STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:

APPLICATION OF OPTASITE TOWERS LLC AND OMNIPOINT COMMUNICATIONS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS FACILITY AT 52 STADLEY ROUGH ROAD, DANBURY, CONNECTICUT

DOCKET NO. 366

October 27, 2008

OBJECTION TO MOTION FOR PROTECTIVE ORDER OF OCTOBER 6, 2008

On behalf of the City of Danbury, ("Danbury") (Party in this Docket) it objects to any issuance of a protective order as requested by Optasite in its referenced filing with this Council. The objections of the Danbury are as follows:

I. The exact consideration of an agreement *IS* required to be disclosed pursuant to C.G.S. Sec. 16-50o.

1. *Plain Meaning (C.G.S. 1-2z).* Connecticut General Statutes Section 1-2z provides as follows:

"The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd of unworkable results, extra textual evidence of the meaning of the statute shall not be considered".

The Applicants assert that CGS Sec. 16-50o does not require the disclosure of "...exact consideration...". Any clear and plain reading of Section 16-50o reveals no mention of the term "exact disclosure". What this statute does reveal is phraseology that states the proposition very simply:

CGS 16-50o - The applicant shall submit into the record the full text of the terms of any agreement, ***and*** (bold and italics provided) a statement of any consideration therefore, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information of trade secrets."

This language, as highlighted is amply clear. The statute requires that the applicant not only provide the full text (of the agreement), but also, a statement of any consideration. The comma between these two phrases indicates that not only does the Council wish to see the entire document, but also needs to see the amount paid for the transaction. Further, a sensible interpretation is that IF the Council wishes to "redact" the

CITY OF DANBURY
OFFICE OF THE CORPORATION COUNSEL

compensation, it must state a reason therefore, and rule according to other, contrary statutory language or legal support.

The use of both terms "full text" and "statement of compensation" provide a double requirement that all information be disclosed in order for the Council to determine the impact of this information upon the application before it.

The Applicant here provides only lip service and speculation as to *why* it claims it should not have to reveal this information. It provide no legal authority for any of its claims and request for the protection of this information, as relates to the language of CGS 16-50o. Further, although it cites the "Oysterman" case, it provides nothing in the way of explanation, clarification, citation or other authority for why "statement of compensation" does not mean "price", which is way a plain meaning interpretation would indicate to the average person.

Finally, the term "statement of compensation" can only mean "price" or "value". If the Applicant is permitted to simply <u>say</u> that it paid something for this transaction, such a statement is not only painfully obvious, unnecessary and painfully simplistic, but does not yield any relevant information to the Council to assist it in making comparisons, as will be explained further below. As one example, a glance at CGS Sec.8-129 et seq. pertaining to acquisition of property by municipal redevelopment authorities will yield helpful guidance in cases where "statements of compensation" are relevant to a financial transaction conducted in the public sector, such that any "Statement of Compensation" requires the payment of a **sum certain** into court, in order for a valid "taking" to occur by a municipality of private lands. Section 8-129 (3) states: "The redevelopment agency shall file a **statement of compensation**, (bold added) containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation..." Were a (property) acquirer to attempt to tell the court into which a deposit were to be given that it will deposit a sum but not disclose it, both the court and the condemnee would understandably be aghast. Thus, the term "statement of compensation" must be given its common and sensible meaning or at least a meaning with *relevance*, to allow all parties, including this Council, access to relevant information.

For this reason alone, the Order should be denied.

2. *The "Land Lease Agreement" was not executed with Christ the Shepherd Church.*

The Applicant misstates the Land Lease Agreement transaction as between Optasite and Christ the Sheppard (sic) Church. The referenced lease was a transaction between Optasite and Candlewood Baptist Church, the latter party being neither a "...party to the certification proceeding..." nor "any third party", therefore and arguably making any request to protect financial information from disclosure moot. The interests of the Candlewood Baptist Church are outside of the statutorily designated "third Party" or "any party to the certification" classifications, as they are simply and only a *contracting party* and nothing more. A "party" as therein defined would be the City or residents who are permitted to join with a party or act as a party themselves, or the Applicant itself. Christ the Shepherd Church as only a subsidiary contracting entity has neither a legal or

statutory basis to obtain protection from such disclosure of information, and the Applicant's request for a protective order cannot be granted as the sole transacting party (Candlewood Baptist Church) is not a party in this matter. Its successor, Christ the Shepherd Church has neither sought nor joined in any request for any order protecting it from the disclosure. Further, the Christ the Shepherd Church has, one more than one occasion, stated publicly that that it undertook the lease arrangement involuntarily and would **not** be a "party" to it, had it had a choice of its own. Therefore, there are no interests to protect here.

3. "*Proprietary Information or Trade Secrets*".

Unfortunately, the Applicant provides no statutory or legal authority for its right not to have disclosed "proprietary or trade secrets", (not that the value information in their lease is even that). A review of Siting Council and related cases in Connecticut and elsewhere yields the finding that proprietary information of trade secrets generally pertain to scientific, technical or other data that would result in the loss of a long term, sensitive or legally protected right. None of that exists here, and Applicant, simply stating that rent paid IS that doesn't make it so. This is supported by the Applicant's statement in its Motion that "Indeed, **to the best of our knowledge** (bold added)...the exact rent...has never been disclosed..."

There are ample and existing clear definitions and findings of "proprietary information" and "trade secrets" that both the Applicant may avail themselves of (and provide to this Council) to indicate that the standards of (non)disclosure are at a far higher level than that which is being asserted by the Applicant here. As one example, under FOI law, a trade secret exists where a "substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means". Director, Department of Information Technology of Town of Greenwich v. Freedom of Information Commission, 874 A2d 785, 274 Conn. 179 (2005).

Clearly the low standard of risk of disclosure in the subject matter, under all of the circumstances begs for proper and timely disclosure, particularly in the face of the public need to know.

II. The Exact Rent to be Paid by Optasite *IS* Relevant to the Siting Council's Statutory Review.

Danbury is not interested in the rent to be paid between these parties for its own sake, and respects the privacy intended. However, in the context of a case and an application where a key element of the case will be whether *alternate sites* have been examined and are available, and for what rent amounts, this information is indeed relevant. The Council is asked to consider whether the Applicant, in circumstances where the predecessor Church had to resort to a "fire sale" of its premises to Christ the Shepherd Church, obtained the unusual benefit of the "low hanging fruit" of a likely undermarket rent, where it had and has *no incentive* to examine other, fully capable sites. The reason Danbury sought the presence of the Pastor, by subpoena, was that based on public comments made, the new church really didn't want this lease, because the possible low value provided it simply made little sense in

exchange for the intrusion and risk. IF the rent at issue is truly substantially under market, the Siting Council needs to know that, so it can determine whether the Applicant has incentive to look elsewhere or not. Without that data, it has no way of determining that. There was a recent case out of Amity, Connecticut, where discussions within the consideration of an Optasite application in that area yielded comments that potential revenue from one of these sites "...was estimated at $24,000 to $40,000./year". For this level of compensation, there is a significant likelihood that at least one or more alternate sites could be available were the Applicant willing to pay market rent for such a site(s). This possibility makes rent information *highly* relevant.

In Corcoran, et. al. v. Connecticut Siting Council, 284 Conn. 455, 934 A.2d 825 (2007), originally brought in the Superior Court of New Britain, that court stated unequivocally that the (Siting) Council is not prevented from freely considering the acquisition of an interest such as a lease in the decision making about an applicant's securing of a site. One need only draw a very short line between the broad language of that stated intent, and the disclosure of rent that would permit the Council to draw relevant inferences.

While the Applicant states in its Motion that the Council should not base its evaluation of the facility on the "financial terms" of the lease, Danbury is not suggesting that; only that the Council review this information as *one of a number of factors that may be relevant pursuant to the statutes and the siting process.* This does not seem too much to ask, especially given that the amount of the compensation may vary significantly from market compensation for alternate or other sites.

III. Conclusion.

IF the Council grants the Applicant's Motion, Danbury will, of course, proceed to its other arguments, including the alternate sites. However, Danbury would suggest, that the Council may fairly infer from the refusal to disclose the rent information, that the City's argument is valid and supportable, simply because there is no perceptible harm to anyone, given the fact that the subject lease is already consummated and executory. Add to that, the Applicant's argument that the site selected covers a "dead zone" that is the only one remaining in a coverage area. Thus, what argument about competitive risk can be made under those circumstances?

The Motion should be denied.

Dated at Danbury, Connecticut, this 27th day of October 2008.

City of Danbury

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CITY OF DANBURY
OFFICE OF THE
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the Connecticut Siting Council via email, and one (1) copy was served on the Applicant's legal counsel via email, (with hard copies to be hand delivered at the hearing on 10/28/08) as follows:

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Dated: October 27, 2008

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C.G.S.A. § 16-50o

Connecticut General Statutes Annotated Currentness
Title 16. Public Service Companies (Refs & Annos)
Chapter 277A. Public Utility Environmental Standards Act (Refs & Annos)

§ 16-50o. Record of hearing. Rights of parties. Administrative notice re electromagnetic fields

(a) A record shall be made of the hearing and of all testimony taken and the cross-examinations thereon. Every party or group of parties as provided in section 16-50n shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(b) For an application on a facility described in subdivision (1) of subsection (a) of section 16-50i, the council shall administratively notice completed and ongoing scientific and medical research on electromagnetic fields.

(c) The applicant shall submit into the record the full text of the terms of any agreement, and a statement of any consideration therefor, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information or trade secrets.

(d) The results of the evaluation process pursuant to subsection (f) of section 16a-7c shall be part of the record, where applicable.

(e) A copy of the record shall be available at all reasonable times for examination by the public without cost at the principal office of the council. A copy of the transcript of testimony at the hearing shall be filed at an appropriate public office, as determined by the council, in each county in which the facility or any part thereof is proposed to be located.

C.G.S.A. § 1-2z

Connecticut General Statutes Annotated Currentness
Title 1. Provisions of General Application
Chapter 1. Construction of Statutes
§ 1-2z. Plain meaning rule

The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

C.G.S.A. § 8-129

Connecticut General Statutes Annotated Currentness
Title 8. Zoning, Planning, Housing, Economic and Community Development and Human Resources (Refs & Annos)
Chapter 130. Department of Economic and Community Development: Redevelopment and Urban Renewal; State and Federal Aid; Community Development; Urban Homesteading (Refs & Annos)
Part I. Redevelopment

§ 8-129. Agency to determine compensation and file with Superior Court and town clerks; notice to owners and interested parties. Possession of land. Certificate of taking

(a) (1) The redevelopment agency shall determine the compensation to be paid to the persons entitled thereto for real property to be acquired by eminent domain pursuant to section 8-128.

(2) For any real property to be acquired by eminent domain pursuant to section 8-128 or 8-193, or by condemnation pursuant to section 32-224, pursuant to a redevelopment plan approved under this chapter or a development plan approved under chapter 132 [FN1] or 588/, [FN2] the agency shall have two independent appraisals conducted on the real property in accordance with this subdivision. Each appraisal shall be conducted by a state-certified real estate appraiser without consultation with the appraiser conducting the other independent appraisal, and shall be conducted in accordance with generally accepted standards of professional appraisal practice as described in the Uniform Standards of Professional Appraisal Practice issued by the Appraisal Standards Board of the Appraisal Foundation pursuant to Title XI of FIRREA [FN3] and any regulations adopted pursuant to section 20-504. Each appraiser shall provide a copy of the appraisal to the agency and the property owner. The amount of compensation for such real property shall be equal to the average of the amounts determined by the two independent appraisals, except that the compensation for any real property to be acquired by eminent domain pursuant to section 8-193 or by condemnation pursuant to section 32-244 shall be one hundred twenty-five per cent of such average amount. If the agency acquires real property that is subject to this subdivision five years or more after acquiring another parcel of real property within one thousand feet of the property pursuant to a redevelopment plan or development plan, the agency shall increase the amount of compensation for the subsequent acquisition of real property by an additional five per cent for each year from the sixth year until the tenth year after the acquisition of the first parcel of real property. With respect to a redevelopment plan or development plan for a project that is funded in whole or in part by federal funds, the provisions of this subdivision shall not apply to the extent that such provisions are prohibited by federal law.

(3) The redevelopment agency shall file a statement of compensation, containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation, and a deposit as provided in section 8-130, with the clerk of the superior court for the judicial district in which the property affected is located.

(b) Upon filing such statement of compensation and deposit, the redevelopment agency shall forthwith cause to be recorded, in the office of the town clerk of each town in which the property is located, a copy of such statement of compensation, such recording to have the same effect and to be treated the same as the recording of a lis pendens, and shall forthwith give notice, as provided in this section, to each person appearing of record as an owner of property affected thereby and to each person appearing of record as a holder of any mortgage, lien, assessment or other encumbrance on such property or interest therein (1) in the case of any such person found to be residing within this state, by causing a copy of such notice, with a copy of such statement of compensation, to be served upon each such person by a state marshal, constable or indifferent person, in the manner set forth in section 52-57 for the service of civil process, and (2) in the case of any such person who is a nonresident of this state at the time of the filing of such statement of compensation and deposit or of any such person whose whereabouts or existence is unknown, by mailing to each such person a copy of such notice and of such statement of compensation, by registered or certified mail, directed to such person's last-known address, and by publishing such notice and such statement of compensation at least twice in a newspaper published in the judicial district and having daily or

weekly circulation in the town in which such property is located. Any such published notice shall state that it is notice to the widow or widower, heirs, representatives and creditors of the person holding such record interest, if such person is dead. If, after a reasonably diligent search, no last-known address can be found for any interested party, an affidavit stating such fact, and reciting the steps taken to locate such address, shall be filed with the clerk of the superior court and accepted in lieu of mailing to the last-known address.

(c) Not less than thirty-five days or more than ninety days after such notice and such statement of compensation have been so served or so mailed and first published, the redevelopment agency shall file with the clerk of the superior court a return of notice setting forth the notice given and, upon receipt of such return of notice, such clerk shall, without any delay or continuance of any kind, issue a certificate of taking setting forth the fact of such taking, a description of all the property so taken and the names of the owners and of all other persons having a record interest therein. The redevelopment agency shall cause such certificate of taking to be recorded in the office of the town clerk of each town in which such property is located.Upon the recording of such certificate, title to such property in fee simple shall vest in the municipality, and the right to just compensation shall vest in the persons entitled thereto. At any time after such certificate of taking has been so recorded, the redevelopment agency may repair, operate or insure such property and enter upon such property, and take any action that is proposed with regard to such property by the project area redevelopment plan.

(d) The notice required in subsection (b) of this section shall state that (1) not less than thirty-five days or more than ninety days after service or mailing and first publication thereof, the redevelopment agency shall file, with the clerk of the superior court for the judicial district in which such property is located, a return setting forth the notice given, (2) upon receipt of such return, such clerk shall issue a certificate for recording in the office of the town clerk of each town in which such property is located, (3) upon the recording of such certificate, title to such property shall vest in the municipality, the right to just compensation shall vest in the persons entitled thereto and the redevelopment agency may repair, operate or insure such property and enter upon such property and take any action that may be proposed with regard thereto by the project area redevelopment plan, and (4) such notice shall bind the widow or widower, heirs, representatives and creditors of each person named in the notice who then or thereafter may be dead.

(e) When any redevelopment agency acting on behalf of any municipality has acquired or rented real property by purchase, lease, exchange or gift in accordance with the provisions of this section, or in exercising its right of eminent domain has filed a statement of compensation and deposit with the clerk of the superior court and has caused a certificate of taking to be recorded in the office of the town clerk of each town in which such property is located as provided in this section, any judge of such court may, upon application and proof of such acquisition or rental or such filing and deposit and such recording, order such clerk to issue an execution commanding a state marshal to put such municipality and the redevelopment agency, as its agent, into peaceable possession of the property so acquired, rented or condemned. The provisions of this subsection shall not be limited in any way by the provisions of chapter 832. [FN4]

Supreme Court of Connecticut.
DIRECTOR, DEPARTMENT OF INFORMATION TECHNOLOGY OF THE TOWN OF GREENWICH,
v.
FREEDOM OF INFORMATION COMMISSION et al.
No. 17262.
Argued Jan. 6, 2005.
Decided June 21, 2005.

Background: Director of town's department of information technology appealed from decision of the Freedom of Information Commission ordering director to provide complainant with requested copies of computerized data from the town's geographic information system (GIS). The Superior Court, Judicial District of Stamford-Norwalk, Owens, J., dismissed the appeal, and director appealed.

Holdings: After transferring the appeal from the Appellate Court, the Supreme Court, Vertefeuille, J., held that:
(1) director had the burden to seek a public safety determination from the Commissioner of Public Works in support of his claim that the GIS data were protected from disclosure under the public safety exemption of the Freedom of Information Act;
(2) in determining whether public safety exemption applied, trial court was not required to balance the town's interest in public safety with the public's right to accessible information;
(3) the GIS data did not constitute a "trade secret" within meaning of the Act's trade secret exemption; and
(4) director failed to meet his burden to show that security or integrity of town's information technology system would be compromised by disclosure of the GIS data.

Affirmed.

Superior Court of Connecticut,
Judicial District of New Britain.
John CORCORAN et al.
v.
CONNECTICUT **SITING COUNCIL** et al.
Town of New Canaan
v.
Connecticut **Siting Council** et al.
Nos. CV04-0527048S, CV04-0527049S.
Jan. 26, 2006. FN*

FN* Affirmed. *Corcoran v. Connecticut **Siting Council***, 284 Conn. 455, 934 A.2d 825 (2007).

Background: Plaintiffs appealed **Siting Council's** grant of certificate of environmental compatibility and public need to telecommunications company for construction of a wireless telecommunications **tower** along highway.

Holdings: After consolidation, the Superior Court, Judicial District of New Britain , Robert Satter, Judge Trial Referee, held that:
(1) **Council** had power to override town zoning requirements;
(2) evidence was sufficient to support **Council's** determination that proposed telecommunications **tower's** effects on scenic values were not disproportionate when compared to need;
(3) **Council** could grant application despite Department of Transportation's written comments regarding safety;
(4) Counsel could consider lease arrangement when considering application; and
(5) interior country club **site** was not a feasible or prudent alternative location.

Appeals dismissed.

West Headnotes

[1] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Siting Council had power to override town zoning requirements when granting certificate of environmental compatibility and public need to telecommunications company for construction of a wireless telecommunications facility which exceeded town zoning regulations regarding **tower** height. C.G.S.A. § 16-50x(a).

[2] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Evidence was sufficient to support **Siting Council's** determination that proposed

telecommunications **tower's** effects on scenic values were not disproportionate when compared to need and were insufficient to deny application for certificate of environmental compatibility and public need to construct **tower**, although town plan of conservation and development designated the area where the **tower** was to be located as a "scenic viewpoint" for a "scenic vista"; **Siting Council** considered a good deal of evidence as to the impact of the **tower** in the residential area and specifically its location as a scenic vista, and **Council** imposed conditions as to its design and color to minimize the **tower's** visibility. C.G.S.A. § 16-50p(a)(3)(B).

[3] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Siting Council could grant application for certificate of environmental compatibility and public need to construct wireless telecommunications **tower** despite Department of Transportation's written comments regarding safety; application did not propose to install **tower** on state property within highway right-of-way or propose a new curb cut access point from a state highway, but rather proposed to locate **tower** on private property outside of highway right-of-way, and there was evidence that many **tower** facilities in state were safely being maintained and operated by wireless carriers and **tower** operators adjacent to, and in some cases even within, state highway rights-of-way. C.G.S.A. §§ 13b-4, 16-50j(h).

[4] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Statute providing that **Siting Council** "shall in no way be limited" by an applicant's property interest did not prohibit **Council** from considering lease arrangement for wireless telecommunications **tower site** when considering application for certificate of environmental compatibility and public need to construct **tower**. C.G.S.A. § 16-50p(g).

[5] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Statute providing that a **siting** counsel considering an application for a certificate to construct a wireless communications **tower** "shall in no way be limited by the fact that the applicant may already have acquired land" 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**. C.G.S.A. § 16-50p(g).

[6] KeyCite Citing References for this Headnote

414 Zoning and Planning
414VIII Permits, Certificates and **Approvals**
414VIII(A) In General

414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Interior country club **site** proposed by town and other plaintiffs was not a feasible or prudent alternative location for telecommunications **tower**, although it may have been aesthetically preferable to telecommunications company's proposed **site** along highway, as telecommunications provider could not reach an agreement with country club regarding the interior location, and **Siting** Counsel had no power to force the country club to agree to the interior **site** .

***871** Alan R. Spirer, Westport, for the plaintiffs in the first case.

Robert L. Marconi and John G. Haines, assistant attorneys general, for the named defendant in each case.

McCarter & English, Hartford, for the defendant Omnipoint Facilities Network 2, LLC, in each case.

Cummings & Lockwood, Greenwich, for the plaintiff town of New Canaan in the second case.

ROBERT SATTER, Judge Trial Referee.

***444** In these two cases consolidated before this court, the plaintiffs appeal the decision of the named defendant, the Connecticut siting council (council), dated February 18, 2004, approving the application of the defendant Omnipoint Facilities Network 2, LLC, a subsidiary of the defendant T-Mobile, USA, Inc. (T-Mobile), for a certificate of environmental compatibility and public need for the construction, operation and maintenance of a wireless telecommunications facility on Route 123 in the town of New Canaan.

Based upon the evidence presented at the hearing of this case before this court, the court finds that two of the plaintiffs, Wanda Corcoran and Lewis Bakes, have been financially injured by the decision of the council, and that all of the plaintiffs, including the town of New Canaan, were granted party status by the council in the proceedings before it. As a consequence, the court finds that all the plaintiffs have been aggrieved and have standing to prosecute this appeal.

The relevant facts are as follows. Pursuant to General Statutes § 16-50k, T-Mobile filed an application with the council for a certificate of environmental compatibility and public need for the construction, operation and maintenance of a wireless telecommunications facility on Route 123 in New Canaan. The facility was intended ***872** to fill a gap in coverage in that area of New Canaan.

The site selected is a twenty-three foot by nineteen foot area located on the property of the Country Club of New Canaan, Inc. (country club), on Route 123. It is adjacent to an existing Southern New England Telephone Company facility compound that is used by the local utility, and it would join the compound to create a 147 foot by 19 foot compound. The site is located in ***445** an area zoned as four acre residential. In the 2003 plan of conservation and development of the town of New Canaan, the site is within a location that is designated a scenic vista. There are eight residences within a 1000 foot radius of the proposed site, the nearest being 200 feet to the east of the proposed site. The tower will consist of a 110 foot steel silhouette pole, using stealth technology to accommodate three sets of antennas contained within the pole. The pole will be painted brown to blend in with the surrounding trees. Tree heights of surrounding trees range from seventy to ninety-five feet above the ground. The proposed tower's location is thirty-six feet from the edge of Smith Ridge Road. The structure will be designed with a midpoint break at the fifty-five foot level so that its fall zone would not extend onto the adjacent property across Smith Ridge Road, but it will still fall onto Smith Ridge Road.

T-Mobile investigated several other potential sites for the construction of the tower within the search ring. One alternate location was within the country club property and the other was on Michigan Road. The location within the country club property would be further away from Route 123 and from nearby residences, but would have a lower ground elevation and require a higher **tower**. The country club, however, would not lease property to T-Mobile for the **tower** other than on the designated **site**. The **tower** placed on Michigan Road would not provide adequate coverage of the

target area.

The **tower** will be visible from sections of Smith Ridge Road (Route 123) to the northwest and southeast of the proposed **site**, and from a portion of Country Club Road and Oenoke Ridge Road. The **tower** can be seen from approximately fifteen to twenty homes on Smith Ridge Road and from approximately ten to fifteen houses on Oenoke Ridge Road. The **council** made a finding that the silhouette structure of the **tower** when ***446** appropriately colored will not present the typical conspicuous **tower** appearance. The **council** did note, however, that a **tower** located at an interior **site** within the country club property would be aesthetically preferable to the proposed **site**.

After giving due notice of the application, the **council** held a public hearing on May 22, 2003, in New Canaan, and two hearings on July 3 and November 20, 2003, at the **council's** office in New Britain. The **council** and its staff made a field inspection of the **site** and flew a balloon to simulate the height of the **tower**.

Based upon the foregoing facts found by the **council**, it concluded that "the effects associated with the construction, operation, and maintenance of a telecommunications facility including effects on the natural environment; ecological integrity and balance; public health and safety; scenic, historic, and recreational value; forest and park; air and water purity; and fish and wildlife are not disproportionate either alone or cumulatively with other effects when compared to need, are not in conflict with the policies of the [s]tate concerning such effects, and are not sufficient reason to deny the application and therefore directs that the [c]ertificate of [e]nvironmental [c]ompatibility and [p]ublic [n]eed ... be issued to ... [T-Mobile] for the construction,***873** maintenance and operation of a wireless telecommunications facility [at] 95 Country Club Road, New Canaan, Connecticut." The council imposed the following conditions: that the tower be constructed as a silhouette structure no taller than 110 feet above ground level; that antennas be installed on the inside of the silhouette structure; that T-Mobile consult with the town of New Canaan and landowners to decide on the color of the structure; and that T-Mobile permit public or private entities to share space on the proposed tower for fair consideration and provide reasonable ***447** space on the tower at no compensation by any municipal antennas, provided that such antennas are compatible with the structural integrity of the tower.

The plaintiffs appeal that decision on the grounds that it is arbitrary, capricious and in abuse of discretion, and that it contains errors of law in light of the whole record, on the following grounds: (1) the decision violates the New Canaan zoning regulations; (2) the decision violates the New Canaan plan of conservation and development by impairing a scenic vista; (3) the decision conflicts with the department of transportation (department) safety standards; (4) the decision violates General Statutes § 16-50p (g) in that the council gave too much weight to the fact that T-Mobile had a lease on the designated site; and (5) there are feasible and prudent alternatives to the approved location.

I

STANDARD OF REVIEW

Pursuant to General Statutes § 16-50g, the standards of General Statutes § 4-183 of the Uniform Administrative Procedures Act; General Statutes §§ 4-166 through 4-189; govern the consideration of this appeal. The principles are well established. It is not the function of the trial court to retry the case or to substitute its judgment for that of the administrative agency. *Connecticut Light & Power Co. v. Dept. of Public Utility Control,* 216 Conn. 627, 637, 583 A.2d 906 (1990). A court shall affirm the decision of an agency unless the court finds that the agency's decisions are in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, clearly erroneous in view of the reliable, probative and substantive evidence of the whole record, or arbitrary, capricious or characterized by abuse of discretion. General Statutes § 4-183(j). The burden is clearly on the plaintiffs to establish these grounds challenging an administrative decision. ***448** *Blaker v. Planning & Zoning Commission,* 212 Conn. 471, 478, 562 A.2d 1093 (1989); *Lovejoy v. Water Resources Commission,* 165 Conn. 224, 229, 332 A.2d 108 (1973).

II

DISCUSSION

A

The Issue of Violation of the New Canaan Zoning Regulations

[1] Section 60-30.7 C (2)(a) of the New Canaan zoning regulations mandates that all **towers** be set back a minimum of "one hundred and twenty-five percent (125%) of the height of the **tower** from an adjoining lot line." The T-Mobile **tower**, as **approved** by the **council**, will be 110 feet high and located only 36 feet from Route 123. Sections of Route 123 and neighboring residential properties are located within the fall zone of the **tower**. As a consequence, the plaintiffs complain that the **tower** violates a specific section of the New Canaan zoning regulations. However, General Statutes § 16-50x (a) provides in relevant part: "Notwithstanding any other provision of the general statutes to the ***874** contrary, except as provided in section 16-243, the council shall have *exclusive* jurisdiction over the location and type of facilities and over the location and type of modifications of facilities subject to the provisions of subsection (d) of this section. In ruling on applications for certificates or petitions for a declaratory ruling for facilities and on requests for shared use of facilities, the council shall give such consideration to other state laws and *municipal regulations as it shall deem appropriate*...." (Emphasis added.)

The courts have interpreted this provision as giving the council the power to override municipal zoning provisions. *Westport v. Connecticut Siting Council*, 47 Conn.Supp. 382, 394, 797 A.2d 655 (2001), aff'd, ***449** 260 Conn. 266, 796 A.2d 510 (2002); see also *Sprint Spectrum, LP v. Connecticut Siting Council*, 274 F.3d 674, 677 (2d Cir.2001). Thus, it was not error for the council to issue a decision conflicting with the New Canaan zoning regulations. Section 16-50x (a) clearly contemplates that, in the event of such a conflict, the council's position should prevail. It should be further noted that the council did consider the town zoning regulations because they were presented to the council as part of T-Mobile's application.

B

The Issue of Impairing the Scenic Vista in Violation of the New Canaan Plan of Conservation and Development

[2] Section 16-50p (a)(3)(B) provides that in reaching a decision as to the public need for facility, the council should take into account the "scenic" values to determine why the adverse effects upon such values are not sufficient reason to deny the application.

The New Canaan plan of conservation and development designates the area where the tower is to be located as a "scenic viewpoint" for a "scenic vista." The council considered a good deal of evidence as to the impact of the tower in the residential area and specifically its location as a scenic vista. The council imposed conditions as to its design and color to minimize the tower's visibility. The council had to balance these factors against the public need for the telecommunications facility, and in the end concluded that the effects on scenic values were not disproportionate "when compared to need" and "are not sufficient reason to deny the application," as stated in its decision and order. The **council** thus performed its statutory obligation under § 16-50p (a) to balance competing concerns against the need for the coverage, and did not abuse its discretion.

***450** C

The Issue of the **Council's** Decision Conflicting with the Department's Safety Standards

[3] General Statutes § 16-50j (h) provides in relevant part: "Prior to commencing any hearing pursuant to section 16-50m, the **council** shall consult with and solicit written comments from the ... Department of Transportation.... Subsequent to the commencement of the hearing, said [department] ... may file additional written comments with the **council** within such period of time as the **council** designates. All such written comments shall be made part of the record provided by section 16-50o...."

The department submitted a comment to the **council** that provided as follows: "The placement of a telecommunication **tower** must be far enough away from a State of Connecticut roadway to protect the travelling public should the **tower** ever collapse. A minimum distance from the roadway of the **tower** height is required." ***875** In a subsequent communication to the **council**, the department stated that it is charged under General Statutes § 13b-4 to review proposals that may have an impact upon the safe operation of the highway system, including the placement of **towers** in proximity to critical highway infrastructure. It went on to state that the department believes "that its comments to the **[c]ouncil** concerning the potential impact upon the safety of the traveling public, including comments on the fall zone of a telecommunications **tower**, should weigh heavily in the **[c]ouncil's** deliberation." However, even the department itself in the last letter to the **council** recognized that it "does not claim to have express jurisdiction over the height of a telecommunications **tower** located on private property except for **towers** located in close proximity to an airport where the height of the **tower** may pose a risk to air safety." With respect to trees, ***451** the letter went on to state that "[t]he [department] must balance the safety of the traveling public ... against the aesthetic characteristics of the roadway...." (Citations omitted.) Thus, T-Mobile's application does not invoke any rights of the department other than the right of the department to submit comments.

The application does not propose to install the tower on state property within a highway right-of-way or propose a new curb cut access point from a state highway; rather the tower is located on private property outside of the Route 123 highway right-of-way. Thus, while the council is obligated to consult with and to solicit comments from the department, nothing in the statute requires the council to abide by the comments of the department. In fact, there can be no doubt that the department's written comments in this matter are not controlling on the council because General Statutes § 16-50w specifically provides that "[i]n the event of any conflict between the provisions of this chapter and any provisions of general statutes, as amended, or any special act, this chapter shall take precedence."

Moreover, the record reveals that there are many tower facilities all over Connecticut that are safely being maintained and operated by wireless carriers and tower operators adjacent to, and in some cases even within, state highway rights-of-way. As a consequence, the council's decision to take into account the department's comments but not to abide by them, was not an abuse of discretion.

D

The Issue of the Council's Decision Violating the Statutory Mandate that Its Decision Not be Unduly Influenced by the Lease Agreement

[4] Section 16-50p (g) provides: "In making its decision as to whether or not to issue a certificate, the council ***452** shall in no way be limited by the fact that the applicant may already have acquired land or an interest therein for the purpose of constructing the facility which is the subject of its application." The plaintiffs argue that the **council's approval** of the application rested heavily on the fact that T-Mobile held a lease for the **site** and could not negotiate an alternate **site** on the property with the country club. Section 16-50p (g) specifically forbids the **council** from allowing a property interest to influence its decision and the plaintiffs claim that this is precisely what the **council** did, which constituted an abuse of its discretion.

council did, which constituted an abuse of its discretion.

[5] The plaintiffs misconstrue the statute. The phrase "in no way be limited" contained 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 ***876** not prohibited from considering such an interest in determining whether the certificate should be issued. The 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**.

In this case, the plaintiffs would like the **tower** located on other property of the country club. The country club refused to lease a portion of its interior property, and the plaintiffs paint the country club as the bete noire for this refusal. The **council** has no power to compel it to do so. Moreover, the **council** was not overly induced to **approve** the location because T-Mobile had leased the particular **site**. The evidence was that, in order to provide coverage to the area and eliminate a coverage gap that existed in the heavy traveled portion of New Canaan, the **tower** had to be placed within a certain radius, and that the specific location chosen met that requirement.

***453** E

The Issue of Feasible and Prudent Alternatives to the **Approved** Location

[6] The plaintiffs argue that the location of the **tower** on other property of the country club would have less impact on the traveling public to use Route 123 and "represents a feasible and prudent alternative to the **approved** location." The **council** itself conceded in its findings that the "**tower** located at an interior **site** within the [c]ountry [c]lub property would be aesthetically preferable to the proposed **site**." The **council** also found, however, that T-Mobile "could not reach an agreement with the [c]ountry [c]lub regarding an alternate interior location for a facility." Since T-Mobile and the country club could not reach an agreement and since the **council** has no power to force the country club to agree, the country club's property was not a feasible alternative.

The court finds no merit to all of the plaintiffs' contentions and, as a consequence, dismisses the appeals.

Conn.Super.,2006.
Corcoran v. Connecticut **Siting Council**
50 Conn.Supp. 443, 934 A.2d 870

Motions, Pleadings and Filings (Back to top)

- HHB-CV-04-0527049-S (Docket) (Apr. 12, 2004)
- HHB-CV-04-0527048-S (Docket) (Mar. 25, 2004)

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