



STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

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DATE: July 10, 2020

TO: Council Members

FROM: Melanie A. Bachman, Esq. *MAB*
Executive Director/Staff Attorney

RE: **DOCKET NO. 488** – Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at one of two sites: Kent Tax Assessor ID #M10, Block 22, Lot 38 Bald Hill Road or 93 Richards Road, Kent, Connecticut. **DRAFT Staff Report - Town of Kent, Planned Development Alliance of Northwest Connecticut, Inc. and Bald Hill Road Neighbors Joint Motion for In-Person Hearing and Site Inspection.**

On June 16, 2020, the Town of Kent (Town), Planned Development Alliance of Northwest Connecticut, Inc. (PDA) and the Bald Hill Road Neighbors (BHRN), collectively, the “Parties,” submitted a Joint Motion for In-Person Hearing and Site Inspection (Joint Motion) with regard to the remote public hearing session scheduled for July 23, 2020 on the above-referenced application. The Joint Motion requests the Council conduct an in-person evidentiary hearing session and an in-person inspection of both proposed sites.

I. Procedural History

On February 28, 2020, Homeland Towers, LLC and New Cingular Wireless PCS, LLC (Applicants) submitted an application for a Certificate of Environmental Compatibility and Public Need (Certificate) for the construction, maintenance, and operation of a telecommunications facility located at one of two sites in the Town of Kent (Town).

On March 10, 2020, Governor Lamont issued declarations of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the state as a result of the COVID-19 Pandemic. On March 12, Governor Lamont issued Executive Order No. 7 entitled, “Protection of Public Health and Safety During COVID-19 Pandemic and Response,” placing prohibitions on large gatherings, among other related orders and directives.

On March 12, 2020, the Council requested an extension of the application completeness review from the Applicants. The Applicants granted the Council an extension of the application completeness review to May 22, 2020. On March 25, 2020, Governor Lamont issued Executive Order No. 7M allowing for an extension of all statutory and regulatory deadlines of administrative agencies for a period of no longer than 90 days. On June 4, 2020, the Council deemed the application complete and voted to schedule a remote public hearing via Zoom conferencing on July 23, 2020.

II. Governor Lamont's Executive Order 7B applies to public hearings held under the Public Utility Environmental Standards Act.

In the Joint Motion, the Parties contend that the Council did not disclose the legal authority for conducting the evidentiary and public comment hearing sessions remotely via the Zoom platform. However, the Council's June 9, 2020 public hearing notice specifically states:

"Pursuant to provisions of Connecticut General Statutes §16-50m and Governor Lamont's March 14, 2020 Executive Order No. 7B, notice is hereby given that the Council will conduct a remote public hearing via Zoom conferencing on Thursday, July 23, 2020 beginning with an evidentiary session at 2:00 p.m., and continuing with a public comment session at 6:30 p.m." (Emphasis added).

Connecticut General Statutes (CGS) §16-50m is a provision under the Public Utility Environmental Standards Act (PUESA) that requires the Council to "...promptly fix a commencement date and location for a public hearing on an application for a certificate... not less than 30 days after receipt of an application or more than 150 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 6:30 p.m. *for the convenience of the general public.*" (Emphasis added).

Governor Lamont's March 14, 2020 Executive Order No. 7B (EO 7B) suspends in-person open meeting requirements under CGS §1-206, §1-225 and §1-226 of the Freedom of Information Act (FOIA)¹ and allows public agencies to hold remote meetings provided that:

1. The public has the ability to view or listen to each meeting or proceeding in real-time, by telephone, video, or other technology;²
2. Any such meeting or proceeding is recorded or transcribed and such recording or transcript shall be posted on the agency's website within seven (7) days of the meeting or proceeding...;³
3. The required notice and agenda for each meeting or proceeding is posted on the agency's website and shall include information on how the meeting will be conducted and how the public can access it;⁴
4. Any materials relevant to matters on the agenda... shall be submitted to the agency... and posted on the agency's website for public inspection prior to, during and after the meeting...;⁵ and

¹ CGS §1-206 relates to the denial of access to public records. CGS §1-225 relates to public meetings of government agencies. CGS §1-226 relates to the recording requirements for meetings.

² The remote public hearing via Zoom conferencing allows the public to view or listen to the proceeding by computer, tablet, smartphone or telephone. See Docket 488 Public Hearing Notice.

³ BCT Reporting, LLC has been retained to transcribe the proceeding. The transcript and an audio recording of the proceeding will be posted to the Council's website. See Docket 488 Hearing Documents.

⁴ The Docket 488 Hearing Notice, Hearing Program, Citizens Guide to Siting Council Procedures and Instructions for Public Access to the Remote Hearing are posted on the Council's website and include information on how the meeting will be conducted and how the public can access it.

⁵ The record of Docket 488 is available on the Council's website for public inspection prior to, during and after the meeting.

5. All speakers taking part in any such meeting shall clearly state their name and title before speaking on each occasion they speak.⁶

Contrary to the representations of the Parties, the Council's public hearings are subject to the open meeting requirements of FOIA that are directly addressed in EO 7B.

"Public agency" or "agency" is defined, in relevant part, as "***Any executive, administrative or legislative office of the state,...***"⁷ (Emphasis added). The Council is a public agency.

"Meeting" is defined, in relevant part, as "***any hearing or other proceeding of a public agency, ... whether in person or by means of electronic equipment***, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power..." (Emphasis added).⁸ The Council's public hearings are meetings.

CGS §1-225 of the FOIA states, "The meetings of all public agencies,... shall be open to the public..."⁹ This is the "open meeting requirement" referenced in EO 7B. It applies to both regular and special meetings of public agencies.¹⁰ The schedule of regular meetings of public agencies is required to be filed with the Secretary of the State not later than January 31 of each year. The Council's bi-weekly Energy and Telecommunications Meetings are regular meetings. Notice of special meetings of public agencies is required to be posted not less than 24 hours before the meeting and shall specify the time, location and business to be transacted. The Council's public hearings are special meetings.

CGS §16-50m is a provision under the Public Utility Environmental Standards Act (PUESA) that requires the Council to "... promptly fix a commencement date and location for a public hearing on an application for a certificate... not less than 30 days after receipt of an application or more than 150 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 6:30 p.m. ***for the convenience of the general public.***" (Emphasis added).

The Parties further contend that EO 7B does not contravene the requirement under PUESA for an in-person hearing, specifically the Council's statutory obligation to hold at least one session of the public hearing in the Town of Kent, and does not suspend the requirement of the Council to provide for due process and fundamental fairness in the evidentiary session.

Statutes are often interpreted by considering the text of the statute, its relationship to other statutes and the legislative intent.¹¹ They are also often interpreted so as not to yield an absurd and unworkable result. The text of CGS §16-50m requires the Council to hold a public hearing on an application for a certificate. A "hearing or other proceeding" is an adjudicative process.¹² Provisions of FOIA and the Uniform Administrative Procedure Act (UAPA) directly relate to

⁶ The Council, parties and intervenors, and members of the public who wish to speak during the public comment session provided their information for identification purposes during the proceeding.

⁷ Conn. Gen. Stat. §1-200(1) (2019).

⁸ Conn. Gen. Stat. §1-200(2) (2019).

⁹ Conn. Gen. Stat. §1-225(a) (2019).

¹⁰ Conn. Gen. Stat. §1-225(b) and (d) (2019), respectively.

¹¹ Conn. Gen. Stat. §1-2z (2019).

¹² *City of Meriden v. Freedom of Information Commission*, 191 Conn. App. 648 (2019), cert. granted, 333 Conn. 926 (2019); *Gould v. Freedom of Information Commission*, 314 Conn. 802, 810-11 (2014).

adjudicative processes. It is clear that the intent of the requirement to hold at least one session of a public hearing after 6:30 p.m. under CGS §16-50m is “*for the convenience of the general public.*” A remote public hearing accessible by computer, tablet, smartphone or telephone is convenient for the general public. To conclude otherwise would yield absurd and unworkable results. It is also clear that the intent of the evidentiary session is to provide for due process and fundamental fairness. The purpose of the hearing is to receive evidence on the applicants’ assertions that the public need for the facility outweighs any adverse environmental effects from the construction, operation and maintenance of the facility. The intent of EO 7B is clear and it applies to public hearings held under PUESA.

III. Site inspections are not an integral part of the public hearing process.

In the Joint Motion, the Parties also contend there is a need for the Council and its staff to personally visit both Sites A and B because it has precedent of making visits to sites in-person. Field reviews are not required under PUESA, but under ordinary circumstances, when the state is not under emergency orders related to a pandemic, the Council typically refers to a field review of proposed sites in its public hearing notice. Field reviews are also not an integral part of the public hearing process.¹³ The Connecticut Supreme Court held in *Grimes v. Conservation Commission of Litchfield* that the purpose of a site visit is to acquaint members of a reviewing commission with the subject property and that site visits are an appropriate investigative tool.¹⁴ As investigative measures, site visits do not rise to the level of a “hearing in fact” and are not an integral part of the hearing process.¹⁵

IV. Conclusion

Based on the applicability of EO 7B to public hearings held under PUESA and the Supreme Court decision in *Grimes v. Conservation Commission of Litchfield* that field reviews are not an integral part of the hearing process, staff recommends the Joint Motion be denied.

MAB/lm

¹³ *Grimes v. Conservation Commission of Litchfield*, 243 Conn. 266, 278 (1997).

¹⁴ *Id.*

¹⁵ *Id.*