State of Connecticut Siting Council

DOCKET NO. 488 —

Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T application for Certificate of Environmental Compatibility and Public Need for construction, maintenance, and operation of a telecommunications facility located at one of two sites: Kent Assessor ID #M10, Block 22, Lot 28 "Bald Hill Road" or 93 Richards Road, Kent, Connecticut.

: August 10, 2020

RESPONSE TO APPLICANTS' FILING OF AUGUST 6, 2020

The Bald Hill Road Neighbors ("BHRN") hereby respond to the Applicant's reply memorandum of August 6, 2020.

First, the Applicants contend that the BHRN objection of July 28 to the Council's Protective Order and Non-Disclosure Agreement ("NDA") is duplicative of earlier objections. An examination of the pleadings reveals that this is not the case.

The Council's Protective Order during the remote hearing on July 23 and the issuance of the NDA furnished additional detail, including the grounds of trade secrets and proprietary, confidential, and commercially valuable information. The Council's actions also placed government imprimatur on the NDA, making it an official proposal to other parties in this matter.

The BHRNs' Objection also cited recently-submitted filings from the Applicants and Insite, including the July 15 letter, only a week before the July 23 remote hearing. This letter revealed the full extent of Insite's involvement as a co-developer who would take long-term control of the project both as property owner and as owner of the constructed facility. The Council's acceptance of the NDA ripened the issue of non-disclosure.

Additionally, the Applicants cite *Corcoran v. Siting Council* to contend that AT&T and Homeland have standing to assert confidentiality as to the Site A property in the Phase 1 report.

The trial court in *Corcoran* found, that the phrase, "in no way be limited" in § 16–50p (g), "implies that the legislature did not want the council to be bound by an applicant's alleged acquisition of an interest in land, but the council was not prohibited from considering such an interest in determining whether the certificate should be issued." The court further explained that, "[t]he language of § 16–50p(g) is that of an enlargement of the council's discretion, not a limitation,

permitting but not obligating the council to consider the likelihood of the applicant securing the proposed site." The Connecticut Supreme Court affirmed.

The Applicants attempt to stretch the meaning of *Corcoran* beyond the case's boundaries. The trial court in *Corcoran* did not address the foundational question of the standing to assert whether a report tied to the environmental conditions on the property itself is subject to review. Rather, *Corcoran* and § 16-50p(g) form the rule that when the Council makes a decision on the merits, it has the discretion whether to weigh or to disregard ownership versus leasehold in a property as to the merits of a Certificate of Environmental Compatibility. To claim that the Siting Council has no jurisdiction over a subject property containing indicia of contamination is absurd.

Neither the trial court, nor the Connecticut Supreme Court in *Corcoran* directly addressed the foundational question of whether an entity may, as a matter of *procedure*, invoke trade and/or commercial confidentiality to prevent evidence from being publicly heard at all. Such a question of standing is foundational, goes to the heart of jurisdiction, and may be raised at any time. Had the General Assembly, through § 16-50p(g), sought to modify the fundamental principle of standing to assert an argument or prevent public airing of evidence, it would have specifically done so in the plain language of the statute.

If anything, the spirit of the *Corcoran* rule would be to *expand* the Council's ability to receive and consider evidence on the merits. Contrary to that rule, the Applicants would have *Corcoran* function in a limiting fashion to prevent the Council from impleading Insite and from publicly hearing the full contents of the Phase 1 report as to Site A. *Corcoran* instead expands the power of the Council to reach Insite through impleader and to publicly air the Phase 1 report.

Although the Applicants cite a "legal interest in the area proposed for Site A" in their August 6 filing, they have repeatedly sought a Protective Order as to the entire property allegedly because, "[t]he Siting Council's evaluation of the Applicant's Proposed Facility at Site A should not be based on evaluations of portions of the property not impacted by the Proposed Facility that do not relate to the criteria set forth in C.G.S. § 16-50p."

The Applicants try to have it both ways: they state that Homeland has sufficient standing to protect a commercial secret as to *the entire* Site A property yet, their previous motion asserts that areas outside of the proposed construction zone have nothing to do with this application. If Applicant Homeland originally asserted the areas outside of the construction area were unrelated to this application, and hence grounds for confidentiality, how can they raise the same unrelated

confidentiality on behalf of the property owner? If those areas are, as Homeland asserts, truly unrelated, then it is for the owner, Insite, to raise commercial confidentiality in this proceeding as a necessary and indispensable party. As the Applicants would have it, AT&T and Homeland would commission but not disclose the contents of the Phase 1, and Insite would never be responsible for asserting confidentiality even though the report was as to its own property.

By its own admission, Insite is a corporate co-developer who will take over Site A long-term. It is for Insite to raise any potential harm to the marketability of the Site A property. After all, Insite was the willing purchaser of the lot from the Estate of John Atwood, is the owner of the existing conditions on the property, and will be the owner of the project long-term. Lot A is under two acres in size and a substantial disturbance of soil is planned in this project, all in a neighborhood where nearby residences draw their water from wells. Furthermore, if proposed Site A is not chosen for development, and Insite subsequently markets the property, it would inevitably need to disclose the conditions to a would-be purchaser. Despite these facts, the Applicants would have no public hearing as to the environmental conditions on the property, and there would be no cross-examination of the property owner, Insite.

These issues cut to the heart of standing to assert confidentiality as a defense, fundamental fairness, and due process in this case through the public airing of vital evidence and meaningful cross-examination.

Respectfully Submitted,

The Bald Hill Neighbors.

By_____

Anthony F. DiPentima, Esq.

August 10, 2020

Date

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CERTIFICATE OF SERVICE

I hereby certify that a true, original copy, of the foregoing were placed in the U.S. Mail on this 10th day of August 2020 and addressed to:

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Executive Director
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I further certify that an electronic copy of the foregoing was sent to:

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And I certify that electronic copies of the foregoing were sent to:

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