

STATE OF CONNECTICUT
SITING COUNCIL

Florida Tower Partners LLC d/b/a North Atlantic Towers : DOCKET # 458
Application for a Certificate of Environmental Compatibility
and Public Need for the construction, maintenance,
and operation, of a telecommunications facility at one of two
locations at Bethel
Tax Assessor's Map 65, Block 57, Lot 122
62-64 Codfish Hill Road, Bethel, Connecticut. : AUGUST 13, 2015

INTERVENOR'S POST-HEARING BRIEF

The Codfish Hill Environmental Trust, ("CHET") a voluntary association and intervening party, hereby submits its post hearing brief and proposed findings of fact for consideration by the Council.

CHET 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 which outweighs the visual impacts on the scenic views in the surrounding area. This in part was demonstrated by AT&T withdrawing from the proceedings and in part by the testimony presented by the public during the proceedings.

However, if the Council finds that a tower must be placed at the proposed property on Codfish Hill, CHET has a strong preference for ***a stealth monopine configuration at Site 2*** to render some relief for those homes that will have a direct view of the tower and for the citizens of Bethel who would have views from various points as they travel through Bethel.

All other parties and intervenors having no preference, in all fairness, the substantial local preference should prevail.

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

While the Telecommunications Act is often 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:

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 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. IOS, 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 the proposed facility.

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) 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...

C. PROPOSED FINDINGS OF FACT

1. On June 2, 2015 a public hearing was held in Bethel for the purpose of taking public comment on the proposed tower. The hearing was very well attended by hundreds of citizens and public officials who were nearly unanimous in their opposition to the placement of the proposed tower at 62-64 Codfish Hill Road.
2. The Codfish Hill Environmental Trust, a voluntary association, intervened in this docket opposing the proposed Site 1 and Site 2 as presented by the Applicant, but with

a strong preference for Site 2 as it was more centrally located on the Lessor's property.

3. The Town of Bethel through its First Selectman urged the Council to consider other locations, but that if the tower had to be sited on Codfish Hill that Site 2 was preferred as it was more centrally located on the property.

4. It is reasonable to infer that the owner of the property on which the proposed facility is to be sited prefers Site 1 because it is further from her own house on the property regardless of its impact to the neighbors.

5. No intervenor, public official or member of the public submitted sworn testimony stating a preference for Site 1.

6. Intervenor's witness, Karyl Kirschbaum, testified that the base of the proposed tower at Site 1 will be directly visible by a number of neighbors on Twin Maple Drive because she could see the truck setting up the balloon float from her house. (Testimony of Karyl Kirschbaum; Transcript pp.19; 20, lines 3-5)

7. Applicant's witness, Michael Libertine, testified at the continued public hearing on July 14th, 2015 that a monopine stealth configuration at Site 2 would give some relief to residents with views of the proposed tower at close views (Transcript p.60) and at greater distances, at the Bethel High School for example, that a monopine would be difficult to distinguish from surrounding trees even though it would extend beyond the treeline (Transcript p. 61; Transcript p. 62, lines 10-15)

8. Mr. Libertine testified that Site 2 was the superior site from a visibility perspective and that the numbers would bear that out. (Transcript p.40, lines 7-24; lines 22-24: "...the numbers bear that out from a residential standpoint solely Site 2 would have less visibility")

9. Mr. Libertine testified that it made "a fairly dramatic difference to near views and therefore I favor that site [Site 2]". (Transcript p.42, lines 4-9)

10. Mr. Libertine also testified that there are more homes closer to Site 1 than Site 2.

(Transcript p. 74, lines 1-8)

11. Applicant's wetlands expert, Dean Gustafson, testified that there "isn't a significant difference in the two" sites regarding wetlands impacts. (Transcript p.42, lines 3-7)

12. Upon withdrawal of AT&T's intervention in these proceedings, there is no evidence in the administrative record which supports AT&T's need for a telecommunications facility at the proposed locations. AT&T's withdrawal letter dated June 26, 2015 is an unsworn document supported by no technical data upon which the Council can determine AT&T's need. (Transcript at p.73 lines 2-10)

13. The Intervenor, Cellco Partnership d/b/a Verizon Wireless, indicated both during the proceedings and in its post-hearing brief that "[t]he installation of Cellco antennas on the NAT tower at either Site 1 or Site 2 locations on the Property would satisfy Cellco's wireless objectives in the area."

Homework Assignment

At the July hearing the Council requested that an enlarged copy of the traffic count data for Bethel taken as administrative notice be filed into the record. Attached is a copy of traffic data which shows that the average daily traffic count on Codfish Hill Road is something less than 1100 cars, which is 1/7th the number represented by the Applicant in its Application Exhibit G, page 5, Table 3. This suggests an overstatement of the number of persons potentially served by the facility and calls into question the accuracy of Applicant's representations generally.

In conclusion, if the Council decides to place a tower on Codfish Hill, Site 2 should be chosen as the visibility at closer view would be greater from a residential perspective, the driveway would be shorter, wetlands impacts are no greater than at Site , the sole carrier involved in the proceedings, Verizon, states no preference for either site and the neighbors who intervened in these proceedings have a strong preference for Site 2.

Respectfully Submitted,

Codfish Hill Environmental Trust,

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CERTIFICATE OF SERVICE

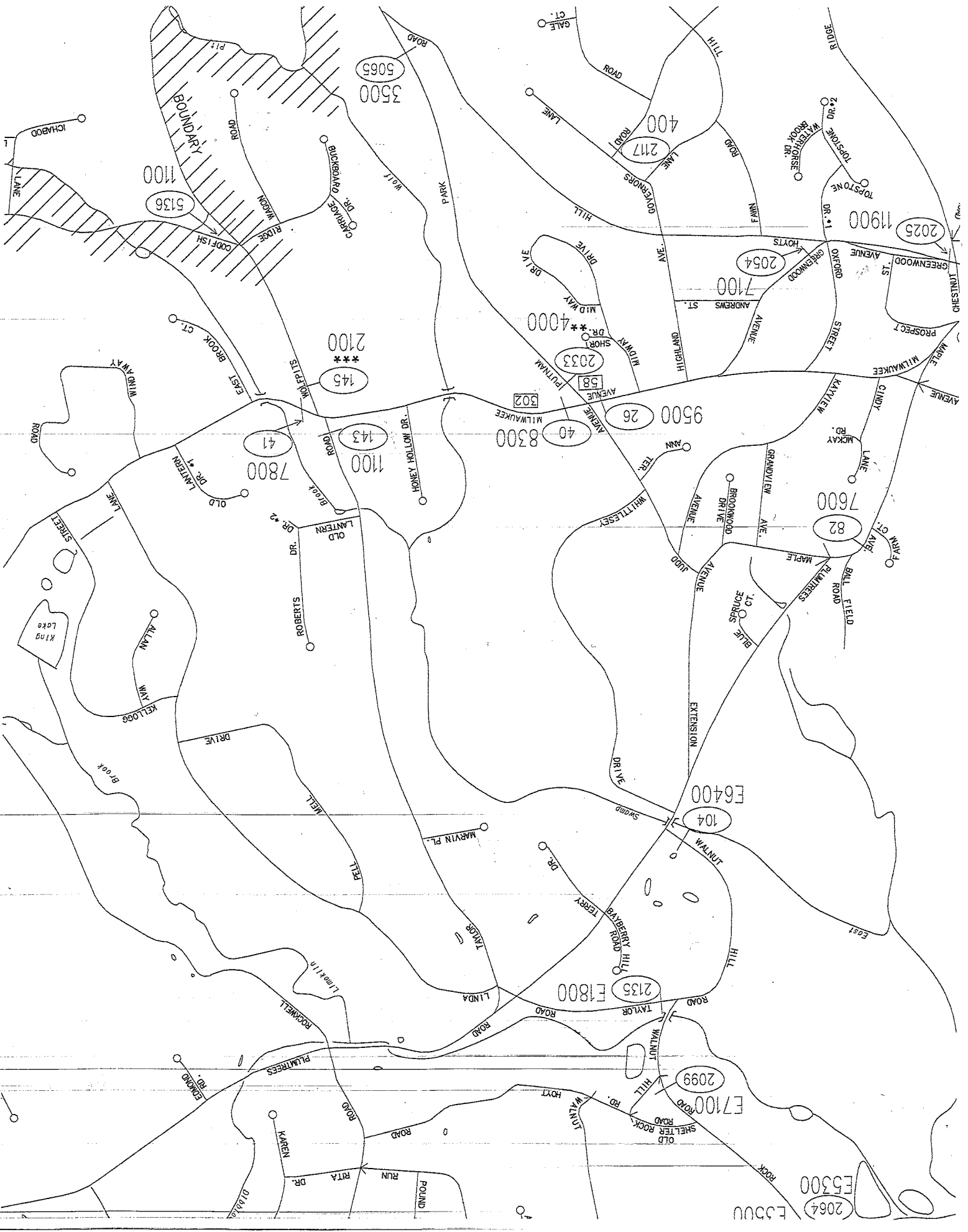
This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 13th day of August, 2015 and/or electronically filed with the following parties:

Ms. Melanie Bachman, Esq., Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic) (US Mail/electronic).

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