STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:
APPLICATION OF NEW CINGULAR WIRELESS PCS, LLC (AT&T) FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS TOWER FACILITY AT 8 BARNES ROAD IN THE TOWN OF CANAAN (FALLS VILLAGE)

DOCKET NO. 409

February 16, 2011

NEW CINGULAR WIRELESS PCS LLC (AT&T) REPLY TO THE TOWN OF CANAAN (FALLS VILLAGE) INLAND WETLAND/CONSERVATION COMMISSION MOTION TO STRIKE AT&T'S APPLICATION

New Cingular Wireless, PCS, LLC ("AT&T") by its attorneys, Cuddy & Feder LLP, respectfully submits this reply to the Town of Canaan (Falls Village) Inland Wetlands/Conservation Commission motion to strike AT&T's Application in this proceeding.

Development and Management Plans ("D&M Plans)

Pursuant to Section 16-50j-75 of the Regulations of Connecticut State Agencies ("RCSA"), the Council may require the preparation of full or partial D&M plans. Sections 16-50j-76 through 16-50j-77 of RCSA describe the information to be provided in a D&M plan and Section 16-50j-75(c) of RCSA sets forth the procedure for preparation of D&M plans. With respect to procedure, Section 16-50j-75(c) of RCSA specifically identifies the preparation of the D&M plan by the *certificate holder* (emphasis added). Accordingly, pursuant to the procedures set forth in RCSA, the D&M plan is prepared after issuance of a Certificate by the Siting Council.

In its interrogatories to AT&T, the Town of Canaan Inland Wetlands/Conservation Commission requested information that is provided in a D&M plan. As such, AT&T responded

that the requested information would be provided when a D&M plan is prepared. Pursuant to RCSA, the D&M plan is prepared by the certificate holder after issuance of a Certificate.

It is respectfully submitted that the Siting Council can effectively balance the public need of AT&T's proposed Facility with any environmental effects associated therewith based on the information, documents, reports, responses and details submitted by AT&T in this proceeding. AT&T's record in this proceeding is consistent with the information required and evaluated by the Siting Council when reviewing applications. Accordingly, information that is provided in a D&M plan after issuance of a Certificate is not warranted for review.

The Siting Council Has Exclusive Jurisdiction Over AT&T's Proposed Facility

Pursuant to Section 16-50x(a) of Connecticut General Statutes ("CGS"), the Siting Council has exclusive jurisdiction over wireless telecommunications facilities. Review and approval by the Siting Council of AT&T's proposed Facility in this proceeding are "in lieu of all certifications, approvals, and other requirements of state and municipal agencies…." CGS Section 16-50x(a). As such, no local land use, zoning, wetland or other permits are required for AT&T's proposed Facility.

The Siting Council's exclusive jurisdiction over wireless telecommunications facilities is well established. *See* Westport v. Connecticut Siting Council, 260 Conn. 266, 796 A.2d 510 (2002), holding that the exclusive jurisdiction of the Siting Council precluded the town from applying its zoning regulations and other local laws; and Corcoran v. Connecticut Siting Council, 50 Conn.Supp. 443, 934 A.2d 870 (Super. Ct. 2006), holding that the Siting Council's exclusive jurisdiction over wireless facilities under CGS 16-50x(a) allows it to override municipal provisions. For convenience, copies are attached hereto.

Given the Siting Council's exclusive jurisdiction over AT&T's proposed Facility in this proceeding, compliance with local regulations is not required. Accordingly, it is respectfully submitted that AT&T's response that the Siting Council has exclusive jurisdiction over its proposed Facility is the appropriate response to any requests for compliance with local regulations and/or submission of applications for local review.

Conclusion

For the reasons set forth herein, it is respectfully submitted that AT&T appropriately and fully responded to all interrogatories in this proceeding and as such, the Town of Canaan's Inland Wetlands/Conservation Commission motion to strike AT&T's Application should be denied.

CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing was sent electronically and by overnight delivery to the Connecticut Siting Council with copy to:

Ellery W. Sinclair
Town of Canaan (Falls Village)
201 Under Mountain Road
Falls Village, CT 06031
(860) 824-7454
wml61@comcast.net

Patty & Guy Rovezzi
36 Barnes Road
Falls Village, CT 06031
(860) 824-0358
rovezzi2005@yahoo.com

Frederick J. Laser
Town of Canaan
Planning and Zoning Commission
Town Hall
108 Main Street
P.O. Box 47
Falls Village, CT 06031
(860) 824-0707
zonelaser@aol.com

Dated: February 16, 2011

Lucia Chiocchio

cc: Michele Briggs, AT&T
David Vivian, SAI
Anthony Wells, C Squared
Scott Pollister, C Squared
Dean Gustafson, VHB
Michael Libertine, VHB
Christopher B. Fisher, Esq.

Supreme Court of Connecticut.
TOWN OF WESTPORT
v.
CONNECTICUT SITING COUNCIL et al.
Cellco Partnership
v.
Zoning Board of Appeals of the Town of Westport.

Nos. 16600, 16601.
Argued March 13, 2002.
Decided May 21, 2002.

Town sought judicial review of a decision of the Connecticut Siting Council approving cellular service carrier's application for a certificate of environmental compatibility to build a telecommunications tower in town. Thereafter, carrier sought judicial review of a decision of town's zoning board of appeals upholding denial of carrier's application for a certificate of zoning compliance required to obtain the building permit for the tower. The Superior Court, Judicial District of New Britain, Cohn, J., consolidated the appeals and entered separate judgments in favor of carrier. Town appealed. The Supreme Court held that: (1) town had standing to appeal from Council's decision; (2) Council had exclusive jurisdiction over tower that would be shared by both cellular and noncellular carriers; and (3) Council's decision to defer consideration of town's zoning regulations until after approval of tower did not prejudice town.

Affirmed.

West Headnotes

[1] Environmental Law 149E ⚷654

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek654 k. Government entities, agencies, and officials. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)

Town was aggrieved by decision of state Siting Council approving cellular service provider's application for a certificate of environmental compatibility to build a telecommunications tower, and thus, town had standing to bring administrative appeal from Council's decision, where town asserted theory that it had right apply its local zoning ordinances because both cellular and noncellular providers would use tower and that Council's decision interfered with that right. C.G.S.A. § 16-50x(a).

[2] Zoning and Planning 414 ⚷1030

414 Zoning and Planning
414I In General
414k1019 Concurrent or Conflicting Regulations; Preemption
414k1030 k. Telecommunications uses. Most Cited Cases
(Formerly 414k14)

Pursuant to Public Utility Environmental Standards Act, state Siting Council had exclusive jurisdiction over telecommunications tower that would be shared by both cellular and noncellular carriers, precluding town from retaining jurisdiction to enforce its own municipal zoning laws with respect to tower. C.G.S.A. §§ 16-50x(a), 16-50i(a)(6).

[3] Zoning and Planning 414 ⚷1030

414 Zoning and Planning
414I In General
414k1019 Concurrent or Conflicting Regulations; Preemption
414k1030 k. Telecommunications uses. Most Cited Cases
(Formerly 414k14)

State Siting Council's procedural decision to defer consideration of town's zoning regulations until after Council's approval of cellular carrier's application for certificate of environmental compatib-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

ility and public need to build a telecommunications tower did not prejudice town where tower was to be located, considering that Council conditioned its approval on carrier's compliance with some of town's recommendations, indicating that Council recognized town's concerns. C.G.S.A. § 4-183(j).

****511*266** Ira W. Bloom, with whom was Michael S. Toma, Westport, for the appellant in each case (plaintiff town of Westport and defendant zoning board of appeals of the town of Westport).

***267** Kenneth C. Baldwin, with whom, on the brief, were Bradford S. Babbitt and Joey Lee Miranda, Hartford, for the appellee in both cases (Cellco Partnership).

Mark F. Kohler, assistant attorney general, for the appellee in the first case (defendant Connecticut Siting Council).

Richard Blumenthal, attorney general, and Phillip Rosario and Neil Parille, assistant attorneys general, filed a brief for the office of the attorney general as amicus curiae.

Mary-Michelle U. Hirschoff, Bethany, filed a brief for the Connecticut Conference of Municipalities as amicus curiae.

Jonathan S. Zorn, Willimantic, and Kenneth Ira Spigle, pro hac vice, filed a brief for Sprint Spectrum L.P. as amicus curiae.

BORDEN, NORCOTT, KATZ, PALMER and ZARELLA, Js.

****512** PER CURIAM.

This is a consolidated appeal [FN1] emanating from a decision of the Connecticut siting council (council), the named defendant in the first case, approving, subject to certain modifications and conditions, an application of the defendant Cellco Partnership (Cellco), doing business as Bell Atlantic Mobile, filed pursuant to the Public Utility Environmental Standards Act; General Statutes § 16-50g et seq.; for a certificate of environmental compatibility and public need for the construction, operation and maintenance of a telecommunications tower facility (tower) to be located in the town of Westport (town). Cellco's application proposed to share the tower with four other wireless telecommunication ***268** service providers,[FN2] including both cellular and noncellular providers. The council approved the application following three public hearings held pursuant to General Statutes § 16-50m, [FN3] at which the town participated ****513** and opposed Cellco's application. In addition, the ***269** four other service providers participated as intervenors in the council proceedings.[FN4]

FN1. The plaintiff in the first case, the town of Westport, and the defendant in the second case, the zoning board of appeals of the town of Westport, appealed from the trial court's judgments to the Appellate Court. We then transferred the consolidated appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199(c).

FN2. The other providers are: Springwich Cellular Limited Partnership (Springwich); Sprint Spectrum L.P., doing business as Sprint PCS (Sprint); Nextel Communications of the Mid-Atlantic, Inc., doing business as Nextel Communications (Nextel); and Omnipoint Communications, Inc. (Omnipoint). Springwich, like Cellco, is a federally licensed provider of cellular service. Sprint and Omnipoint are federally licensed providers of wireless service known as personal communications service, and Nextel is a federally licensed provider of wireless service known as enhanced specialized mobile radio service.

FN3. General Statutes § 16-50m provides: "(a) Upon the receipt of an application for a certificate complying with section 16-50 *l*, the council shall promptly fix a com-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

mencement date and location for a public hearing thereon not less than thirty days nor more than one hundred fifty days after such receipt. 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. If the proposed facility is to be located in more than one county, the council shall fix the location for at least one public hearing session in whichever county it determines is most appropriate, provided the council may hold hearing sessions in more than one county.

"(b) (1) The council shall hold a hearing on an application for an amendment of a certificate not less than thirty days nor more than sixty days after receipt of the application in the same manner as a hearing is held on an application for a certificate if, in the opinion of the council, the change to be authorized in the facility would result in any material increase in any environmental impact of such facility or would result in a substantial change in the location of all or a portion of the facility, other than as provided in the alternatives set forth in the original application for the certificate, provided the council may, in its discretion, return without prejudice an application for an amendment of a certificate to the applicant with a statement of the reasons for such return. (2) The council may hold a hearing on a resolution for amendment of a certificate not less than thirty days nor more than sixty days after adoption of the resolution in the same manner as provided in subsection (a) of this section. The council shall hold a hearing if a request for a hearing is received from the certificate holder or from a person entitled to be a party to the proceedings within twenty days after publication of notice of the resolution. Such hearing shall be held not less than thirty days nor more than sixty days after the receipt of such request in the same manner as provided in subsection (a) of this section. (3) The county in which the facility is deemed to be located for purposes of a hearing under this subsection shall be the county in which the portion of the facility proposed for modification is located.

"(c) The council shall cause notices of the date and location of each hearing to be mailed, within one week of the fixing of the date and location, to the applicant and each person entitled under section 16-50*l* to receive a copy of the application or resolution. The general notice to the public shall be published in not less than ten point, boldface type.

"(d) Hearings, including general hearings on issues which may be common to more than one application, may be held before a majority of the members of the council.

"(e) During any hearing on an application or resolution held pursuant to this section, the council may take notice of any facts found at a general hearing."

FN4. Residents of Clinton Avenue and Residents of Sunny Lane, two interested groups representing residents in the areas likely to be affected by the proposed construction and operation of the tower, also participated in the proceedings.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

The council's decision approving the application was predicated on its determination that it had jurisdiction over the proposed facility because the facility would be "used in a cellular system" within the meaning of General Statutes § 16-50i(a)(6).[FN5] Indeed, the council asserted that, pursuant to General Statutes § 16-50x (a),[FN6] ***270** it had *exclusive* authority, maintaining that the town does not retain jurisdiction to enforce its own municipal laws, despite the fact that the proposed tower would have both cellular *and* noncellular attachments. In addressing the merits of whether to issue the certificate, the council found that Cellco's existing facilities in the area did not provide adequate coverage or capacity in the northern portion of the town and noted similar deficiencies by the other carriers. The council determined that shared access to the tower by the cellular and noncellular service providers would be consistent with state law and policy promoting shared use. With regard to the potential environmental impact of the facility, the council made extensive findings supporting its conclusions that "[d]evelopment of the ... site would involve minimal land disturbance and would not substantially alter the character of the natural resources including wetlands and watercourse, vegetative composition, and wildlife habitats. Furthermore, there are no environmental constraints at this site [that] would justify denial of this site." Finally, in response to ****514** concerns raised by the town, in order to minimize the impact on the residential neighborhood, the scenic quality of the Merritt Parkway and the Poplar Plains brook that traversed the proposed site, the council ordered that the tower be reduced in height and relocated on the lot further away from the inland wetlands and the watercourse than proposed by Cellco.

FN5. General Statutes § 16-50i(a) provides in relevant part: " 'Facility' means ... (6) such telecommunication towers, including associated telecommunications equipment, owned or operated by the state, a public service company or a certified telecommunications provider or *used in a cellular system,* as defined in the Code of Federal Regulations Title 47, Part 22, as amended, which may have a substantial adverse environmental effect, as said council shall, by regulation, prescribe...." (Emphasis added.)

A minor technical change, which is not relevant to this appeal, was made to § 16-50i(a)(6) in 1999, after the council had rendered its decision in this case. See Public Acts 1999, No. 99-286, § 8. References herein are to the current revision of the statute.

FN6. General Statutes § 16-50x (a) provides: "Notwithstanding any other provision of the general statutes to the 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 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. Whenever the council certifies a facility pursuant to this chapter, such certification shall satisfy and be in lieu of all certifications, approvals and other requirements of state and municipal agencies in regard to any questions of public need, convenience and necessity for such facility."

Following the council's approval of the application and grant of the certificate of environmental compatibility and public need, subject to certain conditions, Cellco ***271** proceeded with plans to construct the approved tower. It submitted the certificate to the town zoning enforcement officer in order to receive the zoning certification necessary to obtain a building permit. The zoning officer informed Cellco that its failure to comply with the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

town's zoning regulations prevented the issuance of the permit. Cellco appealed from the zoning enforcement officer's decision to the zoning board of appeals, which thereafter denied the appeal.

Pursuant to General Statutes §§ 4-183 and 16-50q,[FN7] the town appealed from the council's decision approving Cellco's application for the certificate of environmental compatibility, and pursuant to General Statutes §§ 8-8 and 8-10,[FN8] Cellco appealed from the zoning board of ***272** appeals' decision denying its appeal from the zoning officer's denial of its application for a certificate of zoning compliance. See *Westport v. Connecticut Siting Council,* 47 Conn. Sup. 382, 797 A.2d 655, (2001). Because the claims overlapped, the trial court consolidated the appeals.

FN7. General Statutes § 4-183(a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section...."

General Statutes § 16-50q provides: "Any party may obtain judicial review of an order issued on an application for a certificate or an amendment of a certificate in accordance with the provisions of section 4-183. Any judicial review sought pursuant to this chapter shall be privileged in respect to assignment for trial in the Superior Court."

FN8. General Statutes § 8-8(b) provides: "Except as provided in subsections (c), (d) and (q) of this section and sections 7-147 and 7-147i, any person aggrieved by any decision of a board may take an appeal to the superior court for the judicial district in which the municipality is located. The appeal shall be commenced by service of process in accordance with subsections (e) and (f) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes. The appeal shall be returned to court in the same manner and within the same period of time as prescribed for civil actions brought to that court."

In 1999, a minor technical change, not relevant to this appeal, was made to § 8-8(b). See Public Acts 1999, No. 99-238. References herein are to the current revision of the statute.

General Statutes § 8-10 provides: "The provisions of sections 8-8 and 8-9 shall apply to appeals from zoning boards of appeals, zoning commissions or other final zoning authority of any municipality whether or not such municipality has adopted the provisions of this chapter and whether or not the charter of such municipality or the special act establishing zoning in such municipality contains a provision giving a right of appeal from zoning boards of appeals or zoning commissions and any provision of any special act, inconsistent with the provisions of said sections, is repealed."

[1] The trial court first considered Cellco's claim that, because the council has exclusive jurisdiction over the siting of a telecommunications tower, pursuant to the Public Utility Environmental Standards Act, and the town had no direct role in the siting process, the town was not aggrieved and, therefore, the court did not have jurisdiction to consider the town's appeal. ****515** See *Connecticut Business & Industry Assn., Inc. v. Commission on Hospitals & Health Care,* 214 Conn. 726, 729, 573 A.2d 736 (1990) (party must be aggrieved to have standing to bring administrative appeal). The trial court rejected that contention, however, concluding that, because, under the town's theory, a mixed use of cellular *and* noncellular providers, as in this case, would allow the town to apply its local laws and ordinances, the decision of the council interfer-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

ing with the town's rights made it an aggrieved party.

[2][3] Turning to the merits of the consolidated appeals, the trial court addressed the issue of whether the council improperly asserted its exclusive authority in locating the tower and, concomitantly, whether the zoning board of appeals improperly denied Cellco's appeal from the denial of its application for a certificate of zoning compliance necessary for the issuance of a building permit. The trial court determined, based upon its reading of §§ 16-50x (a) and 16-50i(a)(6),[FN9] in conjunction with General Statutes § 16-50p (b)(1)(B) and (b)(2),[FN10] that ***273** the legislature intended to give the council exclusive jurisdiction over telecommunication towers, including those that are shared by cellular and noncellular carriers. The trial court next considered the town's argument that the council's actions were procedurally and substantively illegal. Applying a limited standard of review pursuant to § 4-183(j), the court examined whether the council's findings were supported by substantial evidence in the record and whether its decision approving the application subject to certain modifications reflected a proper application of the pertinent statutory factors set forth in the Public Utility Environmental Standards Act. Concluding that the council's actions were proper, the trial court next turned to the town's procedural claim that the council had acted improperly by deferring any consideration of the town's zoning regulations until after the council's approval of the ***274** application for ****516** the certificate of environmental compatibility and public need. Following its examination of the record before the council, which included testimony and exhibits relating to the town's zoning and other regulatory concerns, the court rejected the town's procedural claim, concluding that the council had recognized the town's concerns, including the factors encompassing environmental and residential objections, prior to the application approval, as evidenced, in part, by it conditioning its approval on Cellco's compliance with some of the town's recommendations. Accordingly, the trial court, in separate judgments, dismissed the town's appeal and sustained Cellco's appeal. This appeal fol- lowed.

FN9. See footnotes 5 and 6 of this opinion.

FN10. General Statutes § 16-50p (b) provides in relevant part: "(1) Prior to granting an applicant's certificate for a facility described in subdivision (5) or (6) of section 16-50i, the council shall examine, in addition to its consideration of subdivisions (1) to (5), inclusive, of subsection (a) of this section ... (B) whether such facility, if constructed, may be shared with any public or private entity which provides telecommunications or community antenna television service to the public, provided such shared use is technically, legally, environmentally and economically feasible at fair market rates, meets public safety concerns, and the parties' interests have been considered....

"(2) When issuing a certificate for a facility described in subdivision (5) or (6) of subsection (a) of section 16-50i, the council may impose such reasonable conditions as it deems necessary to promote immediate and future shared use of such facilities and avoid the unnecessary proliferation of such facilities in the state. The council shall, prior to issuing a certificate, provide notice of the proposed facility to the municipality in which the facility is to be located. Upon motion of the council, written request by a public or private entity which provides telecommunications or community antenna television service to the public or upon written request by an interested party, the council may conduct a preliminary investigation to determine whether the holder of a certificate for such a facility is in compliance with the certificate. Following its investigation, the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

> council may initiate a certificate review proceeding, which shall include a hearing, to determine whether the holder of a certificate for such a facility is in compliance with the certificate. In such proceeding, the council shall render a decision and may issue orders which it deems necessary to compel compliance with the certificate, which orders may include, but not be limited to, revocation of the certificate. Such orders may be enforced in accordance with the provisions of section 16-50u."

Our careful examination of the record, coupled with the briefs and arguments of the parties, persuades us that the judgments of the trial court should be affirmed. The question of aggrievement, and the issues pertaining to whether the council's jurisdiction was exclusive and whether there existed any prejudicial procedural impropriety, were properly resolved in the thoughtful and comprehensive memorandum of decision filed by the trial court. See *Westport v. Connecticut Siting Council,* supra, 47 Conn. Sup. at ----, 797 A.2d 655. Because that memorandum of decision fully addresses the arguments raised in the present appeal, it would serve no useful purpose for us to repeat the discussion therein contained. Accordingly, we adopt the trial court's well reasoned decision. See *Walsh v. National Safety Associates, Inc.,* 241 Conn. 278, 282, 694 A.2d 795 (1997); *Molnar v. Administrator, Unemployment Compensation Act,* 239 Conn. 233, 235, 685 A.2d 1107 (1996); *Greater Bridgeport Transit District v. State Board of Labor Relations,* 232 Conn. 57, 64, 653 A.2d 151 (1995); *Advanced Business Systems, Inc. v. Crystal,* 231 Conn. 378, 380-81, 650 A.2d 540 (1994).

The judgments are affirmed.

Conn.,2002.
Town of Westport v. Connecticut Siting Council
260 Conn. 266, 796 A.2d 510

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.

934 A.2d 870
50 Conn.Supp. 443, 934 A.2d 870
(Cite as: 50 Conn.Supp. 443, 934 A.2d 870)

H

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] Zoning and Planning 414 1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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] Zoning and Planning 414 1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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] Zoning and Planning 414 1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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] Zoning and Planning 414 ⟹1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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] Zoning and Planning 414 ⟹1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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] Zoning and Planning 414 ⟹1399

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1399 k. Telecommunications towers and facilities. Most Cited Cases
(Formerly 414k384.1)

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

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

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.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

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 § 16-50q, 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 zon-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

ing 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 com-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

ments 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.

[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 require-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

ment.

***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

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.