site was inconsistent with local land use planning and was not appropriate for a cell tower due to the proximity and resulting visual impact to both residents and nonresidents. (Tooker Pre-filed Testimony p. 1). Early in the consultation process, the Town engaged David Maxson, WCP, as its wireless consultant, to review the proposal, assess the service need claimed by the Applicants and identify possible alternative sites. During the consultations between the Applicants and the Town, the Town proposed several alternative sites, most notably 55 Greens Farms Road, a large commercial park over 20 acres in size, and later focusing on the CDOT Property. (Tooker Pre-filed Testimony p. 1-2). All along, the Applicants willingly delayed the filing of this Application and pursued these alternative sites in an effort to identify a location that was most compatible with the concerns of the Town and residents in the area.

Eventually, the list of alternative locations narrowed to the CDOT location. The prospect of the 55 Greens Farms Road alternative initially seemed promising after the parties visited the site several times and engaged in discussions with the owner. But by January of 2022, the property owner relinquished interest and denied further attempts to secure the site for a cell tower. (Tooker Pre-filed Testimony p. 2). At that point, the CDOT Property became the last remaining alternative location.

The Hales Road CDOT site is depicted by the highlighted area in the following map (Attachment 1 to D. Maxon Pre-filed Testimony, edited to also identify the proposed site):



The CDOT Property does not have a specific street address on Hales Road, but the Town identifies the Property as Assessor Map/Lot: D06/023, Parcel ID: 10275. (Town Location Preferences). In the Applicants' Site Search Summary Map, the Property is shown as Site No. 9, with another CDOT-owned property to the west, shown as Site No. 8.¹ Due to its quarter-mile proximity to the proposed site and pre-existing roadway access, the CDOT Property shown as Site No. 9 would appear to be a more useful alternative compared to Site No. 8.

From a wireless service standpoint, the CDOT Property is highly comparable to the proposed site. Mr. Maxon verified that "a tower of similar height at the DOT site will provide substantially the same coverage as the proposed tower." (Maxson Pre-Filed Testimony, pp. 3, 8-9).

¹ It appears that the Applicants have inadvertently mixed up the two adjacent CDOT-owned properties within the body of the Site Search Summary itself – the description of Site 8 applies to Site No. 9 shown on the Summary Map, and the description of Site 9 applies to Site No. 8 shown on the Summary Map.

AT&T also confirmed that “a tower facility at 120 AGL in height would be acceptable” at the CDOT Property. (Applicants’ Responses to Town Interrogatories, p. 2). Similarly, the CDOT Property is centrally located within the site search ring of Cellco Partnership d/b/a Verizon Wireless (“Cellco”), the only other wireless provider who has agreed to utilize the tower proposed in this Application. (Cellco Response to Council Interrogatories pp. 3-4, Attachment 2).

On February 8, 2022, the Town hosted a remote Public Information Meeting for the Applicants to present details of the proposed cell tower to the public. Because at that point the owner of 55 Greens Farms Road had withdrawn interest, the sole location presented by the Applicants was the proposed site at 92 Greens Farms Road. Many residents attended the meeting and spoke in opposition to the cell tower for reasons largely related to environmental and aesthetic impact.

Aware of the mounting public opposition to the sole proposed site, First Selectwoman Jennifer Tooker personally visited the CDOT site and instructed the Town Attorney, Ira Bloom, to engage with CDOT and facilitate the determination of whether the CDOT Property was a feasible alternative. (Tooker Pre-filed Testimony p. 1-2). The Town Attorney pursued those discussions and requested preliminary review of the site by CDOT in Spring 2022. (Tooker Pre-filed Testimony p. 2). On May 5, 2022, the Town Attorney met with the CDOT Supervisory Rail Officer to discuss the status of CDOT’s preliminary assessment. At that time, CDOT advised that it was not interested in pursuing a cell tower due to staffing limitations and a lack of priority at CDOT. (Tooker Pre-filed Testimony p. 2). Nonetheless, by letter on May 12, 2022, Ms. Tooker reiterated the Town’s concerns and again urged CDOT to consider the Property for use as a cell tower host site. (Tooker Pre-filed Testimony p. 2).

On May 26, 2022, the Applicants filed the present Application with the Counsel over the requests of the Town to wait until the CDOT had rendered a definitive decision on the Property.

As a result of the ongoing inquiries from the Town, on July 8, 2022, Ms. Tooker and the Town Attorney met with senior CDOT officials, including Eric S. Bergeron, Assistant Rail Administrator. (Tooker Pre-filed Testimony p. 2). Although CDOT identified several challenges associated with obtaining approval for a cell tower at the CDOT Property, CDOT advised that it did have an official process for licensing cell towers and that the Department would act upon the Applicants initiating that process and providing detailed plans for review. (Tooker Pre-filed Testimony p. 2; Coppins Supplemental Pre-filed Testimony; Maxson Pre-filed Testimony, pp. 2-3).

On August 24, 2022, the Applicants prepared and submitted the requisite materials to CDOT seeking further consideration of the CDOT Property. (Coppins Supplemental Pre-filed Testimony p. 4, Ex. B). At the time of the hearing on September 22, 2022, the Applicants had not yet received a final decision from CDOT. (Coppins Testimony, 9/22/22 Transcript, p. 28). At that same hearing, Ms. Tooker highlighted the Town's opposition to the Application on the basis that every alternative location should be fully analyzed, including the CDOT Property. (Tooker Testimony, 9/22/22 Transcript pp. 80-81).²

² While it is anticipated that the Applicants will point out that, during the hearing, Ms. Tooker did not identify a specific preference for the CDOT Property over the proposed site, this statement simply refers to the Town's desire that any potential alternative cell tower location should be fully analyzed for feasibility before an approval may be rendered on a proposed site.

III. STANDARD OF SITING COUNCIL REVIEW

When considering an application for a certificate of “environmental compatibility and public need” for the construction of a cell tower, the Council’s primary statutory duty is to balance the need for the proposed tower with the resulting environmental impact:

The Council is charged with: (1) balancing the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and *to minimize damage to scenic, historic, and recreational values*.... Regs. Conn. State Agencies § 16-50j-1(a).

More specifically, C.G.S. § 16-50p(a)(3) expressly precludes the Council from granting a certificate unless the Council first determines:

- (a) that there is a public need for the facility and explains the basis of the need;
- (b) what the *probable environmental impact* of the facility will be, *including*, but not limited to... (ii) ecological balance, (iii) public health and safety, (iv) *scenic, historic and recreational values*...; and
- (c) that the adverse environmental effects are not sufficient reason to deny the application, and why.

In addition, before granting an applicant's certificate, the Council “shall examine” the following under C.G.S. § 16-50p(b)(1)(C):

[W]hether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Energy and Environmental Protection and any affected municipalities, finds to be a relatively undisturbed *area that possesses scenic quality of local, regional or state-wide significance*....

Finally, grounds for denial of a certificate include a determination that “the proposed facility would *substantially affect the scenic quality of its location or surrounding neighbor-*

hood and no public safety concerns require that the proposed facility be constructed in such a location....” C.G.S. § 16-50p(b)(1).

Similarly, C.G.S. § 22a-19(b) provides that the Council must consider the negative environmental effects at a proposed cell tower location to determine whether said effects are “unreasonable” – if so, and a viable alternative location exists, the Council cannot approve the proposed location:

In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

Therefore, considering the Public Utility Environmental Standards Act³ and the Connecticut Environmental Protection Act of 1971⁴ together, an integral element of the Council’s certificate review process includes careful analysis of whether any feasible alternative locations exist.

IV. ARGUMENT

The Council should deny the Application without prejudice to allow for complete assessment of all potentially viable alternative cell tower locations – here, the CDOT Property.

Connecticut courts have held that a proposed cell tower’s visual impact on local scenic vistas is an environmental concern “within the Siting Council’s jurisdiction and mandate to consider pursuant to General Statutes § 16-50p.” *Planned Dev. All. of Nw. Connecticut v. Connecticut Siting Council*, No. HHBCV216063734S, 2021 WL 5277470, at *2. Further, the General Assembly clearly intended that the Council give weight to scenic impacts during certificate proceedings under § 16-50p, and even went so far as to permit the denial of such a certificate if “the

³ C.G.S. §§ 16-50g, et seq.

⁴ C.G.S. §§ 22a-19, et seq.

proposed facility would substantially affect the scenic quality of its location or surrounding neighborhood and no public safety concerns require that the proposed facility be constructed in such a location.”

The 124-foot cell tower proposed at 92 Greens Farms Road is proposed in a densely populated residential area of the Town with substantial seasonal visibility, amounting to a significant detrimental impact upon the scenic resources of nearby residents. According to the Visual Assessment by the Applicants, approximately 439 surrounding acres will have year-round visibility of the tower, and a total of 538 acres will have seasonal visibility. (Applicant Ex. H, p. 7).

Photo 3 from the Visual Assessment depicts a rendering of the very apparent tower at the proposed 92 Greens Farms Road location:



PROPOSED				
PHOTO	LOCATION	ORIENTATION	DISTANCE TO SITE	VISIBILITY
3	GREENS FARMS ROAD	SOUTHWEST	+/- 375 FEET	YEAR ROUND

Such a drastic visual effect certainly has the potential to affect neighboring property values. And while the Council is not obligated to take property values into account directly, “the council must make use of property values in connection with its analysis of the environmental, scenic, historical and recreational values.” *Town of Westport v. Connecticut Siting Council*, 47 Conn.Supp. 382, 407 (Super Ct. 2001), *aff’d* on other grounds, 260 Conn. 266 (2002). The concern of residents that the proposed cell tower would impair or destroy scenic views from their homes and affect their property values (Intervenor Bergmann Brief, pp. 3-4) is precisely the reason that the legislature intended to give aesthetic concerns legitimate and fair consideration under the Public Utility Environmental Standards Act.

The law charges the Council, when considering the Application, with balancing the claimed need for the cell tower against the anticipated impact on the environment, including the impact on scenic vistas that have historically characterized local neighborhoods. Here, however, the Applicants and Cellco have not demonstrated that wireless service in the area is so deficient that the need clearly outweighs the negative impact on the neighborhood.

All that the Applicants and Cellco have submitted as support for the claimed need are existing coverage maps – yet when specifically asked by the Council as to any statistics that would indicate substandard service in the area, AT&T provided none. (Lavin Testimony 9/22/22, Transcript p. 30; Applicants’ Responses to Council Interrogatories, A33). Similarly, when asked the same question, Cello admitted that it was currently fractions of a percentage point away from its performance goals for dropped calls and incomplete call attempts (Godasu Testimony 9/22/22, Transcript pp. 69-70; Cellco Responses to Council Interrogatories, A13).

The lack of clear metrics in the Record demonstrating the extent of the claimed “need” was further highlighted by Mr. Maxon in his ultimate conclusions – neither AT&T nor Verizon

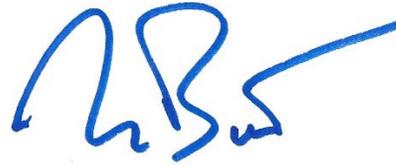
submitted anything that clearly identified a need so urgent that it would necessitate an approval in this proceeding, particularly when there is still an open question about the feasibility of an alternative location. (Maxson Prefiled Testimony pp. 3-6). The fact that the Applicants have not taken any action to construct a tower at the site, despite having legal authority to do so since 2013 (Applicants' Responses to Town Interrogatories, A1, p. 1), further questions the validity of the need claimed in the Application.

Implicit in the Council's duty to balance need with environmental impact is an obligation to fully consider whether that same need could be comparably served in a different location with less of a environmental impact – this is simply common sense. Here, the Town believes that the CDOT Property constitutes a potentially viable alternative location which, if a cell tower was constructed there, would have the same effect on wireless service in the area as the proposed site, but possibly with less impact to the environment and local neighborhood.

Failure to fully examine the CDOT Property as an alternative location is therefore incompatible with the legislative and regulatory scheme for consideration of proposed cell towers. As a result, the impairment and destruction of scenic vistas that will occur with the proposed cell tower is unreasonable under C.G.S. § 22a-19. *See City of Waterbury v. Town of Washington*, 260 Conn. 506, 557 (2002). Further under § 22a-19, where a feasible and prudent alternative exists, “no conduct shall be authorized or approved which does, or is reasonably likely to, have such [unreasonable impairment or destruction].”

Here, a feasible and prudent alternative location may exist at the CDOT Property, and therefore the Council should allow for a complete and careful assessment of the CDOT Property for purposes of siting a cell tower. For these reasons, the Town requests that the Council deny the Application without prejudice and require that the Applicants to finalize the review process with CDOT before reapplying to the Council.

THE INTERVENING PLAINTIFF
TOWN OF WESTPORT

A handwritten signature in blue ink, appearing to be 'NB' followed by a flourish.

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CERTIFICATION

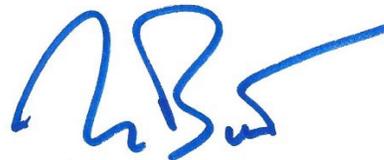
This is to certify that a copy of the foregoing was delivered electronically on the above date to all counsel and self-represented parties of record:

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