DOCKET NO: HHB-CV-23-6076746-S

MARK BUSCHMAN, TRUSTEE JAMIE BUSCHMAN, TRUSTEE and MARK BUSCHMAN	:	SUPERIOR COURT JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	TAX AND ADMINISTRATIVE APPEALS SESSION
CONNECTICUT SITING COUNCIL, HOMELAND TOWERS, LLC and NEW CINCULAR WIRELESS PCS, LLC, et al.	:	MAY 6, 2024

MEMORANDUM OF DECISION

The plaintiffs, Mark and Jamie Buschman, as Trustees, and Mark Buschman, as intervenor pursuant to General Statutes § 22a-19 (together, the Buschmans), appeal from the decision (the decision) of the defendant, the Connecticut Siting Council (the council), approving the construction of a cell phone tower (the subject cell tower) on land abutting the Buschmans' home in New Canann, Connecticut. In challenging the decision, the Buschmans contend that (1) the council was not properly constituted in compliance with General Statutes § 16-50j (b) when the council made the decision; (2) the council's conclusion that construction of the subject cell tower would not harm a nearby reservoir was not supported by substantial evidence in the record and the council did not consider feasible and prudent alternatives; and (3) that the council did not make proper findings in compliance with General Statutes § 16-50p. Because the court finds that the first issue is dispositive to this appeal, the court does not consider the second and third issues.

General Statutes § 16-50j (b) requires that of the five members of the council appointed by the governor, only one of those persons may have a current or former affiliation with a utility company or a government utility regulator. Here, the record demonstrates that council member John Morissette was formerly employed by Eversource Energy and Connecticut Light and Power

Electronic notice sent to all counsel of record and to amicus:
1) D. Sherwood for Buschmann Pls. 2) R. Merconi for Siting Council,
3) B. Goodhouse for Homeland Towers + New Cingular Wireless,
4) K. Balaun for Cellco, 5) J. Nishikawa (amicus).
A. Jordanopoulos, clerk 5-6-24

and council member Mark Quinlan was formerly employed the Department of Public Utility Control. Both Mr. Morissette and Mr. Quinlan were appointed to the council by the governor. A government board that is not properly constituted under its authorizing statute lacks authority to act. See *DuBaldo* v. *Dept. of Consumer Protection*, 209 Conn. 719, 723, 552 A.2d 813 (1989) (board was not properly constituted, and therefore "board's decision to suspend the plaintiff's license was without statutory authority"). Pursuant to General Statutes § 4-183 (j), the court remands this matter back to the council for proceedings consistent with this memorandum of decision and General Statutes § 16-50j (b).

FACTS

The administrative record before the court demonstrates the following facts as relevant to this memorandum of decision which, except where noted, are not in dispute.

On May 6, 2022, Homeland Towers, LLC (Homeland) and New Cingular Wireless PCS, LLC d/b/a AT&T (AT&T), filed an application (application) with the council for a Certificate of Environmental Compatibility and Public Need for the construction and operation of a wireless telecommunications tower at 1837 Ponus Ridge Road in New Canaan, Connecticut (the proposed tower site). The subject cell tower is intended to be "camouflaged" to resemble a pine tree and will be 115 feet tall. The proposed tower site is heavily wooded, steeply sloping, and has exposed rocks and boulders on the surface. Construction of the subject cell tower and accompanying improvements would require the removal of approximately 100 mature trees and the excavation of some 3550 cubic yards of soil and rock and 1500 cubic yards of fill. It appears undisputed that there is a need for better cell phone coverage and emergency services communications in the general area proposed for the location of the subject cell tower. The

proposed tower site is across the road from Laurel Reservoir, a public drinking water supply owned by Aquarion Water Company.

Mark and Jamie Buschman live with their four children at 359 Dan's Highway in New Caanan. The Buschmans own land and a home located at 359 Dan's Highway. 359 Dan's Highway directly abuts the proposed tower site. The application calls for the subject cell tower to be placed approximately 150 feet from the Buschmans' property line. When constructed, the subject cell tower will be plainly visible from the Buschmans' property and home. The Buschmans currently have a forest view of the mature trees that will be cut down to make room for the subject cell tower. Mr. Buschman testified that construction of the subject cell tower will reduce the market value of his home because the home will have a view of the subject cell tower rather than forest and trees. The court credits Mr. Buschman's testimony.[1]

On May 26, 2022, the council granted the Buschmans' petitions to participate in the application proceedings as parties. On May 31, 2022, the Buschmans filed a motion to dismiss the application for lack of jurisdiction. In their motion to dismiss, the Buschmans argued that that the council was improperly constituted. At all times relevant to this memorandum of decision, § 16-50j provided in relevant part:

> (a) There is established a "Connecticut Siting Council", hereinafter referred to as the "council", which shall be within the Department of Energy and Environmental Protection for administrative purposes only.
>
> (b) Except for proceedings under chapter 445, this subsection and subsection (c) of this section, the council shall consist of: (1) The Commissioner of Energy

[1] The court finds that the Buschmans have demonstrated a specific and personal interest in the council's approval of the subject cell tower and that such interest will be specially and injuriously affected by the council's decision and, therefore, the Buschmans are aggrieved by the decision. See *Brouillard* v. *Connecticut Siting Council*, 133 Conn. App. 851, 856, 38 A.3d 174, cert. denied, 304 Conn. 923, 41 A.3d 662 (2012).

> and Environmental Protection, or his designee; (2) the chairperson of the Public Utilities Regulatory Authority, or the chairperson's designee; (3) one designee of the speaker of the House and one designee of the president pro tempore of the Senate; and (4) five members of the public, to be appointed by the Governor, at least two of whom shall be experienced in the field of ecology, and not more than one of whom shall have affiliation, past or present, with any utility or governmental utility regulatory agency, or with any person owning, operating, controlling, or presently contracting with respect to a facility, a hazardous waste facility, as defined in section 22a-115, or an ash residue disposal area. . . .

On June 23, 2022, the council denied the Buschmans' motion to dismiss. At all times relevant to this memorandum of decision, the council was constituted as follows:

- John Morissette, the Presiding Officer (appointed by the governor)
- Brian Golembiewski (designee of the Commissioner of the Department of Energy and Environmental Protection [DEEP])
- Quat Nguyen (designee of the Chair of the Public Utilities Regulatory Authority [PURA])
- Robert Silvestri (appointed by the speaker of the House of Representatives)
- Daniel Lynch (appointed by the president pro tempore of the Senate)
- Mark Quinlan (appointed by the governor, with ecology experience)
- Louanne Cooley (appointed by the governor, with ecology experience)

Mr. Morissette is "retired from Eversource Energy having responsibilities that included: Manager of Siting and Permitting, Supervisor - Distributed Resources for Connecticut Light and Power, Manager - Asset Management, Manager - Contract Administration, Wholesale Power Marketer for Select Energy . . . ." Return of Record (ROR), R3579. Mr. Quinlan "worked for over forty years for the State of Connecticut on a broad range of energy issues. He began his career at the Energy Division of the Office of Policy and Management working on the state's

energy conservation programs. He then moved to the Department of Public Utility Control and later became the Supervisor of Technical Analysis for the electric unit. In that position, he oversaw the regulation of the state's electric utilities. When the Department of Energy and Environmental Protection was created, he focused on procuring energy resources and developing state energy policy as the Director of Energy Supply for DEEP." Id., 3579-80.

On June 28, 2022, the council commenced a public hearing on the application. On September 8, 2022, the council closed the public hearing on the application. On September 29, 2022, the council closed the evidentiary record. On December 8, 2022, the council approved the application. On January 4, 2023, the Buschmans filed the present appeal pursuant to General Statutes § 4-183.

LEGAL ANALYSIS

a. General Statutes § 16-50j (b) (4)

The Buschmans argue that the requirements of § 16-50j are clear: of the five members of the council appointed by the governor, only one of those individuals may have a past or present affiliation with a utility or a utility regulator. The court agrees.

When considering an issue of statutory interpretation, a court's "fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to discern that intent, [courts] look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citations omitted; internal quotation marks omitted.) *State* v. *Spears*, 234 Conn. 78, 86–87, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490

(1995). Section 16-50j (b) (4) provides that the council shall consist of, inter alia, "five members of the public, to be appointed by the Governor, at least two of whom shall be experienced in the field of ecology, and not more than one of whom shall have affiliation, past or present, with any utility or governmental utility regulatory agency . . . ."

Looking to the words of § 16-50j (b) (4) as chosen by the legislature, the court first holds that the pronoun "whom" in the statutory phrase "and not more than one of *whom* shall have affiliation, past or present, with any utility or governmental utility regulatory agency" refers back to the last preceding antecedent phrase "five members of the public," not to the nonantecedent pronoun "whom" included in the phrase "at least two of whom shall be experienced in the field of ecology . . . ." (Emphasis added.) General Statutes § 16-50j; see *L. H.-S.* v. *N. B.*, 341 Conn. 483, 492, 267 A.3d 178, 185 (2021) ("Under the last antecedent rule, which this court has applied on numerous occasions, '[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.'") In other words, based on a plain reading of the words in the statute and application of the last antecedent rule, the court holds that § 16-50j (b) (4) means that of the five public members appointed to the council by the governor, only one may have a past or present affiliation with a utility or utility regulator. Section 16-50j (b) (4) does not mean that of the two public members appointed to the council by the governor based on their experience in ecology, only one of those persons may have a past or present affiliation with a utility or utility regulator.

Second, the court concludes that the legislative history, the circumstances surrounding the enactment of § 16-50j (b) (4), and the legislative policy that § 16-50j (b) (4) was designed to implement all support the court's interpretation of § 16-50j (b) (4) as set forth above.

Section 16-50j (b) (4) is part of the original 1971 legislation establishing the council,[2] and its original language has remained unchanged since its initial enactment. See Public Acts 1971, No. 575, § 4. The original Senate version of the legislation that eventually became No. 575 of the 1971 Public Acts initially did not allow *any* public members appointed by the governor to be affiliated with utility companies or utility regulators. Nevertheless, during legislative debate, the Senate added an amendment sponsored by Senator Hammer allowing for "not more than one" public member appointed by the governor to be affiliated with a utility or utility regulator. See 14 S. Proc. Pt. 4, 1971 Sess., pp. 1860-1869, remarks of Senator Hammer. Senator Hammer described the purpose of the amendment as follows: "This bill as it is before us would exclude persons affiliated with [a] utility. I do not think we should exclude these persons entirely. . . . I believe that it is only fair that the utilities should be entitled to at least one member, if the governor should wish to appoint such a person. The amendment would provide that no more than one member shall have affiliation with any utility." 14 S. Proc. Pt. 4, 1971 Sess., p. 1861. Senator Pac's remarks on the underlying bill after passage of Senator Hammer's amendment further support this view: "What will this bill do? Mainly it will establish the Power Facility Evaluation Council. Composed of nine people. One a designee of the PUC. Another a designee of the Department of Environment. One appointee of the Speaker of the House and one of the

[2] The council's original name was the "Power Facility Evaluation Council." See Public Acts 1971, No. 575, § 4.

President Pro Tempore. And five of the Governor. Out of these five appointed by the Governor, two will be environmentalists and one will represent the utilities as was voted on the amendment."[3] 14 S. Proc. Pt. 4, 1971 Sess., p. 1882, remarks of Senator Pac. After debating Senator Hammer's amendment, the Senate passed it by a vote of 16-13. See id., p. 1869.

After reviewing the legislative history related to No. 575 of the 1971 Public Acts, and the debate surrounding the structure of the council's membership,[4] it is clear to the court that the affiliations of the individual members of the council were of critical importance to the legislature. The legislature debated what the proper balance of members ought to be and how a member's affiliation might impact the important decisions to be made by the council. These were not minor issues, decided with little real consideration. Indeed, the court concludes that a primary motivation for the creation of the council in the first instance was the perception that industry and government regulators where not giving sufficient consideration to environmental issues and therefore a different balance ought to be struck.[5] Thus, this court concludes that

---

[3] It is also clear from the debate on Senator Hammer's amendment that senators understood that the language in the underlying bill applied not just to persons affiliated with utilities, but also to persons affiliated with utility regulators. For example, Senator Gunther made the following statement in opposition to the amendment: "I rise to oppose the amendment. I would disagree with Senator Hammer on the impact that a public utility member or a former member of a commission could have on a board or particular commission. I spent a year and a half on the Commission to Study Power Plant Siting. We had one member from the, a former member of the PUC on that board. His impact was tremendous. I don't think that it would serve this commission to have the risk of a former member of the PUC serve on this particular commission." 14 S. Proc. Pt. 4, 1971 Sess., p. 1867, remarks of Senator Gunther.

[4] 14 S. Proc. Pt. 4, 1971 Sess., pp. 1855-88, 14 S. Proc. Pt. 6, 1971 Sess., pp. 2717-19; 14 H.R. Proc. Pt. 9, 1971 Sess., pp. 4015-37; Conn. Joint Standing Committee Hearings, Environment, Pt. 2, 1971 Sess., pp. 473-88, 458-68, 497, 501-507.

[5] See 14 H.R. Proc. Pt. 9, 1971 Sess., p. 4030, remarks of Representative David Levine ("it is the intent of this bill to balance the environmental needs with the power needs of this State"); id., p.

interpreting § 16-50j (b) (4) as allowing only one of the governor's public member appointees to have a utility or regulatory affiliation is consistent with § 16-50j (b) (4)'s legislative history, the circumstances surrounding its enactment, and the policy goals that statutory provision was intended to further.[6]

In opposition to the court's reading of § 16-50j (b) (4) as set forth above, the commission points to General Statutes § 4-9a, which sets forth general requirements for public members of state boards or commissions. Section 4-9a provides in relevant part: "Public members shall constitute not less than one-third of the members of each board and commission within the Executive Department, except the Commission on Human Rights and Opportunities. Public member means an elector of the state who has no substantial financial interest in, is not employed in or by, and is not professionally affiliated with, any industry, profession, occupation,

---

4031, remarks of Representative Herbert V. Camp, Jr. ("[t]he need for a balance between the sometimes conflicting desires of our utility companies and the need to preserve the environment was, after all, the reason the bill was created"); id., p. 4034, remarks of Representative Harold G. Harlow ("it is my opinion that this bill directly enables the public to become intelligently involved in the final determination of utility activity in our State"); id., p. 4037, remarks of Representative William J. Scully ("This bill may have come as a shock to the utility companies, but all the power in the world will not help us if we're not around to use it. We're not out to kill the utility companies, but to let the people of Connecticut live in a cleaner atmosphere."); Conn. Joint Standing Committee Hearings, Environment, Pt. 2, 1971 Sess., p 458, remarks of Senator Gunther ("I am more convinced than ever that Connecticut cannot afford to continue to allow the utility companies to indiscriminately develop their own site and transmission programs. At this point, I don't think any agency is really watch-dogging the environmental impact of our utility development programs.").

[6] For clarity, the court concludes that council member Louanne Cooley is not "affiliated" with a utility regulator because of her position as a Legal Fellow at the Connecticut Institute for Resilience and Climate Adaptation (CIRCA) at the University of Connecticut. See ROR, R3579. The court concludes that Attorney Cooley is employed by the University of Connecticut and is not affiliated with DEEP simply because DEEP provides some support to CIRCA. The court takes judicial notice that CIRCA receives support and funding from a variety of different sources. See https://circa.uconn.edu/partners/ (last visited May 3, 2024).

trade or institution regulated or licensed by the relevant board or commission, and who has had no professional affiliation with any such industry, profession, occupation, trade or institution for three years preceding his appointment to the board or commission." The commission argues that there is no evidence in the record that either Mr. Morissette or Mr. Quinlan has been affiliated with their former employers within the last three years. The commission further argues that because the court must harmonize statutory provisions into a uniform body of law, the court must engraft the three-year affiliation standard of § 4-9a onto § 16-50j (b) (4). The court is not convinced.

"[I]t is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . . [I]f there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of a general provision, then the particular provision must prevail . . . ." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 137 Conn. App. 307, 315, 48 A.3d 694 (2012), aff'd, 312 Conn. 513, 93 A.3d 1142 (2014). Here, the specific provisions of § 16-50j (b) (4) setting forth the requirements for membership on the council control over any general requirements applicable to public boards and commission more generally as set forth in § 4-9a.

More directly, by its plain terms, § 4-9a sets forth a statutory definition of a "public member" of a state board or commission. Here, there is no dispute that Mr. Morrisette and Mr. Quinlan are public members of the commission. The fact that Mr. Morrisette and Mr. Quinlan

are "members of the public" under § 16-50j (b) (4)[7] does nothing to shed light on the meaning of the additional requirement of § 16-50j (b) (4) that of the five public members appointed to the commission by the governor, "not more than one" may also be affiliated with a utility or utility regulator. To the extent the commission argues that the court should engraft the three year "look back" provision of § 4-9a onto § 16-50j (b) (4), the court cannot do so. In § 16-50j (b) (4), the legislature explicitly prohibited affiliations "past or present," without temporal limitation. Had the legislature really meant "past" affiliations to be limited to only three years, the legislature plainly could have said so. The legislature did not. The court cannot add statutory provisions where the legislature chose not to include them. See *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216, 901 A.2d 673 (2006) ("It is a principle of statutory construction that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." [Internal quotation marks omitted.]).

b. Constitution of the commission

In *DuBaldo* v. *Dept. of Consumer Protection*, supra, 209 Conn. 721-23, our Supreme Court considered a challenge to a state board that was not properly constituted. After concluding that the authorizing statute expressly required that at least two members of the board be engaged in the occupation of electrical contracting and that the two relevant members of the board were

[7] By applying the definition of "public member" set forth in § 4-9a.

not so occupied, the Supreme Court held that the board was not properly constituted and that its decision was therefore invalid. Id.; see also *Block* v. *Statewide Grievance Committee*, 47 Conn. Supp. 5, 14-16, 771 A.2d 281 (2000) (following *DuBaldo*). The *DuBaldo* court specifically held that "the board's decision . . . was without statutory authority" and the Supreme Court set aside the judgment and remanded the matter. *DuBaldo* v. *Dept. of Consumer Protection*, supra, 723. This court concludes that the *DuBaldo* court's holding is controlling. As set forth above, this court concludes that § 16-50j requires that no more than one of the five members of the council appointed by the governor may have a past or present affiliation with a utility or a utility regulator. The record clearly demonstrates that both Mr. Morrisette and Mr. Quinlan have past affiliations with a utility or a utility regulator. Therefore, the council was not properly constituted when it acted on the application. The commission was therefore without statutory authority to act on the application, and the commission's decision approving the application is invalid.[8]

[8] The court distinguishes the holdings of *Levinson* v. *Board of Chiropractic Examiners*, 211 Conn. 508, 538-40, 560 A.2d 403 (1989), and *Fleischman* v. *Board of Examiners in Podiatry*, 22 Conn. App. 181, 186-87, 576 A.2d 1302 (1990), and other cases cited in the defendants' briefs. In both *Levinson* and *Fleischman*, the boards at issue were merely missing a member or members, but still had a sufficient quorum of otherwise proper members to act. Here, the commission was not missing certain members, but instead it affirmatively included members the commission was statutorily prohibited from including.

CONCLUSION

For all the foregoing reasons, the court sustains the appeal of the plaintiffs, and, pursuant to § 4-183 (j), remands this matter back to the council for proceedings consistent with this memorandum of decision and § 16-50j (b).

Budzik, J.