STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

The United Illuminating Company Application for a Certificate of Environmental Compatibility and Public Need for the Construction, Maintenance, and Operation of a Proposed 115-kV/13.8-kV Electric Substation and Associated Facilities at 3-7 Wildflower Lane, Trumbull, Connecticut	)	Docket 317
	)	November 21, 2006

BRIEF OF THE UNITED ILLUMINATING COMPANY REGARDING CONDEMNATION

The United Illuminating Company ("UI") submits this brief to address questions that the Connecticut Siting Council (the "Siting Council") requested during its hearing on October 26, 2006 be briefed in connection with UI's application for a Certificate of Environmental Compatibility and Public Need ("Certificate") for a proposed electric substation in Trumbull, Connecticut:

A. Can the Siting Council *approve* condemnation of Site 11 if UI proposes to acquire it?

B. Can the Siting Council *order* UI to acquire Site 11 by condemnation?

C. Can the *Town of Trumbull* condemn Site 11 and sell it to UI?

I. Summary

A. In a proceeding for a Certificate, UI can condemn property after the Siting Council has granted a Certificate for the facility to be located on the property.

B. The Siting Council does not have the power to order a public service company to condemn private property.

C. The Town may be able to condemn Site 11 and sell the property to UI for the proposed substation.

II. Background

UI is seeking a Certificate from the Siting Council for an electric substation to be located on UI-owned property situated at 3-7 Wildflower Lane in Trumbull ("Site 1"). During the municipal consultation period in this Docket, the Town of Trumbull (the "Town") proposed a location on Quarry Road in Trumbull ("Site 11") as an alternate site for the substation. UI evaluated this site when it was originally suggested by the Town, and determined that since locating a substation on Site 11 would cost approximately $6 million more than doing so on Site 1, Site 11 was not a viable alternative. Application, page 45. UI does not own Site 11, and the current owner has informed UI that he was not interested in selling Site 11.[1] In light of this information, during the Certificate proceedings, the Siting Council asked that the questions set forth above be briefed.

[1] Subsequently, UI received from the Town a copy of a letter, indicating that the family ownership group would be willing to sell Site 11 to UI for $7.5 million. Because no appraisal has been done, UI does not know whether this amount is above the appraised value and, if so, by how much. For purposes of this Brief, UI has assumed that the owner of Site 11 is not willing to sell Site 11 at its appraised value. The filing of this Brief should not be considered an endorsement, express or implied, of Site 11. UI continues to consider this site to be substantially inferior to Site 1 for the reasons discussed at the October 26, 2006 hearing.

III. Jurisdiction of the Connecticut Siting Council

The Siting Council, established pursuant to the Public Utility Environmental Standards Act ("PUESA"), Conn. Gen. Stat. §§ 16-50g et seq., is charged with the responsibility of balancing the need for public utility services with the environmental consequences associated with the location, construction and operation of facilities which produce and supply said services. Conn. Gen. Stat. § 16-50g. In order to perform its statutory functions, the Siting Council has exclusive jurisdiction over the location and type of certain utility facilities, including electric substations.[2] Conn. Gen. Stat. § 16-50x(a). Among other things, PUESA requires public service companies to obtain a Certificate from the Siting Council prior to any exercise of any right of eminent domain in contemplation of, commencement of preparation of a site for, or commencement of construction or supplying of a facility or any modification of a facility, that may, as determined by the Siting Council, have a substantial adverse environmental effect. Conn. Gen. Stat. § 16-50k.

Pursuant to § 16-50l(a)(1)(A)(iv), an applicant for a Certificate in connection with an electric substation must include in its application "justification for adoption of the . . . site selected, including comparison with *alternative . . . sites which are environmentally, technically and economically practical*." (emphasis added.)

[2] "Facility" is defined to include, among other things, "any electric substation or switchyard designed to change or regulate the voltage of electricity at sixty-nine kilovolts or more or to connect two or more electric circuits at such voltage, which substation of switchyard may have a substantial adverse environmental effect, as determined by the council . . . and other facilities as the council may, by regulation, prescribe. . . ." Conn. Gen. Stat. § 16-50i(a)(4).

IV. UI's Condemnation Power

In 1951, the State of Connecticut delegated eminent domain power to UI by Special Act authorizing it to condemn private property. *See* 1951 Conn. Spec. Acts 482 § 1 (Vol. XXVI, p. 348).[3] Specifically, § 1 of the 1951 Special Act empowers UI to ". . .enter upon, take and use all such land, interests in land and real estate as shall be *necessary or convenient* in the exercise of any of its rights, powers and privileges, subject to the terms and conditions provided in section 2 of this act; provided said company shall be held to pay all damages that may arise to any person or person from such taking."[4] (Emphasis added.) Thus, provided UI pays a landowner just compensation, it may take private property in connection with the provision of electrical services.[5]

Traditionally, the determination of what property was necessary for public utility purposes, and therefore subject to condemnation, lay within the discretion of the public utility company, subject only to judicial review of the company's good faith in making the determination. *Connecticut Power Co. v. Powers*, 142 Conn. 722, 725-726, 118 A.2d 304, 305 (1955); 1A Nichols, *Eminent Domain* (3rd Ed. rev. 2005) § 4.11 at 4-153 ("The overwhelming weight of authority makes clear that the question of necessity or expediency of a taking by eminent domain lies within the discretion of the legislatures and is not a proper subject of judicial review."). Given the express delegation of the eminent domain power by the legislature, courts were loathe to intervene unless

[3] The above-referenced 1951 Special Act forms a part of UI's Charter.

[4] The exercise of the power of eminent domain by a public utility company is also contemplated by PUESA and amply supported by case law. *See Connecticut Light & Power Co. v. Costello*, 161 Conn. 430, 288 A.2d 415 (1971); *Connecticut Light & Power Co. v. Powers*, 142 Conn. 732, 118 A.2d 304 (1955); *Connecticut Light & Power Co. v. Bennett*, 107 Conn. 587, 141 A.654 (1928); *Connecticut Light & Power Co. v. Huschke*, 35 Conn. Supp. 303, 409 A.2d 153 (1979).

[5] Just compensation is the market value of the condemned property when put to its highest and best possible use at the time of taking. *See Iroquois Gas Transmission System, L.P. v. Tanner*, CV 304185, 1994 WL 684679 *3 (Conn. Super. 1994), citing *Robinson v. Westport*, 222 Conn. 402, 405, 610 A.2d 611 (1992).

presented with evidence that the company acted in bad faith or unreasonably.[6] *Powers*, at 725; *see also* Nichols, *supra*, at § 3.01[3] at 3-20 ("Like the sovereign itself, the party exercising the delegated power may make a determination as to the necessity or propriety of exercising the power, which, in the absence of fraud, bad faith or abuse of discretion, is not reviewable by the courts.")

In 1971, with the adoption of PUESA, the legislature severely circumscribed the powers of public utility companies to take interests in private property. *Connecticut Light & Power Co. v. Huschke*, 35 Conn. Supp. 303, 409 A.2d 153 (1979). Under PUESA and the regulations adopted thereunder, with certain limited exceptions, prior to any exercise of its eminent domain powers in contemplation of a facility, UI must obtain a Certificate from the Siting Council in accordance with Conn. Gen. Stat. § 16-50k(a).[7] *See also Huschke,* at 307-8 ("The legislature has imposed upon the [Siting Council] the duty of first determining environmental factors and the public need before a utility can take property by condemnation for a facility . . . ."). In order to obtain a Certificate, a utility company must furnish the Siting Council with certain information, including, in the case of a substation: (i) a statement and full explanation of why the substation is necessary and how the

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[6] Note, however, that "[i]t is incumbent upon the condemnor to exhaust all reasonable efforts to obtain the land it desires, by agreement." *New York, N.H. & H.R.R. Co. v. Long*, 69 Conn. 424, 438, 37 A.1070 (1897); *West Hartford v. Talcott*, 138 Conn. 82, 89, 82 A.2d 351 (1951).

[7] Conn. Gen. Stat. § 16-50k(a) provides in relevant part: "Except as provided in subsection (b) of section 16-50z, no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, or commence the construction or supplying of a facility, or any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect, in the state without first having obtained a certificate of environmental compatibility and public need . . . issued with respect to such facility or modification by the council. Any facility with respect to which a certificate is required shall thereafter be built, maintained and operated in conformity with such certificate and any terms, limitations or conditions contained therein." Section 16-50z(b), which lists certain exceptions, provides in relevant part: "a person engaged in the transmission of electric power . . . may acquire real property, and exercise any right of eminent domain, granted by the general statutes or any special act therefore, for (1) relocation of a transmission facility or right-of-way required by a public highway project or other governmental action; (2) acquisition of additional rights or title to property already subject to an easement or other rights for electric transmission or distribution lines; or (3) widening a portion, not exceeding one mile in length, of a transmission right-of-way for reasons of safety or convenience of the public."

facility conforms to a long-range plan for expansion of the electric power grid serving the state and interconnected utility systems, that will serve the public need for adequate, reliable and economic service; and (ii) justification for adoption of the route or site selected, including a comparison with alternative routes or sites which are environmentally, technically and economically practical. Conn. Gen. Stat. § 16-50l. Thus, as a practical matter, where a utility company proposes to take property by eminent domain, the determination of what is "necessary and convenient" has, in part, been shifted from the utility to the Siting Council. Because a Certificate must be obtained prior to initiation of eminent domain proceedings, by the time an eminent domain proceeding arrives in court, the Siting Council has already determined that there is a public need for the proposed project, evaluated alternative routes and sites presented during the Certificate process, and through its order at least implicitly approved of the condemnation.[8]

[8] Courts have, in limited circumstances, inquired into alternative sites to proposed utility facilities in the context of administrative appeals. *City of Torrington v. Connecticut Siting Council*, CV 90 0371550S, 1991 WL 188815, **11 (Conn. Super. 1991)(finding that record contained substantial evidence concerning the site selection process and that since the Siting Council did not find a significant adverse environmental impact resulting from construction of the proposed electricity generation facility at the proposed site, there was no need to consider additional sites); see also *City of New Haven v. Connecticut Siting Council*, CV 02 0513195S, 2002 WL 31126293 (Conn. Super. 2002); *Wilson Point Property Owners Ass'n v. Connecticut Light & Power Company*, 145 Conn. 243, 140 A.2d 874 (1958). However, because judicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act, Conn. Gen. Stat. §§ 4-166 et seq., the scope of a court's review is narrowly restricted and agency decisions are frequently left undisturbed. See e.g. *Town of Preston v. Connecticut Siting Council*, 20 Conn.App. 474, 797 A.2d 655, cert. denied, 214 Conn. 803 (1990); *see also Wilson Point Property Owners Ass'n.* (rejecting plaintiffs' argument in favor of alternative site that utility company did not own, finding that the action of the DPUC was not arbitrary, reasoning that "it is not necessary that justification for the action of the [DPUC] rest upon a finding that there is no alternative" and noting that "[i]t is enough if, in the deliberate, carefully considered judgment of the [DPUC], the site approved serves the public necessity and convenience better than any alternative offered.")

V. After the Siting Council issues a Certificate for a facility, UI may condemn the property on which the facility would be located.

As a preliminary matter, the statutory framework of PUESA clearly contemplates that the Siting Council may approve a site that a public service company does not own.[9] For example, Conn. Gen. Stat. §16-50l(a)(1)(A)(vii) requires that an applicant submit a schedule of dates showing the proposed program of right-of-way or property acquisition, construction, completion and operation. In addition, Conn. Gen. Stat. §16-50p(g) provides that "[i]n making its decision as to whether or not to issue a certificate, the siting council 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 construction of the facility which is the subject of its application." Moreover, Conn. Gen. Stat. § 16-50x(b) provides, "[w]henever the council has certified a facility . . . any person joining in the application for such certification shall be empowered to exercise its power of eminent domain, granted by the general statutes or any special act, to acquire property for such facility for the benefit of all persons receiving such certificates." Read together, these provisions contemplate circumstances in which the public service company does not yet own the proposed facility site(s) and support the proposition that the Siting Council has the power to approve and certify sites that are not owned by the applicant, including, in this case, Site 11.

[9] Connecticut courts have not explicitly addressed the question of whether the Siting Council may, in a Certificate proceeding, approve a site that the applicant does not own – effectively requiring the applicant to acquire the site by purchase or condemnation.

VI. The Siting Council does not have the power to *order* a public service company to condemn private property.

Although under PUESA the Siting Council has the power to approve a site for a proposed facility that a public service company does not own, PUESA does not empower the Siting Council to order a public service company to take property by eminent domain. *See* Conn. Gen. Stat. §§ 16-50g et seq. The decision of whether to take private property by eminent domain lies solely within the discretion of the particular utility company. *Powers*, at 305; *see also* Nichols, *supra*, § 4.11, at 4-153. The Siting Council's jurisdiction is limited to those purposes set forth under PUESA and centers on the location and type of facilities. *See* Conn. Gen. Stat. § 16-50g. Nowhere does PUESA provide that the Siting Council may order a public utility company to condemn private property, especially where, as here, the utility company has no wish or intention to condemn.

VII. The Town of Trumbull may be able to condemn Site 11 and sell the property to UI for the proposed substation.

The power to condemn private property for public use is a necessary incident of a state's sovereignty. *Board of Water Comm'rs v. Johnson*, 86 Conn. 151, 84 A. 727 (1912); *New York, H. & N.R. Co. v. Boston, H. & E.R. Co.*, 36 Conn. 196, 37 A. 1070 (1869). The state may condemn private property that is necessary to effectuate a public use.[10] *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 104 A.2d 365 (1954); *West Hartford v. Talcott*, 138 Conn. 82, 82 A.2d 351 (1951). In Connecticut, it is well settled that "[t]he determination of what property is necessary to be taken in

[10] As a general rule, the authority to condemn property is strictly construed in favor of the owner and against the condemnor. *State v. McCook*, 109 Conn. 621, 147 A. 126 (1929).

any given case in order to effectuate a public use is, under our constitution, a matter for the exercise of legislative power." *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 259 Conn. 592, 600, 790 A.2d 1178 (2002). A municipality may exercise the right of eminent domain "only when it is conferred upon it by the legislature expressly or by necessary implication, since a municipal corporation has no more right than any other corporation to condemn property." 11 McQuillan, Municipal Corporations, (3rd Ed. rev.) § 32.12.

The Connecticut legislature has, by statute, delegated its power to take property by eminent domain to municipalities. Conn. Gen. Stat. §§ 48-1 et seq. Municipalities are authorized to condemn property under Conn. Gen. Stat. § 7-148, which empowers a municipality to "take by eminent domain any lands, rights, easements, privileges, franchises or structures which are necessary for the purpose of establishing, constructing or maintaining any public work, or for any municipal purpose, in the manner prescribed by the general statutes." Conn. Gen. Stat. § 7-148(c)(6)(A)(iii). Conn. Gen. Stat § 48-6(a) further provides that "any municipal corporation having the right to purchase real property for its municipal purposes which has, in accordance with its charter or the general statutes, voted to purchase the same shall have the power to take or acquire such real property." Thus, it is clear that a municipality may take property by eminent domain for a "municipal purpose."[11]

Municipalities may also exercise the power of eminent domain through local development and redevelopment agencies. Connecticut's Redevelopment Act, Conn. Gen. Stat. §§ 8-124 et seq., permits the use of eminent domain by local redevelopment agencies to rehabilitate blighted areas

[11] The procedure for taking property for a municipal purpose under Conn. Gen. Stat § 48-6 is set forth in Connecticut's Redevelopment Act. Conn. Gen. Stat. § 48-12.

within areas slated for redevelopment. Under the Redevelopment Act, a local redevelopment agency is authorized to prepare a plan for redevelopment and to take private property within the redevelopment area in order to carry out the objectives of the plan. Private property taken for the purpose of eradicating conditions existing in redevelopment areas is taken for a "public use." *See Gohld Realty Co.,* at 142-43. In addition, Chapter 132 of the General Statutes, which governs municipal development projects, authorizes the use of eminent domain by municipal development agencies in order to foster industrial and business development. Conn. Gen. Stat. §§ 8-186 et seq. Under that statutory framework, municipal development agencies may condemn private property located within a designated development area by eminent domain for the purpose of economic development in accordance with an approved development plan. Conn. Gen. Stat. § 8-193; *see also Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), *aff'd*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

Connecticut courts have construed "municipal purpose" to include, among other things, acquisition of property for the establishment of an airport, the construction of a school or school playing field. *Hall v. Town of Weston*, 167 Conn. 49, 60-2, 355 A.2d 79 (1974); *Town of Danbury v. Danbury Airport Corp.*, 9 Conn.Supp. 317 (Conn. Super. 1941); *see also* Conn. Gen. Stat. § 48-3 (town may take land for town hall); Conn. Gen. Stat. § 48-3 (town may take land for school purposes); Conn. Gen. Stat. § 48-8 (town may condemn land for records building). In the present case, the Town may condemn Site 11 pursuant to Conn. Gen. Stat. §§ 7-128 and 48-6 *if* it can demonstrate that Site 11 will be used for a municipal purpose. Whether the construction of an electric substation qualifies as a "municipal purpose" is not clear.

Although *Kelo v. City of New London* involved a taking pursuant to Conn. Gen. Stat. § 8-193 by a development corporation in accordance with the Municipal Development Project statutes, it is instructive on the issue of public purpose. In *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), the Supreme Court, citing *Hawaii Housing Authority v Midkiff*, 467 U.S. 229, 244, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), rejected the petitioners' contention that the mere fact that property would be transferred to private individuals upon condemnation would diminish the public character of the taking, explaining that "[i]t is only the taking's purpose and not its mechanics . . . that matters in determining public use." *Kelo*, at 2664. In light of the comprehensive character of the City's development plan, the thorough determination that preceded its adoption and the fact that the Municipal Development Projects statutes specifically authorize the use of eminent domain to promote economic development, the court held that the plan unquestionably served a public purpose and therefore that the exercise of eminent domain power in accordance with the plan satisfied the public use requirement of the Fifth Amendment. *Kelo,* at 2668.

Here, the Siting Council has asked whether the Town can take Site 11 by eminent domain and transfer it to UI for the purpose of constructing the substation. Although case law provides no clear answer to this question, together, Conn. Gen. Stat. § 48-6 and *Kelo* suggest that the Town has a viable argument that it has the power to take Site 11 and transfer it to UI because the substation would serve a municipal purpose, that is – the provision of reliable electric service to the local and regional community at large. In any case, even if the Town has the power to condemn property and then transfer it to a public utility for a particular public utility use, the Town would have no power

to compel the utility to accept a grant for that purpose, or to forego acquiring or using other property.

Respectfully submitted,

THE UNITED ILLUMINATING COMPANY

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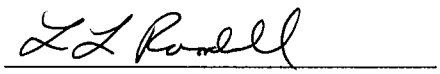
CERTIFICATION

This is to certify that on this 21st day of November, 2006, the original and twenty (20) copies of the foregoing was delivered by hand to the Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051, and one (1) copy was mailed, postage prepaid, on this 21st day of November, 2006, to all other known parties and intervenors. Additionally, an electronic copy of the foregoing was provided to the Connecticut Siting Council and all other known parties and intervenors.



Linda L. Randell

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