STATE OF CONNECTICUT
SITING COUNCIL

T-Mobile Northeast, LLC Application for a Certificate of Environmental Compatibility and Public Need For a Telecommunications Facility Located at Edison Road, Trumbull, Connecticut.	:	DOCKET #421
	:	APRIL 16, 2012

CATT'S POST-HEARING BRIEF

The Citizens Against Trumbull Tower, ("CATT") a voluntary association and intervening party, hereby submits its post hearing brief and proposed findings of fact for consideration by the Council.

CATT urges the Council to reject the certificate on the grounds that the applicant has failed to demonstrate that there is a substantial need for the facility at this location or that the impacts of siting the proposed facility at this location will not outweigh the need for the facility. Primarily, this is a case of over-reaching. The Applicant seeks to build a facility 170 feet tall where it only needs 130 feet to meet its claimed objectives. The remaining height is driven by the empire building of a shady communications consultant for the Town of Trumbull who claims without substantial evidence that there is a need for the speculative height to provide emergency communications for the local police department.

Significant citizen opposition has arisen due to the fact that the proposed facility is surrounded by neatly kept residential neighborhoods in close proximity and with staggering views of the proposed facility. In short, the proposed facility shatters residential expectations by violating Town zoning regulations which the Council must consider under Conn.Gen.Stat. §16-50x which states in relevant part:
"When evaluating a telecommunications facility within a particular municipality…the

Council shall consider any locations preferences or criteria (1) provided to the council pursuant to section 16-50gg or (2) that may exist in the zoning regulations of said municipality as of the submission date of the application to the council."

BACKGROUND

CATT timely intervened in these proceedings by application dated October 5, 2011. Pursuant to Conn.Gen.Stat. §22a-19 ("CEPA"), §16-50n and §4-177a, CATT is an entity which has a direct interest in the proceedings which will be specifically and substantially affected as it is a voluntary association who members include abutters and neighbors to the proposed facility and whose purpose is conservation of natural resources in the Town of Trumbull where the proposed facility is to be located.

T-Mobile originally approached the Town with a design for a 130 foot facility which would meet its needs. (Letter from HPC Development February 9, 2009, p. 3) The Police Communications Director, Sgt. Arlio stated at the Planning Zoning Commission hearing on the proposed lease that the tower "would extend 130 ft from the ground" (P&Z Minutes June 16, 2009, p.6) Presumedly, the police department would have only supported the lease before the P&Z Commission if the height were sufficient to meet its needs.

The application to the Council now claims a need and seeks approval for a massive towering facility 170ft tall which no other carrier will co-locate on.

T-Mobile admitted multiple times during the hearings that it needs only 130 ft but it would *prefer* 140ft if they can get it. The remaining 40 feet of this eyesore would be to service the police department's unspecified future needs as vaguely articulated by Northeast Communications, the Town of Trumbull's communications consultant. [1]

[1] It should be understood that Northeast Communication makes the point that the alternate sites proposed by CATT alternate sites (e.g.: St. Joseph's, Booth Hill tower) cannot be consider since they are not owned by the town. Yet the antenna in Mr. Fine's proposal that is driving the overall height of the tower is based on a non-existing town lease of rooftop space at Sacred Heart University. Keep in mind

Northeast's perspective is not without bias and credibility issues. Northeast has an interest in the future servicing contract for the proposed facility and its witness recently plead guilty to misappropriation of funds evidencing perhaps an undue emphasis on financial motivation. Moreover, the accuracy of his testimony comes further into question when one considers that he testified that he assumed a tree height of 100 feet in calculating line of sight propagation, but Mr. Libertine testified, as he has in many proceedings before the Council, that average tree height in Connecticut suburban locations is 65 feet. It is perhaps convenient for the Applicant to present testimony based upon an outlandishly conservative higher tree height for propagation purposes even though it does not reconcile with the lower heights accepted as reality. It is undisputed that a 170 foot tower would be far above building and tree heights in the area in any event.

Credibility aside, when pressed, Northeast did not produce coverage maps of current and proposed future coverage from the existing and future facility at various heights. In other words, the applicant failed to present substantial evidence upon which the Council could determine the lowest necessary height for the proposed facility. See, *Finely v. Orange*, 228 Conn. 12, 48 (2010).

A. Standard of Law Which the Commission's Decision Must Follow

While the Telecommunications Act is often a used as a shibboleth by telecommunications carriers to suggest that regulatory bodies must approve whatever application they would like in the name of providing a nationwide network of coverage, the Council recently noted on September 22, 2011 in Docket 408 (Hartland) that:

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this is a non-existing microwave relay station, for a service that has no existing FCC license, for a service that is yet to have any origination point. The only sure thing about the Sacred Heart University fixed relay station is that Northeastern Communications, Mr. Fine's employer, would design, provide, build, and manage this relay station.

> Notwithstanding that the 1996 Telecommunications Act pre-empts the Council from determining the need for telecommunication facilities, the Act does not preempt states from determining whether a particular tower is needed in the location where proposed, and if needed, whether it should be sited at the proposed location. Not every tower that marginally decreases a coverage gap or improves service to a limited number of users must be approved. Against the magnitude of the need for a particular tower, namely the size of the coverage gaps, and the number of calls that are impeded, the Council must balance the adverse environmental impacts created by that tower.
> (Opinion, Docket 408)

The Council's decision must be based upon substantial evidence in the record. "Substantial evidence' requires evaluation of the entire record, including opposing evidence, *See American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981), and requires a decision to be supported by "less than a preponderance but more than a scintilla of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951)).

Burden of Proof

The applicant to an administrative agency bears the burden of proof. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 593 (1993). It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted.) *Zhang v. Omnipoint Communications Enterprises, Inc*., 272 Conn. 627, 645 (2005), quoting *Nikitiuk v. Pishtey*, 153 Conn. 545, 552 (1966); see *Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669, 678

(2011) ("[The burden rests with the applicant to demonstrate its entitlement to the requested relief."); C. Tait, Connecticut Evidence (3d Ed.2001) § 3.3.1, p. 136 ("[whoever asks the court to give judgment as to any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense").

The applicant, T-Mobile, has the burden of proof to show it is entitled to a certificate of environmental compatibility and public need for the proposed cellular communications tower under the Public Utility Environmental Standards Act, General Statutes §§ 16-50g et seq.

The statutes governing siting council consideration of applications for a certificate of public need are silent as to the standard of proof that the applicant must meet in order for the application to be granted. "In the absence of state legislation prescribing an applicable standard of proof ... the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings .... " *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 821 (2008).

Due Process and Fundamental Fairness.

The requirements of fundamental fairness and due process apply to siting council procedures. *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990); *Rosa v. Connecticut Siting Council*, Superior Court, judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1,2007),2007 WL 829582, *Torrington v. Connecticut Siting Council*, Superior Court, judicial district of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

In *Grimes v. Conservation Commission*, the Supreme Court defined the parameters of "fundamental fairness" in administrative proceedings:

Although no constitutional due process right exists in this case, we have recognized a common law right to fundamental fairness in administrative hearings. "The only requirement [in administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice." *Miklus v. Zoning Board of Appeals*, 154 Conn. 399,406, 225 A.2d 637 (1967).

Fundamentals of natural justice require that "there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary .... " *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 146- 47,215 A.2d 104 (1965). Put differently, "[d]ue process of law requires that the parties involved
have an opportunity to know the facts on which the commission is asked to act ... and to offer rebuttal evidence." *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. lOS, 149-50,627 A.2d 1257 (1993) (administrative agency "cannot properly base its decision ... upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them"); *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice
and right to produce relevant evidence); *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of

administrative notice requirements is to allow parties to "prepare intelligently for the hearing." *Jarvis Acres, Inc. v. Zoning Commission*, supra, 163 Conn. at 47, 301 A.2d 244. (Footnotes omitted.) *Grimes v. Conservation Commission*, 243 Conn. 266, 273-4 (1997).

The siting council is bound by these requirements in its consideration of this application.

B. The Applicant Has Failed to Satisfy Its Burden of Proof Under Conn.Gen.Stat. §16-50p For the Issuance of Certificate of Environmental Compatibility and Public Need

Pursuant to its own enabling legislation, the Council must find that the Applicant has proven that there is a significant public need for the facility. Furthermore, the Council must weigh the “nature of the probable environmental impact of the facility”.

Even if the Applicant were to show a need for the facility, its presentation cannot overcome the probable impact to scenic resources and surrounding neighborhoods as demonstrated by the organized concern shown by surrounding residents who will have a view of this vastly increased tower.

The Applicant has and will no doubt make much in its brief that the neighborhood is not some pristine bucolic landscape like the one this Council considered in Docket 408 (Hartland), but nevertheless the views of the sky from residential property are a natural resource of this state worthy of protection. The aesthetic value of land is a "natural resource." *See Tarnapol v. Connecticut Siting Council*, 212 Conn. 157 (1989).

The Council’s enabling legislation, Conn. Gen. Stat. §§16-50g and 16-50p(3)(b) ,

does not distinguish between suburban views and rural views. It simply states in relevant part:

> **Sec. 16-50g. Legislative finding and purpose.** The legislature finds that …telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, ***scenic***, historic and ***recreational values of the state***. The purposes of this chapter are: ***To provide for the balancing of the need for adequate and reliable public utility services*** … ***with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values***;

> **Sec 16-50p(3)(b)** - The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine… The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, … on... the natural environment, ecological balance, … **scenic**, historic and recreational values, forests and parks…

Particularly compelling was Lois Gillern's testimony regarding the views from her property on Merwyn Street. Currently, the existing latticework tower barely figures in her view. As proposed, the new facility will loom 70 feet higher and significantly more massive in diameter and angular projections. Similar views will be had from immediate neighbors and middle distance neighbors alike. (See Appendix C 'Abutter's Map" to Bulk Filed NEPA Review) Within the immediate vicinity, there are 15 houses within 300 feet of the proposed structure (Exhibit L, T-mobile's Application); there are 136 residences within 1000 feet of the proposed structure, a number which increases dramatically as one moves to 1500 feet. (Id. and see Lois Gillern Prefiled Exhibits)

The Applicant's viewshed map (Application Exhibit M3) clearly shows that almost every single property within a quarter mile (1330 feet) will have a view of the tower.[2]

[2] It bears noting that T-mobile used a 2 mile viewshed impact ring to make the

While the Applicant’s exhibit describes the impact in acres, something more appropriate for forest land, the impact in terms of numbers of houses or families or citizens would number in the hundreds or thousands respectively.

C. The Facility Would Violate the Standards the Community Has Set For Such Towers

The regulations provided by Trumbull's Planning and Zoning Commission are very explicit with regard to cell towers. Refer to pages 179-204 of the regulations which are included in the bulk filings in this docket. Many of those requirements would not be met by the proposed cell tower, including the following:

a) The use of land distant from higher density residential properties, where visual impact can be minimized, shall be encouraged.

b) The use of land in areas of high density residential properties is the least preferable selection.

c) The applicant has agreed to implement all reasonable measures to mitigate the potential adverse impacts of the facilities.

d) Visual/aesthetic: Towers shall, when possible, be sited where their visual impact is least detrimental to highly rated scenic and historic sites...

d) The minimum lot size shall be 10 acres.

f) Not to be closer than 750' to any structure ...used as primary or secondary residences.

g) The Fall Zones for towers shall be at least the height of the tower plus 75 feet.

h) [Not to be] Within 2,000' of any historic district or property.

While the Town exempted itself from the zoning laws, the Council should give due consideration to the performance standards Trumbull set for towers. (See argument

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viewshed impact appear diminished in size. A one half mile ring would have been more demonstrative. For example, a ring 2 miles in diameter appears to suggest the facility viewshed impact barely exists while a in this setting the densely populated area within one quarter should have been the focus.

regarding §16-50x in the introduction above)

D. There Exist Alternative Configurations for the Facility Which Have Not Been Employed But Which Would Minimize the Visual Impact

Testimony from Kevin Plumb, a certified professional broadcast engineer who has no future stake or interest in additional work from the Town or T-Mobile (and no criminal record), established that there are less intrusive configurations for the proposed facility and that simple, established and long standing technology like multi-band antenna combining and antenna tuners which could eliminate some of the proposed individual whip antennas, many of which are only theoretically needed in the future should some as yet unplanned upgrade happen years from now.

Mr. Plumb also submitted an RF analysis which demonstrates that the increase in height proposed by Mr. Fine at the Edison Road site will not appreciably increase the reach of the EMS transmissions over existing facilities with most of the increase coming over Long Island Sound and Long Island. (Prefiled testimony of Plumb, exhibits)

In addition, Mr. Plumb submitted analysis showing that an existing site at Monitor Hill (a/k/a Tashua Hill) has significant additional terrain height and could be used for better coverage.

E. Conclusion

The intervening citizens have shown by their photographic submissions and by using the Applicant's own photosims that there will be visual impacts to the aesthetic value of

the surrounding neighborhood and that a reasonable person would consider such impacts to be severe. Located as it is, very near the Trumbull exit from the Merrit Parkway, the tower would be the first introduction a visitor to Trumbull would see.

The Council should not forget the public hearing at the Trumbull Town Hall during which the citizenry spoke elegantly against this facility and the likely impacts on their neighborhood. The Town's State Representatives, several Town Council members who felt they had been duped by the presentation of the lease to them, the Police Union (which arguably stands to benefit the most from an improved communications tower, if such an improvement were genuine (which it is not) and a standing room only overflow crowd of residents all spoke with one voice against the Tower. This unity of voice speaks volumes.

As there are readily available alternative technologies which could ameliorate these impacts, insisting on the current configuration constitutes unreasonable environmental impact.

Moreover, the proposed height is excessive and unwarranted. In fact, the top forty feet of the 171 foot facility cannot be justified under the Council's regulations which require a determination of public need for *the facility*. In this case 'the facility' is *only* the T-Mobile installation which T-Mobile admits is adequate at 130 feet. This Council has no jurisdiction to authorize the larger facility.

The Council should keep in mind that the 170 foot tower requires that the tower up to the130 foot level will be more massive in order to support the higher structure. Thus, there will be unnecessary impact to surrounding properties due to the unjustified municipal facilities.

As a result, the Application poses a reasonable likelihood of unreasonable impact to aesthetic values and should be denied.

Respectfully Submitted,

Citizens Against Trumbull Tower,

By Keith R. Ainsworth

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 16th day of April, 2012 and addressed to:

Ms. Linda Roberts, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 electronic) (hand delivery to be made to the Council Dec 6th).

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