

State of Connecticut Siting Council

IN RE:

**APPLICATION OF HOMELAND TOWERS, LLC AND
NEW CINGULAR WIRELESS PSC, LLC d/b/a AT&T FOR A
CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY
AND PUBLIC NEED FOR THE CONSTRUCTION
MAINTENANCE, AND OPERATION OF A
TELECOMMUNICATIONS FACILITY AT ONE OF TWO
SITES IN THE TOWN OF KENT, CONNECTICUT**

DOCKET NO.488

June 16, 2020

MOTION FOR IN-PERSON HEARING AND SITE INSPECTION

The Parties/Intervenors Bald Hill Road Neighbors (hereinafter “Neighbors”); Planned Development Alliance of Northwest Connecticut (“PDA”) and the Town of Kent (“Town”) hereby move that the Connecticut Siting Council conduct its evidentiary hearing, scheduled for 2:00 P.M. on July 23, 2020, in-person in as set forth in the alternatives proposed below, and conduct an in-person inspection of Sites A and B prior to said hearing.

Discussion

General Statutes § 16-50m(a) governs the conduct of Siting Council hearings and provides, “*At least one session of such hearing shall be held at a location selected by the council in the county in which the facility or any part thereof is to be located after six-thirty p.m. for the convenience of the general public. After holding at least one hearing session in the county in which the facility or any part thereof is to be located, the council may, in its discretion, hold additional hearing sessions at other locations...*” [emphasis added]. Such sessions are subject to the Connecticut Uniform Administrative Procedure Act (“UAPA”) and Freedom of Information Act (“FOIA”). (C.G.S. §§ 4-166 *et seq*; CGS §§ 1-200 *et seq*). Although hearings “shall be held at times and locations specified by the Council” (Conn. Agencies Regs. 16-50j-20), that authority is limited by the overall scope and limitations pursuant to §16-50m of the Connecticut General Statutes.

Although an administrative proceeding may not have as many formal rules of evidence and procedure as a trial court has, the proceedings of an administrative body may not “violate the fundamental rules of natural justice”, and the hearing conducted by the administrative body “must

be fundamentally fair.” The common law rights of fundamental fairness and constitutional due process are not coextensive, but there exists an “inherent overlap” between the two concepts. (*Megin v. Zoning Board of Appeals*, 106 Conn. App. 602 (2008); *Passalugo v. Guida-Seibert Dairy Co.*, 149 Conn. App. 478, 480 n. 6 (2014)). Both due process and fundamental fairness apply to administrative hearing proceedings, such as those before the Siting Council and land use boards. (See *Barry v. Historic District Commission of the Borough of Litchfield*, 289 Conn. 942 (2008); see also *Grimes v. Conservation Commission*, 243 Conn. 266, 273 (1997)).

In normal times, compliance with due process, fundamental fairness, the UAPA and the Public Utility Environmental Standards Act (“Chapter 277a”) would be met through an in-person hearing. Indeed, the Siting Council has generally complied with these requirements in the past. However, in this matter, the Siting Council has proposed a novel process — to complete its evidentiary session and public comment session remotely, via the Zoom platform, on July 23, 2020.

Without disclosing the legal authority for its action, the Council apparently relies on one or more of the executive orders promulgated by the Governor of this state as a basis for conducting the evidentiary and public comment sessions of its hearing by Zoom. Executive Order 7B provides for the Suspension of In-Person Open Meeting Requirements under the Connecticut Freedom of Information Act (General Statutes §§ 1-206, 1-225, and 1-226) to the extent necessary to permit any public agency to meet and take such actions authorized by the law without permitting or requiring in-person, public access to such meetings, and to hold such meetings or proceedings remotely by conference call, videoconference or other technology, provided that several conditions are met. Although this *optional* virtual meeting procedure is a relatively broad exception to in-person meeting requirements of *the FOIA*, Order 7B does *not* provide for the suspension of the open meeting requirements of Public Utility Environmental Standards Act (Chapter 277a), including § 16-50m.

While Order 7B may relieve a public agency of public open meeting requirements under FOIA, the Order is *not a* blanket permission to halt all in-person proceedings. Specifically, it does not remove the Siting Council’s statutory obligation to hold at least one session of its hearing in the Town of Kent. Likewise, it does *not* suspend the requirement of the Council to provide for effective examination, cross-examination, and presentation of evidence at the evidentiary session. These remain statutory obligations of the Siting Council under the UAPA, as well as requirements

for constitutional due process and common law fundamental fairness. (*See Barry*, 289 Conn. 942; *see also Passalugo*, 149 Conn. App. at 480; *Grimes*, 243 Conn. at 273.)

Turning to Executive Order 7I, although Order 7I suspends, modifies, and clarifies certain municipal procedural requirements and time limitations regarding notice, commencement, and holding of public hearings, decisions, and appeals, including land use and other municipal boards, Order 7I also does *not* extend to the Siting Council because it does not extend to Chapter 277a of the General Statutes and does not extend to Chapter 54 of the General Statutes (the UAPA).

As for Executive Order 7M, that Order allows a degree of flexibility in meeting statutory deadlines for filings, decisions, and notice in the many permitting and other applications and administrative hearings under the purview of state agencies, and requires agencies to post any changes on their web sites, while extending regulatory administrative deadlines by 90 days. A reading of the Siting Council's schedule in this matter shows the Council will likely avail itself of the additional 90 days. But again, this Order does not suspend Chapter 277a of the General Statutes and does not alleviate the need for an effective, in-person evidentiary session compliant with § 16-50m(a) and the UAPA.

Moreover, the Executive Orders limit “social and recreational gatherings” (*see, e.g.*, Orders 7; 7D; 7N; 7X). The Siting Council's meetings are neither social nor recreational — they are mandatory proceedings under statute in performance of a vital governmental function (*See* CGS. §16-50m). That the Siting Council is an agency of the executive branch of government capable of making its own policies is also not a determinative proposition. Although the Governor may have greater authority to issue directives over executive branch agencies than over legislative or judicial bodies, and even though the Council has a certain ability to issue policies for its hearings, the Governor's orders are still bound by the General Statutes, including Chapter 277a.

As for the Regulations of Connecticut State Agencies, the Siting Council has not conducted a formal process for amending its regulations to authorize fully remote hearings. In any event, those regulations could not contravene Chapter 277a.

Other vital adjudicative tribunals in the state have declined to hold contested evidentiary hearings via Zoom. For example, the Superior Court is gradually reopening, but thus far, the Court is not holding contested trials via Zoom (*see* <https://jud.ct.gov/COVID19.htm>), even though the Court is holding certain, more limited proceedings by Microsoft Teams.

Furthermore, by July 23, Connecticut will likely be farther into its reopening plan. Phase 2 of that plan is scheduled to take effect on June 17. (See <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-and-Certification-for-Reopen>). Phase 1 began in May. As the state gradually moves to reopen, more and more gatherings and additional businesses will reopen, showing the state's commitment to returning to normal, in-person business. The undersigned parties/intervenors propose, as set forth below, several alternatives consistent with those incremental reopening plans and Chapter 277a.

In sum, although the Coronavirus has undoubtedly posed an extraordinary challenge to municipalities and state agencies, the Executive Orders promulgated by the Governor have not repealed Chapter 277a of the General Statutes and have not rendered the UAPA inapplicable. On the contrary, these statutes apply, and they weigh heavily in favor of an in-person evidentiary session fully up to the standards that the Siting Council is accustomed to holding. An evidentiary session via Zoom represents a marked departure from the usual procedures, one which falls short of the UAPA and Chapter 277a, as well as the guarantees of common law fundamental fairness and constitutional due process requirements.

The undersigned also reiterate the need for the Council and its staff to personally visit both Sites A and B. The Siting Council, in many ways, stands in the shoes of local zoning and land use boards. Thus, constitutional due process, common law fundamental fairness, and completeness of the record in this case require a first-hand familiarity with the Sites in question. In this case, a visit is even more important because a third option, that of "small cells" technology, as proposed by PDA, is viable. In the past, the Council has visited proposed sites in matters with even fewer options than are posed in this case. (See *e.g.*, *Town of Westport v. Siting Council*, 47 Conn. Sup. 382, 384-85 (2002)). A field visit is needed in this case, given that the Siting Council performs certain functions of local land use boards, that it is confronted with several options in this case, and that it has precedent of making visits to sites in-person.

Proposals

The undersigned parties/intervenors submit that, at least for purposes of the *evidentiary session* of this hearing, remote proceedings via Zoom do not comply with General Statutes § 16-50m(a), and are not supported under the executive orders and state reopening plan. Several alternatives are available that would allow the hearing to be held in-person:

1. The Siting Council could hold the evidentiary hearing session at the Kent Town Hall on the approved date of July 23, limited to only the Council, parties, and witnesses. The public could watch via Zoom. For the public comment session, the Council could sit in-person in the Kent Town Hall with a limited capacity for in-person public participation and social distancing observed. Above the limited capacity level, Zoom could be used to facilitate public participation.
2. The Council could proceed as outlined above in Option 1, but from any other appropriate location in Litchfield County.
3. The Council could hold the evidentiary session at its headquarters in New Britain on the approved date of July 23 using social distancing. In-person participation would be limited to the Council, parties, and witnesses. The public would watch via Zoom. A necessary quorum of the Council could convene the public comment session from a location in Litchfield County in-person with social distancing and limited in-person capacity. Over capacity, Zoom would be used to complete public participation.
4. The Council could avail itself of the 90-day extension in Executive Order 7M and set a later hearing date for after September 1, the date Kent Town Hall reopens for regular business to the public. The exact parameters of necessary in-person participation could be established by the status of the state reopening plan as the hearing approaches.

The above-proposed sessions would allow for the customary, in-person handling of witnesses and presentation of argument and evidence, which would limit the number of people in the room to an acceptable number under Connecticut's current re-opening plan, the statutes, and the executive orders. An open telephone or Zoom line would provide the public the ability to see and hear the evidentiary session, which provides a sufficient ability to see and hear the session

under FOIA. The public would not participate in the evidentiary session and would not appear in-person.

The in-person hearing session need not be risky. If social distancing and facemasks are required, then those measures could be implemented without much difficulty. In a relatively large space, such as the Kent Town Hall, the parties/intervenors, the Council, and the witnesses need not gather in close proximity.

The undersigned parties/intervenors are amenable to some involvement of a Zoom session for the public comment period, coupled with a period wherein the public can submit written comments to the Council. This strikes a balance between preventing the spread of Coronavirus through a remote public comment session, while allowing an in-person evidentiary session for those with a right to present evidence and examine/cross-examine witnesses. In so doing, the Council can satisfy its evidentiary *and* public comment requirements while limiting the public health risk.

As for the site visit, both proposed sites, as well as the locations of any alternative technology (i.e., “small cells”) are outdoors. Social distancing, facemasks, and other measures could be taken to protect the safety of everyone involved during the visit. This would allow the Council to fulfill due process and fundamental fairness, and to add to the record in this matter under the UAPA while adhering to public safety protocols.

Simply put, the pristine nature of the scenic vistas in and around the two sites is of such importance to the intervening parties’ case, that a site visit becomes imperative. With appropriate practical measures, a site visit becomes feasible.

Conclusion

For the foregoing reasons, the undersigned respectfully request that the Connecticut Siting Council conduct its evidentiary hearing in-person as described above, and conduct an in-person inspection of Sites A and B prior to said hearing. The undersigned hereby offer the proposals above as workable solutions that balance the interests of safety, statutory requirements, and constitutional due process and common law fundamental fairness for all parties.

Respectfully Submitted,

The Bald Hill Road Neighbors,

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6/16/20
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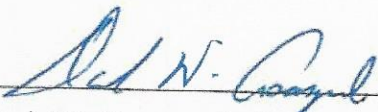
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June 16, 2020
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CERTIFICATE OF SERVICE

I hereby certify that an original copy of the foregoing was placed in the U.S. Mail on this 16th day of June, 2020 and addressed to:

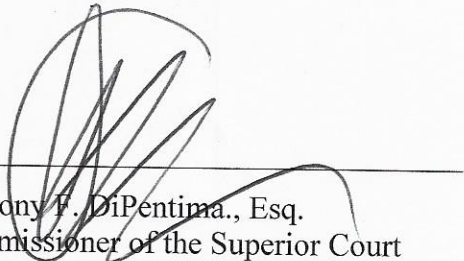
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