CUDDY & FEDER LLP

445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
Tel 914.761.1300 Fax 914.761.5372
www.cuddyfeder.com

July 24, 2009

Judi Lynch, CZEO, Land Use Director
Town of Woodbury
297 Main Street South
Woodbury, CT 06798-0369

Re: AT&T
Proposed Wireless Telecommunications Tower Facility
85 Paper Mill Road, Woodbury, Connecticut
Connecticut Siting Council Docket 375

Dear Ms. Lynch:

We are in writing as a follow up to your memorandum dated July 22, 2009 which was provided to us. In it you reference Sections 7.10.4N and 7.10.5A of the Town's Zoning Regulations and suggest that approvals from the Town's Board of Selectman and Zoning Commission are required for the driveway and tower facility. Please accept this letter in response.

Pursuant to Section 16-50x of the Connecticut General Statutes, no local land use, zoning, wetlands or other permits are required for a cellular tower facility including a driveway serving it. Rather, the State Siting Council exclusively regulates such facilities through a Certificate application process. I've enclosed a copy of relevant cases for review by your Town Attorney which confirm that there is no local jurisdiction over such facilities including driveways.

As you may know, the Certificate application process in Docket 375 is coming to a close and the Siting Council has indicated its intention to issue a Certificate for the AT&T facility as proposed on property off of Paper Mill Road. Additionally, we anticipate that the Siting Council will require AT&T to prepare a Development & Management Plan ("D&M Plan") for the Council's subsequent review and approval. The D&M Plan will include detailed construction drawings and information you and the local Zoning Commission are generally accustomed to seeing as part of a site plan.

At this point in time, we would be happy to meet with you as the Town's representative to go over the details of AT&T's proposed facility once again and prior to submission of a D&M Plan to the Council. While the Town Board of Selectman and Zoning Commission have no jurisdiction to require various driveway improvements or review of a site plan, we will certainly consider any specific suggestions you might make on their behalf and try to incorporate those into the D&M Plan. Additionally, we should begin discussing the local building permit process. I suspect the Town's building department generally requires a zoning certificate of compliance from your office prior to processing same. In this case, however, no such zoning certificate is required and we'd like to ensure a smooth process with the Town's building department and get that started.

CUDDY& FEDER LLP

Thank you for your understanding and please do not hesitate to contact me or refer this to your Town Attorney as needed.

Very truly yours,

Christopher B. Fisher

Enclosures

cc: First Selectman Paul D. Hinckley
Martin Overton, Zoning Commission Chair
Connecticut Siting Council

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 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
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 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
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 compatibility 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 commencement 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.

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 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 interfering 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 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

H

Superior Court of Connecticut.
Judicial District of New Britain.
TOWN OF WESTPORT
v.
CONNECTICUT SITING COUNCIL, et al.
Cellco Partnership
v.
Westport Zoning Board of Appeals, et al.
Nos. CV00-0501129S, CV00-0500547S.

June 27, 2001.[FN*]

FN* Affirmed. *Westport v. Connecticut Siting Council,* 260 Conn. 266, 796 A.2d 510 (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 appeals were consolidated. The Superior Court, Judicial District of New Britain, Cohn, J., held that: (1) town was "aggrieved" and therefore could obtain judicial review; (2) Council had exclusive jurisdiction over location and type of telecommunications tower, though the cellular service carrier would share the tower with non-cellular telecommunications carriers; (3) town was not prejudiced by any procedural error at Council's hearing; and (4) evidence supported Council's decision to grant the application.

Town's appeal dismiss; carrier's appeal sustained.

Opinion affirmed on appeal, 260 Conn. 266, 796 A.2d 510.

West Headnotes

[1] Zoning and Planning 414 ⚿571

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k571 k. Right of Review. Most Cited Cases
Cellular service carrier was "aggrieved" by, and therefore could obtain judicial review of, town zoning board of appeals' decision upholding the denial of carrier's application for a certificate of zoning compliance required to obtain a building permit for a telecommunications tower, where the carrier owned the premises on which the tower would be built.

[2] Telecommunications 372 ⚿1055

372 Telecommunications
372IV Wireless and Mobile Communications
372k1055 k. Judicial Review or Intervention. Most Cited Cases
(Formerly 372k461.5)
Town's environmental, planning, and zoning interests in siting of telecommunications tower established a specific personal and legal interest in the subject matter of the Connecticut Siting Council's decision approving cellular service carrier's application for certificate of environmental compatibility to build telecommunications tower in town, as element for establishing that town was aggrieved by, and therefore could obtain judicial review of, the Council's decision.

[3] Administrative Law and Procedure 15A ⚿668

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General

15Ak665 Right of Review
15Ak668 k. Persons Aggrieved or Affected. Most Cited Cases
The fundamental test for determining aggrievement, as requirement for obtaining judicial review of an administrative decision, encompasses a two-fold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole, and second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision.

[4] Administrative Law and Procedure 15A 668

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak665 Right of Review
15Ak668 k. Persons Aggrieved or Affected. Most Cited Cases
Aggrievement, as requirement for obtaining judicial review of an administrative decision, is established if there is a possibility, as distinguished from a certainty, that some legally protected interest has been adversely affected.

[5] Telecommunications 372 1055

372 Telecommunications
372IV Wireless and Mobile Communications
372k1055 k. Judicial Review or Intervention. Most Cited Cases
(Formerly 372k461.5)
Town established a possibility that its specific personal and legal interest might be specially and injuriously affected by Connecticut Siting Council's decision approving cellular service carrier's application for certificate of environmental compatibility to build telecommunications tower in town, as element for establishing that town was aggrieved by, and therefore could obtain judicial review of, the Council's decision; town alleged that Council's decision permitted both cellular and noncellular providers to make use of the tower, and that such "mixed use" interfered with town's right to apply its local laws and ordinances. C.G.S.A. § 16-50x(a).

[6] Courts 106 97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases
The Connecticut Superior Court is not bound to follow a United States District Court's interpretation of state law.

[7] Zoning and Planning 414 14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
Connecticut Siting Council had exclusive jurisdiction over location and type of telecommunications tower, though the cellular service carrier would share the tower with non-cellular telecommunications carriers. C.G.S.A. §§ 16-50i(a)(6), 16-50x(a).

[8] Zoning and Planning 414 14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
"Used in a cellular system," within meaning of statute giving Connecticut Siting Council exclusive

jurisdiction over the location and type of associated telecommunications equipment used in a cellular system, gives the Council jurisdiction where personal communications services and enhanced specialized mobile radio service carriers are putting their non-cellular equipment into action on a cellular tower. C.G.S.A. §§ 16-50i(a)(6), 16-50x(a).

[9] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
In construing any statute, the court seeks to ascertain and give effect to the apparent intent of the legislature.

[10] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases
In seeking to discern legislative intent, the court looks to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.

[11] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
In the absence of a statutory definition of a term, the term should be given its common meaning as reflected in sources such as dictionaries. C.G.S.A. § 1-1(a).

[12] Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
Statutes are to be construed in a manner that will not thwart their intended purpose.

[13] Statutes 361 ⚿181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases

Statutes 361 ⚿205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
If there are two possible interpretations of a statute, the court should adopt the more reasonable construction and review the statute as a whole.

[14] Statutes 361 ⚿219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
Ordinarily, the reviewing court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes.

[15] Administrative Law and Procedure 15A ⚷754.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak754.1 k. In General. Most Cited Cases

Administrative Law and Procedure 15A ⚷784.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak784.1 k. In General. Most Cited Cases
An agency's factual and discretionary determinations are to be accorded considerable weight by the courts.

[16] Telecommunications 372 ⚷1055

372 Telecommunications
372IV Wireless and Mobile Communications
372k1055 k. Judicial Review or Intervention. Most Cited Cases
(Formerly 372k461.5)
Even assuming that remarks of Chairman of Connecticut Siting Council, discussing the procedure to be followed at hearing on cellular service carrier's application for certificate of environmental compatibility to build telecommunications tower in town, ruled out presentation of evidence of town's concerns until after the decision on location was made, town was not prejudiced, where the Council's findings of fact, opinion, and decision and order each considered the town's concerns. C.G.S.A. § 16-50p.

[17] Telecommunications 372 ⚷1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Document and expert testimony showing percentage of dropped calls in the area to be four times worse than system average established public need, at Connecticut Siting Council's hearing on cellular service carrier's application for certificate of environmental compatibility to build telecommunications tower in town. C.G.S.A. § 16-50p.

[18] Telecommunications 372 ⚷1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Evidence supported Connecticut Siting Council's determination that environmental impacts did not justify denial of cellular service carrier's application for a certificate of environmental compatibility to build a telecommunications tower in town; expert's report showed that the project would not affect the environment to any great degree, and Council inspected the premises. C.G.S.A. § 16-50p(a)(2, 3).

[19] Administrative Law and Procedure 15A

⚿788

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak788 k. Determination Supported by Evidence in General. Most Cited Cases

Administrative Law and Procedure 15A ⚿789

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak789 k. Inferences or Conclusions from Evidence in General. Most Cited Cases
The question in an administrative appeal is not whether the reviewing court would have reached the same conclusion, but whether the record before the agency supports the decision reached.
****657** Wake, See, Dimes & Bryniczka, for the plaintiff in the first case and the named defendant in the second case.

Robert S. Golden, Jr., and Mark F. Kohler, assistant attorneys general, with whom was Richard Blumenthal, attorney general, for the named defendant in the first case.

Robinson & Cole, for the plaintiff in the second case.

COHN, J.

383** These are consolidated appeals. In Docket No. CV00-0501129S, the plaintiff town of Westport (the town) appeals from a December 17, 1998 decision of the named defendant Connecticut Siting Council (the council) approving an application for a certificate of environmental compatibility and public need for the construction and operation of a telecommunications tower facility proposed by Cellco Partnership, doing ***384** business as Bell Atlantic Mobile (Cellco). In Docket No. CV00-0500547S, plaintiff Cellco appeals from a July 27, 1999 decision of the named defendant, the Westport zoning board of appeals (the board of appeals), upholding its zoning enforcement officer's refusal to approve Cellco's zoning application to construct the tower facility. The first appeal is brought pursuant to General Statutes §§ 16-50q and 4-183, the Uniform Administrative Procedure Act (UAPA). The second appeal is brought pursuant to General Statutes §§ 8-8 and 8-10. The court decides for the defendants*658** on the town's appeal, Docket No. CV00-0301129S, and for Cellco on its appeal, Docket No. CV00-0500547S for the reasons stated subsequently in this opinion.

The council, in its final decision of December 17, 1998, made findings of fact that may be summarized as follows.

1. Cellco applied to the council on June 24, 1998, pursuant to General Statutes §§ 16-50g through 16-50aa, for a certificate of environmental compatibility and public need for construction, operation and maintenance of a cellular telecommunications facility in the town. A "prime site" on 2 Sunny Lane and an alternate site near the intersection of Clinton Avenue and the Merritt Parkway were identified. The purpose of the proposed facility was to provide cellular coverage for existing coverage gaps in the area and to meet demand beyond the capacity of existing facilities.

2. Notice was given and hearings were held pursuant to General Statutes § 16-50m. The council and its staff made inspections of the proposed prime and alternative sites. During the field inspection, Cellco flew a balloon at each of the proposed sites to simulate the heights of the towers proposed at the two locations.

3. Springwich Cellular Limited Partnership

(Springwich), the Southern New England Telephone cellular affiliate, Sprint Spectrum (Sprint), a personal *385 communications service provider (pcs provider), Omnipoint Communications, Inc., (Omnipoint), a pcs provider, and Nextel Communications of the Mid-Atlantic, Inc., doing business as Nextel Communications (Nextel), an enhanced specialized mobile radio service provider, sought to share the proposed tower, equipment building, generator and associated fuel tank at both of the proposed sites.

4. Cellco has offered to provide space on the proposed tower to the town of Westport's public safety entities.

5. Existing Cellco facilities in the towns of Westport, Fairfield and Norwalk do not provide adequate service for coverage gaps in the northern Westport area. The primary purpose of the proposed site is to provide coverage to these gaps and additional traffic handling capacity along routes 33, 53, 57, 136 and 15.

6. Springwich also has gaps under existing coverage. Omnipoint has limited coverage in the northern portion of the town and coverage gaps in excess of five miles along route 15.

7. Sprint experiences a coverage gap of approximately 3.5 miles along route 15 and lesser distances on other routes.

8. Nextel experiences a coverage gap of approximately 4.5 miles along route 15 and lesser distances on other routes.

9. Other suggested sites were investigated, but did not prove feasible. The sites were rejected for such reasons as an unwillingness of the property owner to lease land, system performance problems, less favorable channel deployment and insufficient coverage. One site suggested by the town was the department of transportation (department) commuter parking lot off of exit 41 of the Merritt Parkway.

*386 10. Cellco met with town officials in August, 1997, and, in June, 1998, participated in a public hearing.

11. The town does not support the placement of a telecommunications facility at either of the proposed sites. The town has stated that the proposed facilities are commercial in nature, are not appropriate in residentially zoned areas and are inconsistent with the town's plan of development.

**659 12. The town made recommendations to the council, should it approve the prime site, to protect water resources at or near the site, including Poplar Plains Brook. It made similar environmental recommendations for the alternative site.

13. The town suggested, as an alternative to either site, expanding the current 180 Bayberry Lane facility by devoting more town land to the site.

14. The proposed prime site is a 1.63 acre parcel located at 2 Sunny Lane in Westport and is owned by Cellco. It is in a town residence AAA district for single-family homes. According to town zoning regulations, communication towers are allowed with a special permit and site plan approval on ten-acre parcels.

15. The proposed prime site is a developed parcel consisting of a single-family building, an approximately twelve foot wide driveway, maintained lawn and landscaped trees and shrubs. The existing single-family building is the only structure within 160 feet of the base of the proposed tower.

16. The proposed prime site is traversed by the Poplar Plains Brook and contains inland wetlands and a 100-year flood zone located adjacent to the brook. The proposed prime site tower compound would be located no closer than approximately 75, 110 and 55 feet from the areas designated as a watercourse, inland wetland and 100-year flood zone, respectively.

*387 17. Cellco proposed to construct a 160 foot monopole tower, enclosed by an eight foot tall security fence with a gate, on an approximately forty foot compound at the proposed prime site. There would be a variety of antennas placed on the tower by the shared users.

18. Vehicular access would be from Sunny Lane along the existing driveway. Utility service would extend from the existing service along Sunny Lane underground for a distance of approximately 170 feet to the building.

19. All the electrical equipment and a 200 kilowatt emergency generator, sized to accommodate five tower users, would be installed within the existing single-family structure on the proposed site.

20. The proposed prime site is surrounded by existing residential development and the Merritt Parkway. There are approximately twenty-two residences within 1000 feet of the proposed site.

21. The proposed site is located approximately fifty feet south of the Merritt Parkway right of way, near the commuter parking area located adjacent to interchange 41 off the Merritt Parkway.

22. The proposed prime site would require the removal of three trees of less than four inches in diameter, but five trees with diameters of twenty-four inches or greater would be spared.

23. The cost of construction of the prime site was placed at $1,404,000.

24. The alternative site is a 1.238 acre parcel south of the intersection of the Merritt Parkway and Clinton Avenue. It is in a residence A district, allowing for single-family residences and communication towers with special permit.

25. The proposed alternative site is an undeveloped parcel containing mature deciduous trees. It does not *388 contain watercourses, inland wetlands, or a 100-year flood zone. A wetlands area is located on an adjacent parcel.

26. The alternative site would contain a 180 foot monopole tower, a single-story twelve foot wide L-shaped equipment building, with approximately 1200 square feet of area for four of the five carriers' equipment and the proposed generator, and two concrete pads for the fuel tank **660 and Omnipoint's equipment cabinets, within an approximately sixty foot by eighty-eight foot fenced compound.

27. The carriers would utilize the same antennas at the proposed alternative site as at the proposed prime site.

28. Vehicular access to the proposed tower compound would extend from Clinton Avenue along a proposed twelve foot wide gravel driveway. Utility service would extend underground from existing service along Clinton Avenue a distance of approximately 260 feet to the proposed alternative site compound.

29. The site is surrounded by woodlands, residential development and the Merritt Parkway. There are approximately seventy-nine residences within 1000 feet of the proposed site.

30. Development of the proposed alternative site would require the removal of approximately twenty-four trees, twenty-four inches or greater in diameter. Approximately thirty-four cubic yards of cut material would be generated and ninety-eight cubic yards of fill material would be required for the construction of the proposed alternate site.

31. The approximate cost of the construction for the alternative site would be $1,334,000.

*389 32. There are no known existing populations of federal or state endangered species occurring at the proposed prime or alternative sites.

33. Development of the proposed prime site would involve minimal land disturbance and would not substantially alter the character of the natural resources including wetlands and watercourses, vegetative composition and wildlife habitats. Development of the proposed alternative site would result in an incremental loss of wildlife habitat, lessen the visual screening from the Merritt Parkway and impair the open space aspect of the site.

34. The state historic preservation office states that a 160 foot tower located within the Merritt Parkway right of way would constitute an incompatible and irreparable alteration of the historic landscape design and scenic character of the Merritt Parkway.

35. The town's historical district commission stated that the proposed towers would adversely effect the historic and scenic character of the Merritt Park- way.

36. The Samuel Morehouse residence is located 600 feet north of the proposed alternative site and has been placed by the town on a historic resource survey.

37. The proposed prime and alternative sites are underlain by the Saugatuck River aquifer; however, both sites are not located in the draw down area of public water supply wells.

38. Postconstruction noise generated at the proposed sites would consist of the operation of the heating, air conditioning and ventilation systems and the back-up emergency generator.

39. Finally, the findings of fact set forth statistical data for the following matters: electromagnetic radio frequency power densities for the prime and alternative ***390** sites; the visibility from various locations of the prime and alternative sites; and, proposed coverage for Cellco's and the other shared users' antennas at both sites and other less prime sites.

Based on the aforementioned findings of fact, the council concluded that it had jurisdiction over the proposed facility because it would be "used in a cellular system" within the meaning of General Statutes § 16-50i(a)(6). It found that Cellco's and the other shared users' existing facilities in the area do not provide adequate coverage or capacity in the northern Westport area. ****661** The sharing of the tower was consistent with state law and policy promoting shared use.

The council found that the prime site at Sunny Lane was preferable to the alternative site. There were fewer homes in a 1000 foot radius than the proposed alternative site, and the Sunny Lane site would be near a location recommended by the town as an alternative site for the development of a facility (the aforementioned department commuter parking lot). Development of the proposed alternative site would result in an incremental loss of wildlife habitat, lessen the visual screening from the Merritt Parkway, require the removal of a substantial number of mature deciduous trees and impair the open space aspects of the site.

There were no environmental constraints at the Sunny Lane site. The project would involve minimal land disturbance and would not substantially alter the character of the natural resources including wetlands and watercourses, vegetative composition and wildlife habitats. The town had raised concerns regarding Poplar Plains Brook and the wetlands at the site. This would be resolved by adjusting the location of the tower away from the inland wetlands and watercourses. The council did find the tower at a proposed height of 160 feet might impact on the existing residential land use and be visible to ***391** motorists on the Merritt Parkway. The council resolved this issue by restricting the tower to a height of 130 feet and suggesting that an existing tower, operated in conjunction with the new tower, would ensure coverage.

In its accompanying order, the council approved the

application of Cellco for a certificate of environmental compatibility and public need for the construction, operation and maintenance of the telecommunications tower at the Sunny Lane site, under certain conditions. The following three conditions were included.

First, the tower was to be constructed as a monopole, sufficient to accommodate the antennas of Cellco, Springwich, Sprint, Omnipoint and Nextel, and is not to exceed 130 feet.

Second, Cellco was to prepare a "Development and Management Plan" for the site, under the regulations of the council, to be submitted for review by the council.

Third, and finally, Cellco was to take the site development and construction actions as set forth in the foregoing opinion of the council and in the recommendations of the town.

[1] In Docket No. CV00-0501129S, the town appealed from this final decision.[FN1] In the meanwhile, Cellco applied for a building permit from the town for the certified facility. The town's zoning enforcement officer refused to issue an opinion of zoning compliance which was needed to obtain the building permit. Cellco appealed that refusal to the board of appeals. On July 28, 1999, the chairman of the board of appeals informed Cellco that "at the work session held by the Zoning Board of Appeals on July 27, 1999, the Board voted 5-0 ... to DENY your request for Appeal ... from the denial of a zoning ***392** permit for construction of a wireless telecommunications facility approved by the Connecticut Siting Council ... in a Res. AAA zone...."'"This Appeal was denied and the Planning and Zoning Director's decision was upheld since the Board determined that the decision not to issue a ****662** zoning permit was an appropriate action." Cellco has appealed in Docket No. 00-0500547S from this decision.[FN2]

FN1. Whether the town is aggrieved by this final decision is discussed subsequently in this opinion.

FN2. At the hearing of November 21, 2000. Cellco introduced a deed to the Sunny Lane premises and other uncontroverted evidence indicating that it is the owner of the premises and that the ruling of the board of appeals was injurious to its interest. Aggrievement, therefore, is found. *Gregorio v. Zoning Board of Appeals,* 155 Conn. 422, 426, 232 A.2d 330 (1967).

[2][3][4] Initially, the court considers the contention made by Cellco that the appeal taken by the town, Docket No. CV00-0501129S, should be dismissed on the jurisdictional ground of lack of aggrievement. "[T]he fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision.... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected." (Internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. Dept. of Public Utility Control,* 247 Conn. 95, 103, 717 A.2d 1276 (1998); see also *Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Commission,* 58 Conn.App. 441, 447, 755 A.2d 249 (2000) ("[s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights.") (Internal quotation marks omit- ted.)

***393** Three witnesses testified at the November 21,

2000 hearing in support of the town's claim of aggrievement. The first witness was the acting conservation director for the town. She stated that the council in the final decision did not adequately consider the various environmental and conservation issues under her jurisdiction. The second witness was the director of planning and zoning for the town. She testified that the final decision of the council violated the zoning laws of the town, particularly in that the approved tower would have a "mixed use." The final witness was the first selectman of the town. She testified that she was responsible under the town's charter to execute the laws and ordinances of the town faithfully, and to supervise the conservation director and planning and zoning director.

On the first requirement of aggrievement (specific personal and legal interest), there is precedent that "[a]s the representative of the public interests of all its inhabitants, the plaintiff is an aggrieved person...." *Milford v. Commissioner of Motor Vehicles,* 139 Conn. 677, 681, 96 A.2d 806 (1953); *Guilford v. Landon,* 146 Conn. 178, 179-80, 148 A.2d 551 (1959). "It is the court's finding that the plaintiffs have a specific personal and legal interest in the subject matter of the defendant's decision granting the modified site plan application. The Town of Cromwell is legally required to enforce the provisions of the Inland Wetlands and Watercourses Act.... Clearly, the regulated activities which the defendant approved affect wetlands and watercourses which are located in both the city of Middletown and the town of Cromwell. It follows that the town has a specific legal interest which has been affected by the defendant's decision, and the plaintiffs are aggrieved by it." *Cromwell v. Inland Wetlands & Watercourses Agency,* Superior Court, judicial****663** district of Middlesex at Middletown, Docket No. 65192 (September 15, 1993) ***394** *Gaffney, J.*) (10 Conn.L.Rptr. 92, 93-94, 1993 WL 382348.) Here, the town's three witnesses demonstrated that town officers had environmental, planning and zoning interests in the siting of the tower and that the town was obliged to ensure that these interests were pursued.

[5] The second aggrievement requirement (interest injuriously affected), is more difficult for the town to satisfy. Under General Statutes § 16-50x(a), the council has exclusive jurisdiction over the siting of a telecommunications tower. *Preston v. Connecticut Siting Council,* 20 Conn.App. 474, 483, 568 A.2d 799,cert. denied, 214 Conn. 803, 573 A.2d 316 (1990). Section § 16-50x(a) further provides that the council "shall give such consideration to other state laws and municipal regulations as it shall deem appropriate." It has been held under § 16-50x(a) that the plaintiff town, since it has no direct role in the siting process, "failed to demonstrate how any interest it may have has been specially and adversely affected by the council's decision." *E ast Hartford v. Connecticut Siting Council,* Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV91-0503484S, 1993 WL 466023 (November 5, 1993) (*Barry, J.*).

In the present case, however, the town argues that the council has in its final decision permitted both cellular and noncellular providers to make use of the tower. The town claims an error in that the council's jurisdiction does not extend to allowing this "mixed use." Under the town's theory, a mixed use situation still allows the town to apply its local laws and ordinances; as the final decision of the council interferes with the town's rights, it is injured in fact. This assertion, under the standard that standing exists if there is a possibility that legal interests may be affected, is sufficient for the court to find that the town has satisfied this second requirement of aggrievement.

***395** The court must now consider the merits of the issues raised in these consolidated appeals. The first issue in both appeals is that of the exclusive jurisdiction of the council. When the issue was initially briefed, it was assumed, based on a declaratory rul-

ing of the council, that it had no jurisdiction over towers used only for personal communications services systems. Subsequently, just one day before argument in the present cases, the United States District Court ruled that the council did have jurisdiction over personal communications services as well as cellular systems. *Sprint Spectrum LP v. Connecticut Siting Council,* United States District Court, 274 F.3d 674 (2000) (Covello, J.), appeal pending 01-17127 (United States Court of Appeals, Second Circuit) (*Sprint Spectrum*).

[6] The parties have further briefed the effect of *Sprint Spectrum* on the cases before the court. Cellco argues that the District Court's decision resolves the jurisdictional issue here, while the other parties resist application of the decision. *Sprint Spectrum* was appealed on January 22, 2001, and is still pending in the Second Circuit Court of Appeals.[FN**] In addition, this court is not bound to follow a District Court's interpretation of state law. *Anderson v. Ludgin,* 175 Conn. 545, 551, n. 6, 400 A.2d 712 (1978). The court, therefore,**664 will consider the matter without relying on the holding in *Sprint Spectrum.*

> FN** Since the time Judge Cohn issued his decision in the present case, the Second Circuit Court of Appeals reached its decision in *Sprint Spectrum LP v. Connecticut Siting Council,* 274 F.3d 674 (2nd Cir.2001) which affirmed the judgment of the District Court.
>
> Reporter of Decisions

[7] In its first issue, the town argues that, given that the tower will have both cellular and noncellular attachments, the town, in addition to the council, retains jurisdiction and may enforce its municipal codes. From this, the town claims in its appeal that the council erred in *396 asserting its exclusive authority in locating the tower, and, in Cellco's appeal, that the board of appeals was correct in denying the building permit.

[8] Under the provisions of § 16-50x(a), the council has "exclusive jurisdiction over the location and type" of certain statutorily defined facilities. "Facility" is defined by § 16-50i(a)(6) to include "such telecommunication towers, including associated telecommunications equipment *...used in a cellular system,* as defined in the Code of Federal Regulations Title 47, Part 22, as amended...." [FN3] (Emphasis added.) Thus, the question becomes whether the legislature, in employing the phrase "used in a cellular system," intended to give the council exclusive jurisdiction over telecommunications towers that not only are to be developed for use by a cellular carrier, but also have noncellular equipment thereon.

> FN3. As stated in *Nobs v. Connecticut Siting Council,* Superior Court, judicial district of New Britain, Docket No. CV98-0492714S, 2000 WL 675643 (April 28, 2000) (*McWeeny, J.*): "Wireless telephones work by transmitting a low power signal between a wireless telephone and a personal wireless facility, commonly known as a 'cell site,' which consists of antennas mounted on a tower, tall building or similar tall structure. Radio frequency principles and network design require a number of cell sites. The network functions by having the caller signal 'handed off' to a cell site in an adjacent area as it moves out of coverage of a cell site, with a goal of providing seamless and continuous mobile telephone service throughout the wireless service providers' licensed area." The noncellular equipment is attached to these cellular towers so that the separate type of wireless communication may also function seamlessly and continuously.

[9][10] "[I]n construing any statute ... we seek to ascertain and give effect to the apparent intent of

the legislature.... In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." ***397** (Internal quotation marks omitted.) *Oxford Tire Supply, Inc. v. Commissioner of Revenue Services,* 253 Conn. 683, 690, 755 A.2d 850 (2000).

[11] The court must turn first to the statutory language "used in a cellular system" itself. *In re Baby Z.,* 247 Conn. 474, 498, 724 A.2d 1035 (1999). In the absence of a statutory definition of a term, the term should be given its common meaning as reflected in sources such as dictionaries. *Hartford Hospital v. Dept. of Consumer Protection,* 243 Conn. 709, 716-17, 707 A.2d 713 (1998); General Statutes § 1-1(a). The dictionary definition of the word "use" is "to put into action or service." Webster's Third New International Dictionary 2523 (1966).[FN4] The common meaning of "used in a cellular system," as it affects the council's jurisdiction, encompasses not only the approved cellular providers, Cellco and Springwich, but also the personal communications services and enhanced specialized mobile radio service carriers ****665** that are "putting their non-cellular equipment into action" on the cellular tower.

> FN4. See also Black's Law Dictionary 1541 (6th Ed.1990), defining "use" a s follows: "To put or bring into action or service ... *Beggs v. Texas Dept. of Mental Health and Mental Retardation,* Tex.Civ.App., 496 S.W.2d 252, 254 [1973]."

United States Fire Ins. Co. v. Kentucky Truck Sales, Inc., 786 F.2d 736 (6th Cir.1986) concerned a similar definitional issue. In that case, an insurance policy excluded coverage of "autos while used in any professional or organized racing or demolition contest or stunting activity." Id., at 737. At a Kentucky fair, at which there was stunting activity, a death occurred when a truck used to tow racing cars struck a spectator. A declaratory judgment action raised the issue of whether the truck was "used in" the stunting so that there would be no insurance coverage for the incident. The United States Court of Appeals for the Sixth Circuit quoted from the same dictionary definition set ***398** forth previously: "The District Court also correctly held that Kentucky Truck's Autocar semitractor was 'used in' the stunting activity of the Truck Pull. The court referred to Webster's definition of 'use' as 'to put into action or service: avail oneself of,' and found it clear on the undisputed facts that the tractor was used in the event, within the meaning of the policy exclusion. Appellants argue that the vehicle was not a participant in the event, was not a competitor in the event, and that all vehicles 'connected with' the event should not be excluded. None of those questions need be decided, however, because the Kentucky Truck vehicle was *used in* this stunting activity and was accordingly plainly excluded from policy coverage." (Emphasis in original.) Id., at 740.

United States Fire Ins. Co. is a clear indication that the phrase "used in" is not as narrow in meaning as the town contends. See also *Mills v. Colonial Penn Ins. Co.,* 47 Conn.Supp. 17, 27, 768 A.2d 1 (2000) (" 'use of the automobile was *in some way* "connected with" the accident....' ") (Emphasis in original.) The court concludes that the council's jurisdiction is broad enough to cover noncellular equipment placed on a cellular tower.

The legislative history of the phrase is also instructive. Public Acts 1984, No. 84-249 added subsection 6 to the definitions of § 16-50i(a). The act as initially passed in the Senate gave the council exclusive jurisdiction to regulate telecommunications towers used for public cellular radio communication services. 27 S.Proc., Pt. 3, 1984 Sess., p. 842, remarks of Senator John B. Larson. In the House

proceedings, Representative David Lavine first generally pointed out that the purpose of the legislation was to end ad hoc town-by-town regulation in favor of regulation by the council. He also introduced an amendment that changed the Senate language to the current "used in a cellular system" terminology with a ***399** reference to the federal definition of a cellular system. 27 H.R.Proc., Pt. 9, 1984 Sess., pp. 3206-11, especially pp. 3209-10. The Senate later joined in the bill as amended in the House. Public Act 84-249 as enacted thus contains broader language than as initially proposed.

[12][13] Moreover, "[s]tatutes are to be construed in a manner that will not thwart [their] intended purpose...." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities v. Sullivan Associates,* 250 Conn. 763, 778, 739 A.2d 238 (1999). If there are two possible interpretations of a statute, the court should adopt the more reasonable construction and review the statute as a whole. *Ferrigno v. Cromwell Development Associates,* 244 Conn. 189, 202, 708 A.2d 1371 (1998).

Here, Cellco put forth in its application a use of the tower that included sharing the facility with another cellular carrier and three noncellular carriers, and the council agreed by ordering this sharing. ****666** These additional users, according to the council, "have been unable to identify existing facilities that would improve their respective coverage and consequently seek to share the proposed tower...."

Such action by the council is in keeping with clear direction from the General Assembly. In § 16-50g, the legislature states that one of the purposes of the Public Utility Environmental Standards Act (PUESA) is "to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state...."

When the application was presented to the council, it had the duty to investigate the feasibility of whether Cellco might use an existing tower. As Judge McWeeny stated in ***400***Nobs v. Connecticut Siting Council,* Superior Court, judicial district of New Britain, Docket No. CV98-0492714S, 2000 WL 675643 (April 28, 2000): "The sharing of the facilities is encouraged if not required by General Statutes § 16-50p(b)(1)(A)."

In granting a certificate to Cellco, the council was also obliged to examine whether a tower to be constructed might be shared with "*any* public or private entity which provides telecommunications ... service to the public...." (Emphasis added.) General Statutes § 16-50p(b)(1)(B). Under § 16-50p(b)(2), the council is authorized to impose tower sharing as part of its locational order. These statutes do not limit the scope of the duty to investigate the sharing of towers, or the council's ultimate requirements regarding sharing, to cellular providers only.[FN5]

> FN5. In 1993, the legislature also added General Statutes § 16-50aa(b). which sets forth a definition for existing towers. The argument cannot be made, however, that because the legislature did not change, at that time, the phrase "used in a cellular system," that it intended to affect the council's jurisdiction over towers with cellular and noncellular equipment. See 36 H.R.Proc., Pt. 20, 1993 Sess., p. 6997, remarks of Representative John W. Fonfara.

It is only reasonable to conclude that the council's order that Cellco share its tower with noncellular carriers is in furtherance of the legislative purpose. To hold that the exclusive jurisdiction of the council is destroyed through this sharing process would frustrate the goals of the legislature and is not a rational result. Such a claim is merely a subset of the argument made by the town in *Preston v. Connecticut Siting Council,* supra, 20 Conn.App. at 482-83, 568 A.2d 799, that a planning and zoning commission had jurisdiction to review an application to the

council for a certificate. The Appellate Court called this argument an "erroneous hypothesis." Id., at 482, 568 A.2d 799.[FN6] The court, therefore, rejects the town's jurisdictional argument.

> FN6. As seen in the aforementioned legislative history, the town's home rule argument was rejected in the passage of PUESA. There is no reason why the council cannot reject any application from a provider that appears to be a subterfuge: that is, a cellular provider deliberately seeks approval from the council only so that a noncellular provider might share the tower. Finally, it is legally insignificant that the council has decided not to take direct jurisdiction over noncellular carriers. As indicated previously, the council's jurisdiction over telecommunications towers "used in a cellular system" would extend to the noncellular carrier equipment on a cellular tower.

[14][15] ***401** The court now considers the town's argument in its appeal that the council's actions were both procedurally and substantively illegal. The standard of review of the town's claim "is highly deferential.... Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered**667 by law to carry out the statute's purposes.... [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts...." (Citations omitted; internal quotation marks omitted.) *Bezzini v. Dept. of Social Services,* 49 Conn.App. 432, 436, 715 A.2d 791 (1998).

General Statutes § 16-50p of PUESA sets forth the criteria for council decisions and certificate proceedings such as are at issue in the present case: "[T]he council shall not grant a certificate ... unless it shall find and determine: (1) A public need for the facility and the basis of the need; (2) the nature of the probable environmental impact, including a specification of every significant adverse effect, whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish and wildlife; (3) why the adverse effects or conflicts referred to in subdivision (2) of this subsection are not sufficient reason to deny the application...."

The court's "review of an agency's factual determination is constrained by ...§ 4-183(j), which mandates that a court shall not substitute its judgment for that ***402** of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.... This limited standard of review dictates that, [w]ith regard to questions of fact, it is neither the function of the trial court ... to retry the case or to substitute its judgment for that of the administrative agency.... An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole.... Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.... This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review.... The burden is on the plaintiffs to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record...." (Citations omitted; internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. DPUC,* 247 Conn. 95, 117-18, 717 A.2d 1276 (1998).

[16] The town initially raises a procedural defect in

the proceedings, alleged to have been committed by the council's chairman. During the hearing of September 28, 1998, an attorney for the residents of Sunny Lane asked a witness for Cellco whether she had submitted applications to local agencies of the town for permit approval. When the residents' attorney sought to follow up on this question, Cellco's attorney objected. The residents' attorney then stated: "And what I don't want to have happen here ... I don't want this application to be evaluated by the Siting Council and approved ... and *403 then a site development plan presented which is different than the one you're looking at. Now, if this doesn't comply with local zoning, we ought to know that now. It's a central issue in this application. And there's been no attempt to demonstrate that it does comply.... I would like to have those questions resolved at this time."

At this point, the chairman, who had previously stated that "when [the council] **668 gives permission for that site to be built, when they do the development and management plan, they have to conform to all the local regulations," indicated as follows: "For a long time we required all these nuts and bolts to come before the Council before we made a decision. And when we turned down an application, those nuts and bolts really [were not] necessary and they went through a lot of work. Now we take the basis of an application, we go through and look at it as carefully as we can. And based upon our considered judgment of everybody involved, we grant them this application. And [when] we grant this [application] with certain provisions ... they have to come before us with what we call a development and management plan. And all those things that are critical to the environment, that we believe critical to the environment, the Connecticut Soil and Erosion Guidelines and all the rest of it, have to conform in order for them to get a plan so they can build a site. That's the reason we don't ask them for all the nuts and bolts before we grant the application. But they do have to give us all the nuts and bolts when they give us the development and management plan to build on this site."

The residents' attorney stated that, "[Y]ou're wrong in doing it that way. I think that it violates the statute. I think that it violates the spirit of the law and the letter of the law." At this point, assistant attorney general Kohler stated: "Mr. Chairman, just to try to get back on track, *404 I think that the question that was originally posed ... should be answered by the applicant." The chairman stated that the question on submission to the zoning authorities of the town should be answered "right now." The question was answered, as were further follow-up questions.

From this exchange, the town argues that the chairman of the council, in discussing the procedure to be followed at the hearing, ruled out the presentation of evidence of the town's concerns until after the decision on location was made. Even if the remarks of the chairman can be read in this manner,[FN7] the fact is that the question on zoning, and numerous additional questions, were answered as sought by the residents' attorney. The record before the council contains testimony and exhibits from which the council could gather local regulatory concerns, including zoning issues. In addition, the three documents issued by the council, the findings of fact, the opinion, and the decision and order, each consider the town's concerns.

> FN7. It is equally possible to understand the chairman to be indicating that specific detail in the local regulations only comes into consideration in the management and development plan.

The council recognized the town's concerns regarding the Poplar Plains Brook, and the factors encompassing environmental and residential objections in the designation of the site. In its decision and order, the council conditioned its approval of the application on Cellco's compliance with the town's recom-

mendations, including abandonment of the septic system, planting of dense vegetation and relocation of the fuel tank.

In order to show that the chairman's remarks, if interpreted as claimed by the town, justify this court in taking action to set aside the council's decision, the town must show prejudice. *Griffin v. Muzio,* 10 Conn.App. 90, 94, 521 A.2d 607,cert. denied, ***405**203 Conn. 805, 525 A.2d 520 (1987) (claim of erroneous exclusion of evidence requires showing of substantial prejudice). This record does not support such a finding of prejudice in light of the lengthy ****669** record in the present case, and the full and complete opportunity that the town had to present its case. *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council,* 215 Conn. 474, 489, 576 A.2d 510 (1990) ("The Council made voluminous detailed findings about the facility's likely effects on water and on the air. These findings consistently indicate that the facility, properly constructed in accordance with the Council's guidelines, would have no significant adverse environmental impact.").

[17] The council concluded that there was sufficient showing of need for the granting of the application. The town contests these findings and conclusions, specifically stating that Cellco did not submit specific percentages of dropped calls. Under the substantial evidence test, there was sufficient evidence in the record for the council to conclude that the need requirement was met. Cellco introduced a document and expert testimony showing the percentage of dropped calls in the area of northwest Westport to be four times worse than the system average. The percentage of ineffective attempts (blocked calls) in this area likewise ranged between the system average and four times worse than the system average. This evidence on dropped calls in the record supports the council's conclusions.

The council also properly evaluated the issue of need as regards Springwich, Omnipoint, Sprint and Nextel. The council further found that the proposed site would improve coverage for Cellco and the other carriers. On this record, these findings must be accepted. *Nobs v. Connecticut Siting Council,* supra, Superior Court, Docket No. CV98-0492714S, 2000 WL 675643.

[18] As indicated previously, the council must determine whether there are environmental impacts in locating ***406** the facility and whether such impacts justify denial of the issuance of a certificate by the council. General Statutes § 16-50p(a)(2) and (3). The town claims that the council's findings on the environmental impacts are flawed, especially because it relied on the testimony of Cellco's expert, Klein. The town charges that Klein could not describe his visit to Sunny Lane, was unaware of the term "waterways protection line," and had no knowledge of the wetlands map for the property. It points out that the town conservation officer was concerned that Cellco had not thoroughly studied the effects of the tower on the property.

[19] It has been stated numerous times by our Supreme Court that it is the agency's role to evaluate the evidence before it and the trial court may not retry the matter in an administrative appeal. *Samperi v. Inland Wetlands Agency,* 226 Conn. 579, 588, 628 A.2d 1286 (1993). "The question is not whether the trial court would have reached the same conclusion, but whether the record before the agency supports the decision reached." (Internal quotation marks omitted.) *DeBeradinis v. Zoning Commission,* 228 Conn. 187, 198, 635 A.2d 1220 (1994). The council did have evidence before it indicating that Klein had studied the environmental impacts, including the effects on wetlands, even if he was unfamiliar with town regulations. The council in its order took into account environmental concerns in placing the tower at a distance from the brook and the wetlands.

In addition, the record included more than Cellco's submissions and Klein's testimony. It included an

expert's report submitted by the Clinton Avenue residents at a town zoning hearing, and then later submitted by the town to the council, showing that the project would not affect the environment to any great degree. The council also made its own inspection of the premises.**670 The cases have noted the significance of an agency *407 inspection on its determination. *Grimes v. Conservation Commission,* 243 Conn. 266, 277, 703 A.2d 101 (1997).

The council evaluated the environmental findings and decided that they did not require the denial of the certificate. ("[T] he need for the facility outweighs the environmental effects of the facility after a detailed analysis of the effects on scenic resources, land use, ecological resources, and human health.") The council also took into account, as seen in its opinion, that the alternative site, Clinton Avenue, was more likely to present environmental difficulties than Sunny Lane.

The town also appeals on the ground that the council did not take into account the effect of the location of the tower on real estate values at or around the approved site. Under § 16-50p, as quoted previously, the council is not obliged to take into account the status of property values directly. The council must make use of property values in connection with its analysis of the environmental, scenic, historical and recreational values. The council has more than adequately considered these topics.

The final claim of the town is that the council did not adequately consider the status of the private residence on the premises. Such consideration, however, may be made, when appropriate, under the continuing jurisdiction of the council. General Statutes § 16-50u. Under certain circumstances that need not be decided now, the house may well be subject to the joint jurisdiction of the town and the council.

The council had substantial evidence for the decision that it reached. As the Appellate Court stated in *Preston v. Connecticut Siting Council,* supra, 20 Conn.App. at 490-91, 568 A.2d 799: "[The town's] arguments are not borne out by the record. The council found that the potential adverse impacts were ameliorated by the design and efficiency *408 of the facility, and the requirement that the facility meet other state laws and regulations prior to and during operation." Based upon the foregoing, the appeal of the town in Docket No. CV00-0501129S, is dismissed, and the appeal of Cellco in Docket No. CV00-0500547S, is sustained, as the board of appeals did not have jurisdiction to enter its July 27, 1999 order.

The town shall comply with the council's orders by supplying the appropriate legal documents sought by Cellco.[FN8]

> FN8. Council condition number six intends that the recommendations of the town be observed by Cellco in the construction process. This is the avenue for town input, not through the enforcement of municipal zoning regulations.

Conn.Super.,2001.
Town of Westport v. Connecticut Siting Council
47 Conn.Supp. 382, 797 A.2d 655

END OF DOCUMENT

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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
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 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.

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 administrat-

ive 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 zoning 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, *449260 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 applica- tion.

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 comments 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 requirement.

*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

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.
TOWN OF **REDDING**
v.
CONNECTICUT **SITING COUNCIL** et al.
No. 322676.

Oct. 31, 1996.

Memorandum of Decision

MORAGHAN.

*1 The Town of **Redding** (Town) instituted this proceeding against the defendants, the Connecticut **Siting Council** (Council), Springwich Cellular Limited Partnership (Springwich Cellular), the Connecticut Department of Public Safety, Division of State Police (State Police) and Robert J. Kaufman, seeking declaratory and injunctive relief arising from Springwich Cellular's desire to erect a telecommunications facility in **Redding**, Connecticut, on property owned by Kaufman.

Springwich Cellular applied to the Council in February, 1995, for a Certificate of Environmental Compatibility and Public Need (certificate) in order to construct and maintain the facility, and on August 9, 1995, the Council issued the certificate. The Town challenged the granting of the certificate by commencing an administrative appeal in the judicial district of Hartford in September, 1995, but the appeal was dismissed by the court (Maloney, J.) for failure to properly serve the defendant Council.

In December, 1995, the Town commenced this action, asserting that the Council's decision to grant the certificate is unconstitutional in the following ways: (1) as part of its written decision to grant the certificate, the Council purported to authorize the construction of an access road on the property, which exceeds the powers granted to it by § 16-50 et seq. of the General Statutes; (2) Springwich Cellular's application and the public notice of the application were incomplete in that neither identified the access road; (3) the public notice of the public hearing was incomplete in that it did not identify or describe the access road; and (4) the Council was without authority to authorize the construction of the access road since such construction would violate the Town of **Redding's** land use, planning and inland-wetland regulations. The Town of **Redding** seeks a declaratory judgment that the Council's approval of Springwich Cellular's application was unconstitutional and further seeks an injunction barring the defendants from implementing the approval of the application.

The Council and the State Police have filed separate motions to dismiss, each asserting that the court lacks subject matter jurisdiction over this action because the Town has failed to exhaust its administrative remedies. The defendants note that the Town raised the same issues in the administrative appeal as it does in the present action, i.e., that the Council's granting of the application was unconstitutional and in excess of its statutory authority. In response, the Town argues that this action is distinct from the administrative appeal it previously pursued because in this case, it does not challenge the authority of the Council to regulate the location and type of telecommunications tower that may be erected; rather, it is challenging the Council's authority to approve the construction of an access road without the appropriate planning and environmental considerations. The Town notes that it is seeking a declaratory judgment that its land use regulations are applicable to an access road.

*2 "[A] motion to dismiss is the proper vehicle to attack the jurisdiction of the court. A motion to dismiss essentially asserts that, as a matter of law and fact, the plaintiff cannot state a cause of action that is properly before the court." *Third Taxing District v. Lyons,* 35 Conn.App. 795, 803, 647 A.2d 32,cert. denied, 231 Conn. 936, 650 A.2d 173 (1994). "A party may not institute an action in the Superior Court without first exhausting available administrative remedies. If the applicable administrative remedies are not exhausted, the trial court does not have subject matter jurisdiction ... The doctrine of exhaustion discourages piecemeal appeals from the decisions of administrative agencies thus fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions."

(Citations omitted; internal quotation marks omitted.)

Gemmell v. New Haven, 32 Conn.App. 280, 283. "Exhaustion is required even in cases where the agency's jurisdiction over the proposed activity has been challenged." *O & G Industries, Inc. v. Planning & Zoning Commission,* 232 Conn. 419, 425. Moreover, "when a party has a statutory right of appeal from the decision of an administrative agency, he may not, instead of appealing, bring an independent action to test the very issues which the appeal was designed to test." (Citations omitted; internal quotation marks omitted.) *Pet v. Department of Health Services,* 207 Conn. 346, 352, 542 A.2d 672 (1988).

It appears quite obvious to this court that the Town is essentially seeking to do what it attempted to do in its failed administrative appeal; that is, to have the Council's issuance of the certificate declared an unconstitutional use of its powers. An examination of the complaint in the administrative appeal and the complaint in the instant action reveals that the two actions are essentially identical, notwithstanding the Town's protestations to the contrary. Though there are exceptions to the exhaustion requirement, the Town does not claim to fit into any of them; it merely contends that the doctrine of exhaustion is not applicable to this action since it is distinct from an administrative appeal.

As noted above, the Town attempted to challenge the Council's actions in an administrative appeal, but that appeal was dismissed due to the failure by the Town to properly serve the Council. This does not, however, relieve the Town of its duty to exhaust the administrative remedies available to it. Significantly, in a related proceeding brought by a citizens' group known as "NOT," the Hartford Superior Court (O'Neill, STR.) dismissed a declaratory judgment action because the plaintiffs had failed to exhaust their administrative remedies. *Neighbors Opposed to the Tower v. Connecticut* ***Siting Council,*** Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 557602 (June 18, 1996) (O'Neill, J.). The court held that dismissal of the plaintiffs' prior administrative appeal-the same administrative appeal to which the Town of **Redding** was a party-for failure to properly serve the Council did not excuse the plaintiffs from exhausting their administrative remedies, noting that all the plaintiffs' claims could have been fully adjudicated in an administrative appeal.

*3 In short, the Town is seeking, by way of a declaratory judgment action, to do what it should have done in the failed administrative appeal; that is, challenge the legality of the Council's decision to issue a certificate to Springwich Cellular to construct a telecommunications tower. To reiterate, since the Town had available to it the remedy of an administrative appeal, it may not "bring an independent action to test the very issues which the appeal was designed to test." *Pet v. Department of Health Services, supra.* The defendants' motions to dismiss this action for lack of subject matter jurisdiction are, accordingly, granted.

Conn.Super.,1996.
Town of Redding v. Connecticut Siting Council
Not Reported in A.2d, 1996 WL 649291 (Conn.Super.)

END OF DOCUMENT