STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:
APPLICATION OF NEW CINGULAR WIRELESS PCS, LLC (AT&T) FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS TOWER FACILITY IN STAMFORD, CONNECTICUT

DOCKET NO. 447

April 9, 2014

APPLICANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN RESPONSE TO INTERVENOR WHET'S REPLY AND MOTION SEEKING AN ADMINISTRATIVE ORDER COMPELLING WHET'S SITE ACCESS & TESTING

I. Introduction

The purpose of this Supplemental Memorandum of Law is to address new legal authority cited by Intervenor West Hill Environmental Trust's ("WHET") in its Reply ("Reply") to AT&T's[1] Response and Objection to Intervenor WHET's Motion for Compelled Site Access and Testing ("Objection") filed with the Siting Council ("Council") on April 8, 2014. The new legal authority cited therein has not previously been raised regarding Intervenor WHET's Motion for Compelled Site Access and Testing, which was filed with the Council on April 3, 2014 (the "Motion"). For a full recitation of the facts and procedural history, the Council is respectfully referred to the accompanying Affidavit of Daniel M. Laub, Esq., dated April 9, 2014, and to the Applicant's Objection, filed with the Council on April 7, 2014.

II. Intervenor WHET Has Failed To Cite Any Relevant Legal Authority Upon Which The Council Could Compel AT&T To Allow Intervenor WHET Access To The Property On Which AT&T Has Proposed Its Facility

It is black letter law in Connecticut that "[t]here is no right of opponents of a land use application to get access to the land involved in the application in order to inspect or to perform tests on it." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice § 20:11 (3d ed.). This rule is deeply rooted in the rights afforded to property owners with respect to their property and in the protections against unreasonable search and seizure afforded to those with a

[1] Unless otherwise noted, all terms are as defined in New Cingular Wireless PCS, LLC's ("AT&T") Application for a Certificate of Environmental Compatibility and Public Need for a Telecommunications Tower Facility at 560 West Hill Road in Stamford, Connecticut.

property interest under the Fourth Amendment to the United States Constitution, as made applicable to the state of Connecticut through the Fourteenth Amendment.

In derogation of these bedrock legal principles, Intervenor WHET has argued that an amalgamation of several selected, truncated sources of legal authority somehow compel the opposite result.[2] Intervenor WHET has, at times, based its argument upon the Environmental Protection Act of 1971, General Statutes § 22a-14 *et seq.*[3] ("CEPA"), the Uniform Administrative Appeals Act, General Statutes § 4-166 *et seq.* ("UAPA"), the Public Utility Environmental Standards Act, General Statutes § 16-50g *et seq.* ("PUESA"), and the Council's own regulations codified at Regulations of Connecticut State Agencies § 16-50j-1 *et seq.*[4] Nevertheless, the applicable law clearly supports the Applicant's position — that the Council lacks the statutory authority to compel an applicant to grant an environmental intervenor under General Statutes § 22a-19 (a) physical access to a facility site that is the subject of a certificate proceeding under PUESA.

In *Montigny* v. *Town of Vernon*, Superior Court, judicial district of Tolland at Rockville, Docket No. CV-03-0081630S (Sept. 30, 2004), the Superior Court dispensed with the exact same claim raised by the plaintiffs, reasoning that: "Essentially, the plaintiffs ask this court to create new law that establishes that environmental intervenors under § 22a-19 (a) shall always have the express right to enter the subject property in question without the land owner's consent. This court declines to do so. . . . [T]his court upholds the long-standing right of a property owner to deny access to his or her property." Id. In so holding, the Court in *Montigny* adopted the reasoning of the Court in *Mulvey* v. *Environmental Commission*, Superior Court, judicial district

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[2] Intervenor WHET also relies upon the purported language of the Applicant's lease agreement with the underlying property owner. Nevertheless, even a cursory reading of the language cited by Intervenor WHET in footnote one of its Reply and the correct lease provision reveals that it fails to support Intervenor WHET's position.

[3] Intervenor WHET's argument that CEPA, specifically General Statutes § 22a-20, somehow confers equity *jurisdiction* upon the Council strains credulity. The plain language of General Statutes § 22a-20 contemplates that the Superior Court, in the exercise of its jurisdiction, may grant interim equitable relief as necessary to ensure the statutory rights of environmental groups to intervene in agency proceedings under General Statutes § 22a-19 (a). To assert otherwise is to conflate the *authority* of a state administrative agency as enabled by the General Assembly through the General Statutes with the general unlimited *jurisdiction* conferred upon the Superior Court by Article fifth, § 1 of the constitution of Connecticut.

[4] Intervenor WHET has chosen in its Reply to now rely solely upon its status as an intervenor under CEPA and the common-law doctrine of "fundamental fairness" in administrative proceedings. Regarding the other grounds cited by Intervenor WHET in its Motion, the Council is respectfully referred to the Applicant's Objection, filed with the Council on April 7, 2014.

of Stamford, Docket No. CV 97 0156976S (Aug. 26, 1998) (22 Conn. L. Rptr. 665). There, the Court, *Tobin. J.*, plainly dispensed with the same "due process" concerns raised by Intervenor WHET herein: "The plaintiffs' claim that they were denied due process in that the Commission should have assisted plaintiffs and their experts in obtaining limited access to the property is without merit. The property owner (BHC) exercised its rights in denying access to its property." Id.

The judicial districts of the Superior Court are in accord with respect to the rule of law that an administrative agency cannot compel an applicant to allow an environmental intervenor under General Statutes § 22a-19 (a) to access the applicant's property for the purposes of conducting an inspection and testing. As set forth by the Court in *Gevers* v. *Inlands Wetlands & Watercourses Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-03-0091084 (Oct. 5, 2004) (38 Conn. L. Rptr. 63), "the appellants have not been able to find any requirement that an applicant give opponents access to the subject property in order to inspect or test it. Such a requirement has not been a part of land use practice here in Connecticut. Any such requirement would need to come from the legislature through an amendment to the governing statutes." Id.

WHET, by way of its Motion, is asking the Council to act in a manner beyond the authority vested in it by the legislature and state laws. For the Council, the Motion further implicates the rights of all applicants in a manner that, if granted, would be precedent in future proceedings. Intervenors in all future dockets would be able to move the Council, over the objection of an applicant with a real property interest, to force physical access and testing of any number of environmental conditions at a site involving a proposed facility. The list of such facilities includes nuclear power plants, hazardous waste facilities, high tension power line sites, windfarms and telecommunications tower facilities, all as regulated by the Council. See, e.g., General Statutes §§ 16-50i, 22a-116. As such, the vast departure from the law of the state of Connecticut as sought by Intervenor WHET in the form of an administrative order implicates much more than just this Docket for the Siting Council.

It is clear based upon the controlling legal authority and cases directly on point that Intervenor WHET's Motion is entirely devoid of merit and should denied by the Council if not immediately withdrawn by Intervenor WHET.

III. The Fundamental Fairness Of The Council's Proceedings Is Not Implicated By Intervenor WHET's Motion

Intervenor WHET maintains in its Reply that the legal doctrine of fundamental fairness in administrative proceedings somehow: (a) empowers the Council to grant its Motion and (b) compels that its Motion should be granted. Notwithstanding that the Council lacks any legal authority to grant Intervenor WHET's Motion (*see* Point II, supra), the Council has no obligation to assess on an *ad hoc* basis the "fundamental fairness" of its own pending certificate proceeding under PUESA. Rather, the Council must simply adhere to UAPA and its rules in administering the interests asserted by parties, intervenors and others to ensure that a fundamentally fair proceeding is administered by it as an agency. In this regard, it is telling that Intervenor WHET cites to court opinions, as it is the Superior Court that has the requisite jurisdiction to determine whether an administrative proceeding was fundamentally fair, and only after the administrative process is complete. *See* General Statues § 4-183 (a) ("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."); footnote 3.

Fundamental fairness requires only "that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary. . . . The purpose of administrative notice requirements is to allow parties to prepare intelligently for the hearing. (Citations omitted; internal quotation marks omitted.) *Grimes* v. *Conservation Commission of the Town of Litchfield*, 243 Conn. 266, 273-74, 703 A.2d 101 (1997) (holding that plaintiff-intervenor had no constitutional or common law right to actual notice of site walk);[5] see also *Red Hill Coal., Inc.* v. *Conservation Commission of the Town of Glastonbury*, 212 Conn. 710, 719-20, 563 A.2d 1339 (1989) ("In our case law we have recognized that it is important to remember that against the laudable state policy of such legislation must be balanced the interests of the private landowner who wishes to make productive use of his wetland."); *George* v. *Inland Wetlands Commission of Montville*, Superior Court, judicial district of New London, Docket No. CV 09 4009292 (Oct. 21, 2011) (inability of § 22a-19 (a) intervenor's expert botanist to conduct inspection and commission's

[5] The Court in *Grimes* distinguished due process of law – a constitutional right inuring to those with a bona fide interest in property — from Connecticut's common law right to fundamental fairness in administrative proceedings, in which the property interests of the intervening party are not at stake. *Grimes* v. *Conservation Commission of the Town of Litchfield*, supra, 243 Conn. 273 n.11.

approval of application "any time before the following summer when the rare plants would be in bloom and could be observed by a qualified botanist" did not violate intervenor's right to fundamental fairness in administrative proceeding).

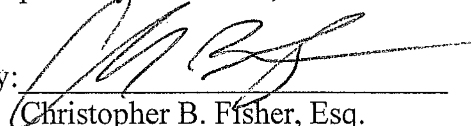
In this Docket, the Council granted intervenor status to WHET, which allows it to serve interrogatories on the Applicant, which it has now done. Intervenor WHET will also be provided with notice of every phase of the Council's proceedings, an opportunity to produce its own relevant evidence as limited to environmental considerations, and to cross-examine the witnesses produced by the Applicant. These are the fundamental fairness protections afforded to an environmental intervenor under General Statutes § 22a-19 (a). See *Mulvey* v. *Environmental Commission*, supra, Superior Court, Docket No. CV 97 0156976S (22 Conn. L. Rptr. 665) ("The plaintiffs' claim that they were denied due process in that the Commission should have assisted plaintiffs and their experts in obtaining limited access to the property is without merit."). The Applicant is confident that the Siting Council will ensure its proceeding is fundamentally fair to all parties and intervenors, including the Applicant.

IV. Conclusion

Based on the foregoing, Intervenor WHET should withdraw its Motion immediately, and in the absence of same, the Council should deny Intervenor WHET's Motion as a matter of law. As the controlling law makes clear, the Council lacks any authority to grant WHET's Motion to compel AT&T to allow WHET to access its lease area and the property at 560 West Hill Road in Stamford. Notwithstanding the foregoing, and outside of Intervenor WHET's Motion, the Applicant has offered WHET's consultant to provide input on the scope of Mr. Gustafson's field work, studies and independent analyses of the existing conditions at 560 West Hill Road in the City of Stamford and will also allow him to attend a supervised visit for visual observations as relevant to the Application in Docket 447. These courtesies are being extended by AT&T to WHET without any legal obligation to do so.

We thank the Siting Council for its consideration in this regard.

Respectfully Submitted,



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