STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IN RE:	:	
APPLICATION OF HOMELAND TOWERS, LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS FACILITY AT 1837 PONUS RIDGE ROAD, NEW CANAAN, CONNECTICUT	:	DOCKET NO. 509
	:	OCTOBER 26, 2022

PROPOSED FACTUAL FINDINGS - APPENDIX TO
POST HEARING BRIEF OF PARTIES MARK BUSCHMANN, TRUSTEE AND JAMIE BUSCHMANN, TRUSTEE, AND MARK BUSCHMANN, INTERVENOR

Project Site

1. The applicants intend to proceed with the proposed cell tower as shown on the site plans included in the “Applicants' Supplemental Submission, 08/31/22.” (Transcript, 9/8/22, Burns Cross, pp. 21, 35)

2. The proposed cell tower would be built on a 5.16-acre parcel of land at 1837 Ponus Ridge Road in New Canaan that is situated to the east of and adjacent to the Laurel Reservoir. (Application, Attachment 3, p. 2/8; Applicants' Supplemental Submission, 08/31/22, Sheet EX-1)

3. The site plans were drawn using the survey as the base map. (Transcript, 7/14/2022, Burns Cross, pp. 80-81)

4. The bearings and distances of the proposed cell tower site on the “Site Survey” do not match the bearings and distances in the deed of acquisition or on the survey of record. Three ambiguities exist: the location of the northeasterly street line of Ponus Ridge Road, the location of the northerly street line of Dan's Highway, and the common lot line between Lot 56 and Lot 57. (Applicants' Supplemental Submission, 08/31/22, Sheet EX-1; Hesketh Prefiled Testimony, 06/15/22)

5. At the prehearing conference held on June 8, 2022, the parties and intervenors were informed that all individuals responsible for preparation of the application would be

available at the public hearing for cross examination.

6. The applicants did not make Earle E. Newman, who prepared the applicants' survey, of the proposed cell tower site, available for cross examination.[1]

7. The proposed cell tower site is located in the "4 Acre Residence Zone" on the *New Canaan Zoning Map*. (Bulk Filing Technical Report, p. 354/609)

8. The proposed cell tower site would be developed on a lot with an existing residence that is accessed by a driveway extending east from Ponus Ridge Road. (Applicants' Supplemental Submission, 08/31/22, Sheet EX-1)

9. A residential home has already been constructed on the proposed tower site, and § 3.5.B.1 of the *New Canaan Zoning Regulations* would prohibit further residential development at the site. (Bulk Filing Technical Report, p. 175/609)

10. Laurel Reservoir is located downgradient 70 feet from the proposed cell tower site. (DPH Comments, 06/01/22; Applicants' Supplemental Submission, 08/31/22, Sheet N1)

11. The proposed cell tower site is densely forested, and slopes down to an inland wetlands and stream corridor running along its northerly boundary which connect directly to Laurel Reservoir. (Applicants' Supplemental Submission, 08/31/22, Sheet EX-1; Application, Attachment 6, pp. 8-9/22))

12. The applicants' Wetlands Inspection Report indicates that "field identified soils are consistent with N[atural] R[esource] C[onservation] S[ervice] mapped soils." (Application, Attachment 6, p. 9/22).

13. The applicants' wetlands scientist testified that "the onsite soils are consistent with NRCS mapped soils." (Transcript, 8/16/2022, Gustafson Cross, pp. 10-11)

14. The vast majority of onsite soils are characterized as "Charlton and Chatfield, extremely rocky." (JMB Admin Notice Item 35; see also Transcript, 8/16/2022, Gustafson Cross, p. 11)

15. "Charlton and Chatfield" soils are included among the "Highly Erodible Soil Map Units for Fairfield County" by the Natural Resource Conservation Service. (JMB Admin Notice Item 34)

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[1] The "*Connecticut Siting Council Information Guide to Party and Intervenor Status*" requires that all individuals responsible for the preparation of application materials be made available for cross examination at the public hearing on the application. ("For example, if a party or intervenor presents a land survey in their pre-filed testimony, the author or engineer that prepared the land survey must be present at the hearing, sworn in and available to answer questions pertaining to the land survey that are asked by the Council and the other participants in the proceeding.") (*Connecticut Siting Council Information Guide to Party and Intervenor Statu*s, p.2)

16. When conducting their archaeological survey assessment of the site, the applicants' consultants planned to perform 12 shovel tests to a depth of 19.3 inches, but 9 of the 12 planned shovel tests could not be completed because the consultants encountered large immovable rocks.. (Applicants' Responses to Council's Interrogatories, Set One, dated June 2, 2022, A25 and Attachment 4)

17. Exposed ledge outcroppings and rock are visible at the proposed cell tower site (Transcript, 6/28/22, Vergati Cross, p. 42, Burns Cross, p. 44; Transcript, 7/14/22, Burns Cross, pp. 98-99; Transcript, 8/16/22, Burns Cross, pp. 73-74)

18. The 2014 Plan of Conservation and Development of the Town of New Canaan shows the proposed cell tower site located within an area designated as "Slopes greater than 25 %" on the Natural Resources Map (Bulk Filing Technical Report, p. 92/609)

Visibility

19. The *2014 Plan of Conservation and Development of the Town of New Canaan* shows the proposed cell tower site within a scenic area on the "Scenic Resources" Map and within the "New Canaan/Stamford Greenway" on the Open Space Map. (Bulk Filing Technical Report, pp. 24/609, 26/609)

20. The Centennial Watershed State Forest includes the lands of the Aquarion Water Company and of the Connecticut Department of Energy and Environmental Protection adjacent to Laurel Reservoir. (JMB Administrative Notice Items 26, 38)

21. The proposed cell tower will be visible year-round from Laurel Reservoir and from essentially all of the shore of Laurel Reservoir. (Applicants' Responses to Council Interrogatories, Set One, 06/02/22, A29 and Attachment 5; Transcript, 7/14/2022, Gaudet Cross, p. 126)

22. The proposed cell tower would be visible year-round from that portion of Centennial Watershed State Forest which includes Laurel Reservoir and essentially all of the shore of Laurel Reservoir. (JMB Administrative Notice Items 26, 38)

23. The *Natural Resources Management Agreement* establishing the Centennial Watershed State Forest, § 5.4, provides that "[p]ublic use and recreation opportunities [of Centennial Watershed State Forest lands] will be encouraged" under appropriate circumstances. (JMB Administrative Notice Item 25)

24. Areas of the Centennial Watershed State Forest are currently open to public use, such as the Means Brook Watershed Block (666 Acres in Shelton and Monroe) (JMB Administrative Notice Item 11)

25. The application fails to conform to the following requirements of the *New Canaan Zoning Regulations*, § 7.8, "Telecommunications Facilities," which expressly encourage utilization of "the least obtrusive means of having [telecommunications] services available" in New Canaan:

a. The facility violates § 7.8.G.3, which provides “Avoid locating wireless communication facilities in locations which will have adverse visual impacts upon. . . Scenic resources designated in the Plan of Conservation and Development or elsewhere; [or] Areas shown on the: Connecticut DEEP Natural Diversity Database, and/or Federal Listed Species and Natural Communities Maps.”

b. The proposed “[n]ew ‘monopine’ with externally-mounted antennae, with fewer than three “branches” per vertical foot (or equivalent), or extending more than 10 feet above tree height.” Is “not preferred” and ranks 12 out of 16 on the list of “Order and hierarchy of preferences for wireless communication facilities” in § 7.8.G.5.

c. The equipment shelter associated with the proposed facility violates § 7.8.G.13, which provides “the presence of wireless communication equipment shall be concealed within buildings that resemble sheds and other building types found in New Canaan.”

(Bulk Filing Technical Report, pp. 302-313/609)

26. In a letter dated April 22, 2022 to the Siting Council, the New Canaan Planning and Zoning Commission recommends that the applicants “[c]onsider utilizing a wood fence around the installation,” and [c]ontemplate using a structure to enclose the equipment [which] should resemble a residential accessory structure, for example a barn.” (New Canaan Planning and Zoning Commission Comments, 04/22/22)

27. If the application is approved, the applicants would not follow the New Canaan Planning and Zoning Commission’s recommendations with respect to screening the proposed site with a wood fence and enclosing the equipment in a barn-like structure. (Transcript, 08/16/22, Vergati Cross, pp. 43-4).

28. Although the applicants describe the “Proposed Facility . . . as a monopine tower in a location with interspersed stands of conifers,” according to the applicants’ own Tree Survey Table, there are only three conifers (all hemlocks) on site, and all three would be removed in the construction of the cell tower. (Applicants’ Supplemental Submission in Response to CSC 6/28/22 Hearing Requests July 7, 2022, A7; Applicants' Supplemental Submission, 08/31/22, Sheets EX-1, EX-2, SP-2)

Environmental Considerations

Connecticut Conservation and Development Policies Plan

29. Connecticut's statewide *Conservation and Development Policies Plan (2018-2023)* identifies the proposed cell tower site as located within a Conservation Area. The definitional criteria for this designation state that it is Connecticut's policy for such Conservation Areas to "plan and manage, for the long-term public benefit, the lands contributing to the State's need for food, fiber, water and other resources, open space, recreation and environmental quality and ensure that changes in use are compatible with identified conservation values." According to the Office of Policy and

Management, "Conservation Areas are delineated based on the presence of factors that reflect environmental or natural resource values. In contrast to Priority Funding Areas, which are based on man-made Census Blocks, Conservation Areas are based on existing environmental conditions, such as soils or elevation, which oftentimes have no visible boundaries. Any growth-related project being considered by a state agency in Conservation Areas would require an exception in accordance with CGS Section 16a-35d, including a review of consistency with the affected municipality's plan of conservation and development." (JMB Administrative Notice Item 4, pp. 26-27)

Stormwater

30. According to the *Connecticut Guidelines for Soil Erosion and Sediment Control, DEP Bulletin 34*, the erosion potential for any area is principally determined by four interrelated factors.

    a. Soil characteristics which influence erosion are those which affect the infiltration capacity of soil and those which affect the resistance of soil to detachment and transport by falling or flowing water. The characteristics most important in determining soil erodibility are soil texture, structure, permeability, and percent of organic matter.

    b. Vegetative cover controls erosion by shielding the soil surface from the impact of falling rain, holding soil particles in place, maintaining the soil's capacity to absorb water, slowing the velocity of runoff, and removing subsurface water between rainfalls via evapotranspiration.

    c. Topography includes the size, shape, amount of impervious surface, and slope of a watershed, which influence the amount and rate of runoff. As both slope length and gradient increase, the rate of runoff increases and the potential for erosion is magnified.

    d. Climate includes factors such as the frequency, intensity, and duration of rainfall; these determine the amount of runoff produced in a given area.

    (CSC Administrative Notice Item 36, Figure 2-4, p. 2-4)

31. The applicants' engineers have not examined the culvert which originates at the northwest corner of the proposed cell tower site and crosses Ponus Ridge Road and have no knowledge of its condition or where drainage entering the culvert outfalls. (Transcript, 9/8/22, Burns Cross, pp. 39-40, 52)

32. New Canaan Town Code § 54-11, "Water draining on highways prohibited," prohibits "any owner or occupant of land adjoining any highway in the Town [from draining] any water from such land onto such highway or into the gutter thereof." (JMB Administrative Notice Item 33)

33. Based on field observations by David S. Ziaks, P.E., who reviewed the site plans for

the proposed cell tower facility, Ponus Ridge Road "relies primarily on sheet runoff to both edges of the roadway. On the southerly side of the roadway, that sheet runoff is currently directed to the reservoir." (Ziaks Prefiled Testimony, 06/13/22, p. 1)

34. Stormwater from the proposed cell tower site currently sheet flows across Ponus Ridge Road and will continue to do so if the proposed cell tower facility is built as shown on the site plans. (Transcript, 9/8/22, Burns Cross, pp. 37-38; Applicants' Supplemental Submission, 08/31/22)

35. Stormwater from the proposed site, after construction is complete, will flow from the stilling basins on the westerly side of the access road down the hill to Ponus Ridge Road. (Transcript, 7/14/2022, Burns Cross, p. 90)

36. The "Drainage Certification Policy of the Town of New Canaan Prior to Approval of Permit (PreDevelopment)" requires the submission of "[c]omplete drainage information and/or calculations for pre-activity (pre-development) and post-activity (post-development) stormwater runoff from a site," and that "[p]eak flow rates and runoff volumes shall be determined using the Rational Method, the Time of Concentration Method, the Tabular Method or the Unit Hydrograph Method and a minimum 25-year 24-hour design storm." (JMB Administrative Notice Item 32)

37. The drainage system for the proposed cell tower site has been sized for a ten-year/24-hour storm based on undisclosed "comps." (Transcript, 7/14/2022, Burns Cross, pp. 22, 93; 9/8/22, Burns Cross, pp. 38-39)

38. The applicants' engineers represent that the drainage design for the proposed cell tower facility will achieve zero increase in volume of storm water runoff from the property in addition to matching peak flows from the property. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2; Transcript, 8/16/2022, Burns Cross, p. 18)

39. The only way to achieve zero increase in stormwater volume off the property is to have a successful infiltration program incorporated into the drainage design. (Transcript, 9/8/22, Ziaks Cross, p. 128)

40. According to the Drinking Water Section of the Department of Public Health, "[t]he proposed access road will increase the amount of impermeability on the parcel and will increase the risk of runoff. Measures should be taken to increase infiltration near the road, such as a rain garden." (DPH Comments, 06/01/22)

41. As presently designed, the site plans make no provision for the infiltration of stormwater. (Transcript, 7/14/2022, Burns Cross, p. 92)

42. The swales proposed by the applicants along the easterly side of the access road "are designed as riprap swales, so they're rock with a smaller stone check dam so they're not grass swales." Similarly, the stilling basins proposed by the applicants along the westerly side of the access road are rock, because the applicants are unsure if the onsite soils are suitable for infiltration. (Applicants' Supplemental

Submission, 08/31/22, Sheet SP-2; Transcript 6/28/22, Burns Cross, pp. 47, 49-50, 55)

43. The proposed cell tower site is covered in Charlton and Chatfield soils, exposed ledge, shallow bedrock conditions, and during construction the applicants would be excavating down through the minimal overburden that exists on the site down into probably rock formations. Under such conditions, infiltration cannot be accomplished. (Transcript, 9/8/22, Ziaks Cross, pp. 128, 130-131)

44. The application makes no mention of the increasing risks brought on by climate change, which results in more frequent intense rainstorms which will overwhelm the stormwater management train on this site, elevating the possibility of catastrophic failures. (Klemens Prefiled Testimony, 6/16/22, p. 8)

45. Despite assurances by the applicants' consultants that a proposed project will cause no environmental harm, unanticipated problems may arise during the construction of a project which can cause significant adverse impacts to wetlands and watercourses. (Transcript, 7/14/22, Gustafson Cross pp. 113-114)

46. The Siting Council has experienced catastrophic stormwater failures at some of its approved sites (e.g., Petition 1056 East Lyme, Petition 1178 Sprague). (JMB Administrative Notice Items 19, 20; Klemens Prefiled Testimony, 6/16/22, p. 8)

47. At the Sprague solar site, Connecticut Siting Council Petition No. 1178, for example, where the applicants' consultant All Point Technologies served as both the design consultants and the so-called "third-party monitors," there were significant discharges of stormwater-transported sediment onto adjacent properties, into several intermittent watercourses, into two farm ponds and into the Little River which occurred during only 1- to 2-inch storm events. Additionally, an oil sheen was observed in stormwater discharges and construction equipment was observed leaking oil. (JMB Administrative Notice Item 20 (Correspondence from Town of Sprague Wetlands Agent, 05/11/17))

48. Following construction of the proposed cell tower, the disturbed areas are to be revegetated with white clover, tall fescue and ryegrass. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2)

49. The applicants have proposed no other planting plan for the proposed cell tower facility. (Transcript, 6/28/22, Burns Cross, pp. 110-111; Transcript, 7/14/22, Burns Cross, p. 90; Transcript, 8/16/22, Gustafson Cross, pp. 16-17)

50. The proposed cell tower and access road cannot be designed without a geotechnical study, which would indicate the depth to bedrock and the location of soils shallow to bedrock on the site. (Transcript, 7/14/2022, Burns Cross, pp. 91, 104; Transcript, 8/16/2022, Gustafson Cross, p. 12; Transcript, 9/8/22, Ziaks Cross, pp. 91-92)

51. Without a geotechnical study, the site cannot be designed to ensure that the construction of the proposed cell tower will not negatively impact the inland wetlands

on the property or Laurel Reservoir. (Transcript, 7/14/2022, Burns Cross, pp. 103-105; Transcript, 9/8/22, Ziaks Cross, pp. 127-128)

52. The applicants did not submit a geotechnical study as part of their application materials. (Record)

53. The side slopes leading from the stilling basins on the west side of the access driveway to Ponus Ridge Road are 2:1, or 50 percent. (Transcript, 7/14/2022, Burns Cross, p. 88-89)

54. The access driveway at the proposed cell tower site would have a 250 ft. paved section with a 19.40 percent slope and a 210 ft gravel section with an 8.9 percent slope. (Applicants' Supplemental Submission, 08/31/22, Sheets SP-2, SP-3)

55. Construction of the access driveway would require a 50-ft. high cut and the resulting slopes on either side of the driveway would be 2:1, or 50 percent. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2; Transcript, 7/14/2022, Burns Cross, pp. 88-89)

56. "Homeland does not regularly plow access drives to their sites since these sites are visited so infrequently. Should a tenant on the tower need access to the tower, they will coordinate plowing/clearing." (Applicants' Responses to Buschmann Interrogatories, 06/21/22, A4)

57. The access road to the proposed cell tower compound will have to be treated with a de-icing compound in order to make it passable in winter. (Transcript, 9/8/22, Ziaks Cross, p. 131)

58. According to David S. Ziaks, P.E., who reviewed the site plans for the proposed cell tower, "[d]riveway slopes greater than 12-15% are considered excessive by general accepted design standards and are difficult and potentially dangerous to navigate." (Ziaks Prefiled Testimony, 06/13/22, p. 1)

59. The access driveway grades leading to the proposed cell tower compound are "right at the limit" with respect to the ability of vehicles to utilize the driveway. (Transcript, 9/8/22, Burns Cross, pp. 48-49)

60. According to David S. Ziaks, P.E., who reviewed the site plans for the proposed cell tower, "[r]unoff patterns will change, volume will increase and peak flow rates will intensify with the driveway and pad site construction." (Ziaks Prefiled Testimony, 06/13/22, p. 1)

61. According to Joseph T. Welsh, Manager, Natural Resources for Aquarion Water Company: "Undeveloped land offers the greatest level of protection to drinking water reservoir quality. While the applicant seems to acknowledge the sensitivity of this site with multiple stormwater management controls shown in the plans, the removal of vegetation and alterations to the site will degrade stormwater quality which will impact reservoir water quality." (JMB Administrative Notice Item 24).

62. The Council on Environmental Quality (CEQ) “is concerned about stormwater management on the proposed site and the potential impact of increased stormwater on wetland resources, water quality, and native vegetation and soils. The [CEQ] believes that the length and steepness of the proposed access drive, and all the proposed earthwork that might be required warrants additional scrutiny of the stormwater control measures during the application process as well as during the Development and Management (D&M) Plan, if approved. The [CEQ] notes that the review of critical environmental impact mitigation details during the administrative hearing process, by the public, parties and/or intervenors, benefits the Siting Council in assessing potential adverse impacts to the environment.” (CEQ Comments, 06/27/22)

63. In evaluating the risk of adverse environmental impact, it is necessary to consider the value and sensitivity of the receiving resource, and the more valuable and sensitive the resource, the greater the precautions that are warranted. (Transcript, 7/14/22, Gustafson Cross, p. 115)

Acid Rock Drainage

64. The site work required for the proposed cell tower entails 3,550 cubic yds. of excavation and 1,500 cubic yds. of fill over a 37,000 sq. ft. area of disturbance. The proposed tower compound and access drive would require 250 cubic yards of fill. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2)

65. The applicant assumes that the 1,500 cubic yards of fill that would be required to construct the proposed cell tower facility will come from the excavation activities in the construction of the site, but whether the excavated fill will be suitable cannot be determined until the material itself is tested. (Transcript, 6/28/22, Burns Cross, p. 45)

66. It is likely that rock will be encountered during construction. (Transcript, 6/28/2022, Burns Cross, pp. 44-45; 7/14/22, Burns Cross p. 28)

67. The applicants acknowledged the potential need for blasting in the construction of the proposed cell tower facility. (Transcript, 6/28/22, Burns Cross, pp. 44-45)

68. According to David S. Ziaks, P.E., who reviewed the site plans for the proposed cell tower, “[i]n all likelihood, blasting and considerable rock excavation will be required given the extensive 50 ft. high slope cut that will be required to construct the access driveway and tower pad site.” (Ziaks Prefiled Testimony, 06/13/22, p. 1)

69. Once removed from the ground, the applicants may crush the excavated rock at the site with a rock crusher. (Transcript, 6/28/2022, Burns Cross, p. 45)

70. Acid rock drainage does not solely result from blasting, it can occur anytime bedrock is exposed. (Transcript, 9/8/22, Gustafson Cross, p. 29)

71. “One of the primary concerns [where significant earth removal and/or blasting activities occur] is acid rock drainage (ARD), which is a natural process, but can be

exacerbated when rock is crushed and used for fill or other purposes that expose the freshly crushed rock to precipitation. ARD is caused by the presence of bedrock containing high levels of iron sulfide (which is present in Eastern and Western Highlands and sometimes the central valley of CT), especially such rock that is freshly exposed or crushed and has been subjected to the elements/precipitation." (JMB Administrative Notice Item 39, p. 2)

72. Acid rock drainage is caused by the presence of bedrock containing high levels of iron sulfide, particularly where such rock is freshly exposed or crushed and subjected to precipitation. Under these conditions, there is an elevated risk for mobilizing naturally-occurring iron, manganese, and sulfur, which may adversely affect groundwater and drinking water quality. (Applicants' Supplemental Submission, 08/31/22, Sheet N2)

73. A geotechnical study would be required in order to determine the depth to bedrock and the location of soils shallow to bedrock on the site. (Transcript, 8/16/2022, Gustafson Cross, p. 12)

74. "The geotechnical investigation to be performed at the site would include an evaluation of the underlying bedrock in terms of its potential to cause ARD [acid rock drainage]." (Applicants' Supplemental Submission, 08/31/22, Sheet N2)

75. "Where significant earth removal and/or blasting activities are likely to occur. . . . there is concern for possible negative impacts to the quality and quantity of water in neighboring drinking water wells, as well as other environmental factors such as erosion, sedimentation, and decreased surface water quality conditions." (JMB Administrative Notice Item 39, p. 2)

76. Acid rock drainage may affect drinking water wells in the vicinity of the proposed cell tower site as well as surface water bodies such as Laurel Reservoir. (Transcript, 9/8/22, Gustafson Cross, p. 30-31)

77. Acid rock drainage can affect the potability of groundwater and surface water and may have potentially adverse health effects. (Transcript, 9/8/22, Gustafson Cross, p. 42)

Water Quality

78. The Connecticut General Statutes (C.G.S. §§ 25-37a and 22a-380) establish that the protection of public water supply watershed lands is a primary goal and policy of the State, and that public water supplies must be protected wherever possible.

79. The Western Connecticut Council of Governments, *2020-2030 Regional Plan of Conservation and Development* includes the proposed site within an "Aquifer Protection Area," and provides: "Both existing and potential [water] supply sources should be given equal weight for protection on the Future Growth Map, as Conservation Areas." (JMB Administrative Notice Item 3, pp 84-94).

80. The *2014 Plan of Conservation and Development of the Town of New Canaan* shows the proposed cell tower site located within a "Public Water Supply Watershed," on the Natural Resources Map (p. 85) (Bulk Filing Technical Report, p. 92/609)

81. According to the Drinking Water Section of the Department of Public Health, "[t]his project is contained within the public water supply watershed of Laurel Reservoir, an active source of public drinking water for Aquarion Water Company (PWSID CT1350011)." (DPH Comments, 06/01/22)

82. Laurel Reservoir is an important public drinking water supply that serves over 120,000 customers in lower Fairfield County. (JMB Administrative Notice Item 24)

83. Laurel Reservoir is included in the Commissioner of Public Health's *High Quality Source (HQS) List.* (JMB Administrative Notice Item 1)

84. The proposed cell tower site was formerly was formerly owned by the Stamford Water Company. (JMB Administrative Notice Item 23)

85. All land owned by a water company falls into three classes. Class I includes watershed land nearest to water supply sources, (e.g., within 250 feet of a reservoir, 200 feet of a well, or 100 feet of a watercourse). It also includes certain environmentally sensitive lands, such as those that are steeply sloped or where bedrock is less than 20 inches from the soil surface. Class II land is (1) on the public drinking supply watershed but not included in Class I and (2) completely off the watershed but within 150 feet of a reservoir or a major stream that runs into it. Class III consists of the rest of the company's land. (JMB Administrative Notice Item 6)[2]

86. C.G.S. § 25-32 requires a Department of Public Health certificate to sell, transfer, or change the use of watershed land owned by a water company. Water companies are prohibited from selling or leasing Class I or II watershed land to a telecommunication company or other tower developer. (JMB Administrative Notice Item 7)

87. If the proposed cell tower site were still owned by a water company, it would be classified as Class I and Class II watershed land. (Transcript, 7/14/22, Gustafson Cross, p. 39)

88. The intermittent stream forming the northerly boundary of the proposed cell tower site is a Class 1 Stream per the Connecticut Department of Energy and Environmental Protection (JMB Administrative Notice Item 9)[3]

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[2] The three classes of water-company owned land are established by statute, not, as the applicants' expert surmised, by the water companies themselves. See C.G.S. § 25-37c, and compare Transcript, 7/14/22, Gustafson Cross p. 38.

[3] Connecticut Stream Flow Classifications, Stream Segment ID: 202,001,367.00

89. Pesticides and herbicides may be used at the site. (Applicants' Supplemental Submission, 08/31/22, Sheet N2, Note 8)

90. According to the Drinking Water Section of the Department of Public Health, the application for the proposed cell tower contains “little to no analysis of the potential impacts this installation could have upon the active Laurel Reservoir.” (DPH Comments, 06/01/22)

91. According to the Drinking Water Section of the Department of Public Health, “[f]orests are ideal for enhancing drinking water source quality by maximizing contaminant filtration and minimizing runoff and mobilization of potential contaminants. According to the proposal, 106 trees will be removed.[4] Due to the close proximity of this parcel to the drinking water reservoir and the existing slope on this and adjacent land, runoff is a significant concern to drinking water source quality.” (DPH Comments, 06/01/22)

92. According to the Drinking Water Section of the Department of Public Health, “65 yards of fill is proposed to be brought onsite as part of this proposal. It is imperative that the source of the fill is known and that it is verified that no legacy contamination is contained within the fill. In numerous instances in Connecticut, the use of contaminated fill has impacted water quality. Also, with a large quantity of fill, erosion is a concern before a vegetative cover is established.” (DPH Comments, 06/01/22)

93. According to Joseph T. Welsh, Manager, Natural Resources for Aquarion Water Company: “Any activity from the development of [the proposed site] or land uses that occur will negatively impact water quality of the nearby wetlands, watercourse, and drainage which enters the public drinking water supply reservoir. The removal of over 100 trees which make up a protective tree canopy and cut and fill activities on steep slopes to create a 500+- foot driveway to access the structure both will negatively impact the function of this watershed area. Careful consideration should be given by the council to determine if this is the best location and appropriate use given the proximity to the public water supply and negative impacts to water quality.” (JMB Administrative Notice Item 24)

Wetlands and Watercourses

94. The Inland Wetlands and Watercourses Act, C.G.S. § 22a-36, et seq., contains a legislative finding that the inland wetlands and watercourses of the State are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed, and the preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the State. (C.G.S. § 22a-36, et

[4] According to the Applicants' Supplemental Submission, 08/31/22, Sheet SP-2, the applicants propose to remove 103 trees which are 6” or greater in diameter at breast height.

seq.)

95. The Inland Wetlands and Watercourses Act, C.G.S. § 22a-36, et seq., vests a regulatory agency with the authority to regulate upland review areas in its discretion if it finds such regulation necessary to protect inland wetlands or watercourses which will likely affect those areas. (C.G.S. § 22a-42a)

96. Pursuant to C.G.S. § 22a-4 (b) (1) a regulatory agency may not issue a permit for a proposed regulated activity which may have a significant impact on wetlands or watercourses unless it finds on the basis of the administrative record that a feasible and prudent alternative does not exist.

97. The 2014 *Plan of Conservation and Development of the Town of New Canaan* shows the proposed site within a "Wetlands" area on the Natural Resources Map (Bulk Filing Technical Report, p. 92/609)

98. An intermittent stream and wetlands corridor run along the northerly boundary of the proposed cell tower site. The limit of disturbance for construction of the access road is 107 feet from the wetlands boundary. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-1)

99. The intermittent stream forming the northerly boundary of the proposed cell tower site is a Class 1 Stream per the Connecticut Department of Energy and Environmental Protection (JMB Administrative Notice Item 9)

100. A "First-Order Stream Tributary" is "a stream which directly enters a reservoir." Regs. Conn. State Agencies § 25-37c-1.

101. The intermittent stream forming the northerly boundary of the proposed cell tower site is a First-Order Stream Tributary because it directly enters Laurel Reservoir. (Application, Attachment 6, p. 8/22)

102. There are more than 5,000 square feet of inland wetlands located on the proposed cell tower site. (Applicants' Supplemental Submission, 08/31/22, Sheet EX-1; Transcript, 7/14/2022, Gustafson Cross, p. 117)

103. The total area to be disturbed by construction of the proposed facility is 37,000 sq. ft., or approximately 4/5 of an acre. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2)

104. The slopes leading from the access driveway to the inland wetlands and intermittent watercourse on the proposed tower site are 2:1, or 50 percent. (Transcript, 7/14/2022, Burns Cross, p. 88)

105. The construction of the proposed facility would constitute a "regulated activity" under § 2.1 (33) of the *New Canaan Inland Wetlands and Watercourses Regulations*, which provides that "any clearing, grubbing, filling, grading, paving, excavating, constructing, depositing or removing of material and discharging of

stormwater on the land within the following upland review areas is a regulated activity. . . . Areas where the total area to be disturbed by any activity is cumulatively more than one half acre, and any disturbed area is upgrade from a wetland or watercourse larger than 5000 square feet situated at least in part on the same property and/or properties immediately adjacent thereto." (Bulk Filing, *Town of New Canaan Inland Wetlands and Watercourses Regulations*, pp. 9-10/69)

106. Only some of the onsite wetlands were flagged by the applicants' soil scientist, Matt Gustafson. (Application, Attachment 6; Transcript, 7/14/2022, Gustafson Cross, pp. 117-118)

107. The applicants did not make Matt Gustafson, the soil scientist who prepared the applicants' wetlands inspection, available for cross-examination. (Transcript, 7/14/22, Gustafson Cross, p. 116)

108. No assessment of wetlands functions and values was performed for the onsite wetlands and watercourse. (Transcript, 7/14/2022, Gustafson Cross, pp. 119)

109. Following construction, untreated stormwater runoff from the proposed access drive will run into the wetlands along the northerly boundary of the property. (Transcript, 7/14/2022, Burns Cross, p. 88-89)

110. "In general, the greater the slope of the land being developed, the greater the potential threat of damage to adjacent wetlands and watercourses from erosion and sedimentation." (JMB Administrative Notice Item 36, p. 11)

111. "Combined with slope, the type of soil found adjacent to wetlands and watercourses is an important factor in how development may affect adjacent wetlands or watercourses." (JMB Administrative Notice Item 36, p. 11)

112. The applicants' wetlands scientist testified that the majority of onsite soils are highly erodible soils. (Transcript, 8/16/2022, Gustafson Cross, pp. 12-13)

113. The applicants' engineer could not testify to the Siting Council whether the proposed facility as depicted on the site plans included with the application will have an adverse effect on the water quality of Laurel Reservoir or the onsite inland wetlands. (Transcript, 7/14/2022, Burns Cross, pp. 104-105)

Plants and Wildlife

114. Northwest New Canaan is an area of the State of Connecticut with great ecological integrity. (Transcript, 9/8/22, Klemens Cross, p. 148; JMB Administrative Notice Item 30 (Conservation of Amphibians and Reptiles in Connecticut (Klemens et al. 2021), Wildlife Urban Interface map, p. 248))

115. The applicants performed no site-specific surveys or investigations of plant and wildlife species found at or near the proposed cell tower site in connection with this application. (Transcript, 7/14/2022, Gustafson Cross, p. 131)

116. The JMB parties requested permission to visit the proposed cell tower site so that their experts could conduct field investigations, but they were not given permission to enter the site. (JMB Parties, Exhibit Item 4; Transcript, 9/8/22, Ziaks Cross, pp. 104-105)

117. Without on-site field investigations of the proposed cell tower site, it is not possible to evaluate the environmental impact which would result from its construction and operation. (Transcript, 9/8/22, Klemens Cross, pp. 147-148; JMB Administrative Notice Item 30 (*Conservation of Amphibians and Reptiles in Connecticut* (Klemens et al. 2021)), p. 254)

118. The applicants did not make Deborah Gustafson, who submitted the USFWS NLEB Letter which accompanies the application, available for cross examination. (Application, Attachment 9)

119. In the 2014 *Plan of Conservation and Development of the Town of New Canaan*, the proposed site is located within a "Natural Diversity Database Area" on the Natural Resources Map (Bulk Filing Technical Report, p. 92/609)

120. State and Federal Listed Species have been reported in the vicinity of the proposed site. (JMB Administrative Notice Item 14)

121. According to the Connecticut Department of Environmental Protection Natural Diversity Database, three State-listed species may be affected by activities associated with the proposed facility: Little Brown Bat (*Myotis lucifugus*)- State Endangered; Red Bat (*Lasiurus borealis*)- State Special Concern; and Eastern Box Turtle (*Terrapene carolina carolina*)- State Special Concern. (Application, Attachment 9, p. 40/42)

122. Additionally, the Northern Long-eared Bat (*Myotis septentrionalis*) and Bog Turtle (*Clemmys (Glyptemys) muhlenbergii*), two federally listed threatened species, are found within the project area. (Application, Attachment 5, p. 5/42)

123. According to *Conservation of Amphibians and Reptiles in Connecticut* (Klemens et al. 2021), the following additional listed species have been documented in the vicinity of the site: Spotted Turtle (*Clemmys guttata*, p. 123) – State Special Concern, Wood Turtle (*Glyptemys insculpta*, p. 125) – State Special Concern, and Black Racer (*Coluber constrictor*, which is a GCN (Greatest Conservation Need) "important species," p. 142). (JMB Administrative Notice Item 30; Klemens Prefiled Testimony, 6/16/22, p. 4)

124. The Council on Environmental Quality expressed concern "about the proposed access drive and the potential environmental impacts associated with the loss of trees; root damage to the remaining trees adjacent to the proposed access drive; and the impacts to the edge habitats, which could be exposed to invasive species colonization." (CEQ Comments, 6/27/22)

125. The proposed cell tower would be located in an area that is comprised of mature

upland hardwood forest dominated by an overstory of red, white, and black oak and sugar maples. (Klemens Prefiled Testimony, 6/16/22, p. 1)

126. The forested areas on properties adjacent to the proposed cell tower site will be affected by the clearing proposed in connection with the tower, which will convert a perforated forest into an edge forest. (Transcript, 9/8/22, Klemens Cross, p. 100)

127. The applicants' wetlands consultant failed to account for the distinction between the development footprint versus the ecological footprint, and mischaracterized the proposed cell tower site as edge forest. (Transcript, 9/8/22, Klemens Cross, pp. 99-100; cf. Application, Attachment 5, p. 2/25, Transcript, 7/14/2022, Gustafson Cross, pp. 35-36

128. Edge effects from forest clearing can reasonably be anticipated to extend 300 feet beyond the cleared forest affecting the species and ecological integrity of the forest. Not only will these edge effects, including invasive species, light spillage, and desiccation, affect a significant portion of the proposed cell tower site, these edge effects will significantly affect the ecological integrity of the forest on adjacent properties. (Klemens Prefiled Testimony, 6/16/22, p. 2)

129. The applicants' "final" site plan shows the proposed removal of 103 trees which are 6 inches or more in diameter. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-2)

130. The Tree Survey Table does not include all trees found on the site, identifies trees only by their generic name, and fails to provide any identification at all for 24 of the trees. (Transcript, 7/14/22, Burns Cross, pp. 76-79; Applicants' Supplemental Submission, 08/31/22, Sheet EX-2)

131. It is important to identify the species of tree, not just a common name, because the bark of certain trees, such as sugar maples, provide excellent bat roosting habitat, in contrast to the smooth barked Norway maple. Likewise, certain oak species are especially good candidates to serve as bat roosting areas. (Klemens Prefiled Testimony, 6/16/22, p. 2)

132. The applicants did not make Michael Rozeski, who prepared the applicants' Tree Survey Table, available for cross-examination. (See Applicants' Responses to Buschmann Interrogatories, 06/21/22, A8)

133. The applicants' tree protection detail differs from that recommended by the *Connecticut Guidelines for Soil Erosion and Sediment Control*, DEP Bulletin 34. (Applicants' Supplemental Submission, 08/31/22, Sheet C-3; CSC Administrative Notice Item 76, Table TP-2, p. 5-1-6; Transcript, 7/14/22, Burns Cross, pp. 84-85)

Alternatives

134. The construction and operation of the proposed cell tower is reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in

the air, water and other natural resources of the state. (Record)

135. The applicants claim to have “identified and investigated twenty-four (24) sites in and around the New Canaan/Stamford site search area where the construction of a new tower might be feasible for radio frequency engineering purposes.” (Application, Attachment 2)

136. Four of the sites included in the site search (3, 14, 15,17) are Class I Watershed Land owned by Aquarion Water Company and comprise part of the Centennial Watershed State Forest. (Application, Attachment 2)

137. Five of the sites included in the site search (8, 11, 13, 16, 22) are owned by the State of Connecticut and comprise part of the Centennial Watershed State Forest. (Application, Attachment 2)

138. Cell towers may not be located on water company lands or lands in State Forests. (JMB Administrative Notice Item 7)

139. A large percentage of propagation of signal for the proposed cell tower facility is located over Laurel Reservoir, where currently there is no need for cell phone service. (Transcript, 9/8/22, Slovenko Cross, pp. 87, 141)

140. The Radio Mobile Online propagation software used by 360°RF takes terrain and tree cover into account when evaluating signal coverage. (Transcript, 9/8/22, Slovenko Cross, pp. 110-111, 119)

141. Utility poles represent viable alternative locations for the siting of cell phone antennas and are used throughout the country. (Transcript, 9/8/22, Slovenko Cross, pp. 114-117)

142. Utility pole locations for antennas are readily accessible in bad weather conditions and may be served by generators during power outages if battery power is insufficient. (Transcript, 9/8/22, Slovenko Cross, p. 138)

143. The Town of New Canaan currently has public safety radio antennas at 982 Oenoke Ridge Road, which, in combination with other Town-owned public safety radio antennas, satisfy public safety requirements for the area to be served by the proposed cell tower. (NCN Administrative Notice Item 60 (gg); Transcript, 6/28/22, Fine Cross, pp. 90-93; Transcript, 9/8/22, Slovenko Cross, p. 83)

144. On January 13, 2022, Joseph Zagarenski, Senior Engineer, New Canaan Department of Public Works, wrote that “[t]he Town searched for a location where ii might install an antenna, a location which would provide sufficient coverage [for emergency services] to the northwest area of town. Two antennas in two locations became the solution. In 2018, the Town was granted permission by New Canaan's Board of Education to install a new antenna on top of West Elementary School. And that same year, the Planning and Zoning Commission granted the Town permission to locate an antenna on a barn located at 982 Oenoke Ridge. Following the

installations, a radio propagation study, conducted by Motorola, proved the solution to be a success. Emergency services personnel were able to communicate, using their portable radios, with dispatch, in the northwest area of Town. (NCN Administrative Notice Item 60 (gg), p 1/48))

145. The license agreement controlling Town of New Canaan access to 982 Oenoke Ridge Road for the installation and maintenance of public safety radio antennas commenced on April 1, 2018, expires on March 31, 2024, and thereafter automatically renews for one year periods unless the property owner elects to terminate the license agreement. (NCN Administrative Notice Item 60 (ff))

146. The property owners at 40 River Wind Road would be amenable to locating a cell tower facility on their property. (Transcript, 9/8/22, Slovenko Cross, p. 83)

147. According to 360°RF, alternative sites at 982 Oenoke Ridge Road, 40 Dans Highway and 40 River Wind Road appear to offer better coverage at similar or lower heights, and utility pole mounted antennas, individually or in combination, could provide similar or better coverage in northwestern and central western New Canaan, and, when in combination, would allow for less traffic loading than at a single site; and an alternate site for the EMS Dispatch repeater antenna on 155.175 MHz (WXB951) at 168 Lost District Drive would offer broad coverage for western New Canaan and beyond. (Berg/Slovenko Prefiled Testimony, 06/15/22, pp. 2/3, 5/31 – 8/31)

148. According to 360°RF, towers at either of the two Oenoke Lane lots owned by Emily B. Nissley, the wife of Thomas Nissley, member of 1837 LLC, the owner of the proposed cell tower site, would provide for good coverage of all the AT&T gaps identified in the proposed 1837 Ponus Ridge Road cell tower site. (Berg/Slovenko Prefiled Testimony, 06/17/22, p. 1-3/8; NCN Administrative Notice Item 60 (d)).

149. The applicants' radiofrequency engineer agreed to provide the Siting Council with his analysis of the sites proposed by 360°RF, but no such analysis was ever provided. (Transcript, 06/28/22, Lavin Cross, pp. 108-109, Morrisette Comment, pp. 30-31)

150. The "First Responder" records of the Town of New Canaan make no reference to instances "where lack of cell [phone] service in emergency situations was a public safety problem." (NCN Administrative Notice Item 60 (cc))

151. The Council on Environmental Quality "recommends that the Applicant assess other opportunities to minimize the amount of earthwork associated with the construction of the proposed access drive, potentially including relocating the proposed access drive and/or tower compound." (CEQ Comments, 06/27/22)

152. The applicant did not consider or present alternative locations for the proposed cell tower compound and access road on the 1837 Ponus Ridge Road property other than rotating the proposed site compound 90 degrees to be aligned in a northeast to southwest direction, which was done at the request of the Siting

Council. (Applicants' Late-Filed Exhibits, 07/07/22, A 8, 9; Transcript, 9/8/22, Vergati Cross, p. 53)

153. The access road to the proposed cell tower could be modified to eliminate the switchback and to redirect the access road to run from the second stilling basin directly to the tower compound, thereby eliminating substantial disturbance and tree clearing and moving the facility farther away from the onsite inland wetlands and watercourse corridor. However, additional excavation would be required to lower the elevation of the tower compound. (Transcript, 9/8/22, Burns Cross, pp. 47-50)

154. Use of retaining walls in the construction of the access driveway for the proposed cell tower site would reduce the area of disturbance and lessen concerns about post-development stabilization. (Transcript, 7/14/2022, Burns Cross, p. 97)

155. Use of a retaining wall is a feasible design alternative to the construction of the access road to the proposed tower compound as presently designed in the application materials. (Transcript, 7/14/2022, Burns Cross, p. 98, 101)

156. The proposed tower compound could be relocated off of the hilltop and moved westerly farther down the slope towards Ponus Ridge Road which would reduce the area of disturbance and number of trees to be removed. (Transcript 6/28/22, Burns Cross, pp. 58-62; Gustafson Cross, p. 45)

157. According to the applicants, if the proposed tower compound were relocated off of the hilltop and westerly farther down the slope towards Ponus Ridge Road, "the additional required height and proximity to the road would make a facility at this location much more visible from Ponus Ridge Road. In addition, the entire facility would be constructed on an existing steep slope which would require a retaining wall over 100' in length and approximately 10' in height. This retaining wall would be very difficult to construct and result in a great deal of disturbance on the hillside. Overall, this location would likely result in greater impacts than the Proposed Facility location and the alternative location discussed in Response 9 below." However, no alternative plans were submitted substantiating these statements, and they contradict statements made by the applicants' civil engineer and wetlands scientist at the public hearing. (Applicants' Late-Filed Exhibits, 07/07/22, A 8, 9)

158. The applicants' engineer testified that relocating the proposed tower compound off of the hilltop farther down the slope towards Ponus Ridge Road would be "constructible." (Transcript 6/28/22, Burns Cross, pp. 58-62)

159. The slope of the access driveway could be reduced to a 10 percent grade by lowering the proposed cell tower compound. (Transcript, 9/8/22, Ziaks Cross, pp. 132-133)

160. The applicants rejected placement of the proposed cell tower adjacent to the stone wall near the existing entrance driveway primarily because the height of the tower would have to be increased by 35 feet. (Transcript, 6/28/22, Burns Cross, pp. 59-60)

161. The proposed cell tower could also be sited down the hill adjacent to the second stilling basin, which would result in “far less tree clearing” with no “significant change” in visibility. (Transcript, 6/28/22, Burns Cross, pp. 60-62)

162. According to the applicants’ engineer, “as far as further reducing the amount of trees to be removed, we've already looked at it once and I'm not sure it can be reduced by any more significant number without some serious retaining walls or something along those lines.” (Transcript, 6/28/22, Burns Cross, pp. 110-111)

163. Although construction of the proposed cell tower compound adjacent to the stone wall near the existing entrance driveway or adjacent to the second stilling basin would be “harder to build than where [it’s] going currently” and would require a “significant retaining wall,” it could be constructed. (Transcript, 7/14/22, Burns Cross, pp. 40-44, 99-100)

164. Constructing the proposed cell tower compound near the existing entrance driveway adjacent to the stone wall would result in less tree clearing, less disturbance and a reduction in impervious surface. (Transcript, 7/14/22, Gustafson Cross, p. 45)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically mailed to the following service list on October 27, 2022.

Lucia Chiocchio, Esq.
Kristen Motel, Esq.
445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
lchiocchio@cuddyfeder.com
kmotel@cuddyfeder.com

Raymond Vergati
Manuel Vicente
Homeland Towers, LLC
9 Harmony Street, 2nd Floor
Danbury, CT 06810
rv@homelandtowers.us
mv@homelandtowers.us

Rachelle Bidon-Lewis
Harry Carey
AT&T
84 Deerfield Lane
Meriden, CT 06067
rb9471@att.com
hc3635@att.com

Kenneth C. Baldwin, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
kbaldwin@rc.com

Justin Nishioka
60 Squires Lane
New Canaan, CT 06840
Justin.nishioka@gmailcom

___S/ David F. Sherwood_____
David F. Sherwood
Commissioner of the Superior Court