APPELLATE COURT

of the

STATE OF CONNECTICUT

A.C. No. 29086

CARL BORNEMANN, M.D., EMR POLICY INSTITUTE, INC., Appellants

vs.

CONNECTICUT SITING COUNCIL, NEXTEL COMMUNICATIONS, INC., Appellees

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BRIEF OF PLAINTIFFS-APPELLANTS WITH SEPARATE APPENDIX

GABRIEL NORTH SEYMOUR
200 ROUTE 126
FALLS VILLAGE, CT 06031

JURIS NUMBER: 424367

T: (860) 824-1411
F: (212) 455-2502

WHITNEY NORTH SEYMOUR, JR.
425 LEXINGTON AVENUE, ROOM 1721
NEW YORK, NY 10017

T: (212) 455-7640
F: (212) 455-2502

ATTORNEYS FOR APPELLANTS

COUNSEL OF RECORD and ARGUING ATTORNEYS

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PRINCIPAL ISSUES ON THIS APPEAL

1. Are Connecticut General Statutes §16-50j(g) and §16-50q, and the Connecticut Siting Council's implementing regulations, along with related statutes and regulations, unconstitutional on their face and as applied to the facts of this case?
(Brief pages 5-8)

2. In view of Nextel's express reservation of the right to reapply at any time to construct a wireless facility on the Bornemann property, did the trial court err in finding all of the issues in Dr. Bornemann's Petition 763 to be "moot"?
(Brief pages 8-26)

3. In light of the evidence and the pleadings in the whole record, were the facts set out in the trial court's Memorandum of Decision as the basis for dismissing the appeal on standing clearly erroneous? (Brief pages 27-30)

TABLE OF AUTHORITIES

Federal Statutes:

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Federal Cases:

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Constitutional Provisions Involved in This Appeal:

United States Constitution, Amendment V and Amendment XIV, Section 1

"Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Connecticut State Constitution, Section 8

"SEC. 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger."

PRELIMINARY STATEMENT

Carl Bornemann, M.D. and EMR Policy Institute, Inc. submit this brief in support of their appeal from the Memorandum of Decision of the Superior Court filed July 27, 2007, dismissing as moot and for lack of standing their appeal from the October 19, 2006 written order of the Connecticut Siting Council (CSC) dismissing Dr. Bornemann's Petition No. 763 before the Council, and from various agency violations of the UAPA and denial of Plaintiffs' constitutional rights under the First and Fifth Amendments.

NATURE OF THE PROCEEDINGS

This case involves actions by a major telecommunications company (Nextel – now Sprint-Nextel) to construct a wireless cell transmission facility and antenna on the Bornemann property in the Town of Canaan without the property owner's knowledge or permission, and without any hearing as to (1) the company's claim of legal right to do so, or (2) misstatements as to the absence of adverse impact of the facility on the environment.

Plaintiffs' administrative appeal challenged the agency's approval of the Nextel plan; the agency's wholesale disregard of constitutional due process and UAPA requirements; and the agency's failure to comply with state environment and wildlife protection laws.

The standard of review to be applied to Point I on this appeal is plenary and de novo since the argument involves questions of constitutional law based on undisputed facts.

The standard of review to be applied to Point II on this appeal is whether the court's factual findings are "clearly erroneous," and whether the court's application of law is plain error – either of which requires reversal.

The standard of review on Point III, where the factual basis for the court's decision is challenged, is whether, in light of the evidence and the pleadings in the whole record, the facts set out in the Memorandum of Decision are "clearly erroneous." [Barzetti v. Marucci, 66 Conn. App. 802, 786 A.2d 432 (2001)].

STATEMENT OF FACTS

On December 14, 2004, Nextel filed its Petition No. 701 with the CSC seeking Siting Council approval of its erection of a wireless cell telecommunications facility and antenna on the Bornemann property at 145 Beebe Hill Road without going through the formal certification proceeding prescribed by statute [C.G.S. §16-50l]. (Appendix A1)

On January 24, 2005, the Siting Council approved Nextel's Petition without any notice to Dr. Bornemann and without any hearing. No staff member or commissioner investigated Nextel's legal right to construct a facility on the site, or contacted the DEP on Nextel's claim that there would be no adverse impact on the environment. (A16) The Siting Council, however, made a wholly unsupported ex parte ruling that "this proposal would not have a substantial adverse environmental effect, and pursuant to General Statutes § 16-50k would not require a Certificate of Environmental Compatibility and Public Need." (A15)

Over a year later, Dr. Bornemann learned of the proposed construction of the Nextel wireless transmitter by chance from reading a newspaper article, and promptly engaged legal counsel and filed his Petition No. 763 with the Council to void (not simply "vacate") the agency's approval of Nextel's Petition. (A20, A63)

When Dr. Bornemann's attorney protested the lack of notice of Nextel's Petition 701 from either Nextel or the agency, Nextel suddenly produced a purported "form letter"

allegedly sent by Nextel to Dr. Bornemann a year and a half earlier. Dr. Bornemann's counsel challenged the authenticity of the document, which the doctor never received. (A63)

On May 17, 2006, the Council rejected a proposed study of the Beebe Hill site designed by the United States Fish and Wildlife Service (USFWS), to determine the environmental impact of the Nextel transmitter on migratory birds. (A40)

On May 25, 2006, Dr. Bornemann filed a written request for reconsideration of the Council's rejection of the migratory bird study. (A50)

The Siting Council then scheduled a public hearing on Dr. Bornemann's Petition No. 763 for October 12, 2006. (A82)

In preparation for the public hearing, Dr. Bornemann requested the issuance of a Council subpoena for various Nextel documents relating to its purported right of access to the property, effect on the environment, and the purported "form letter" notice. He also requested the recusal of Commissioner Colin Tait under the UAPA because he had previously been the investigator who approved the Nextel proposal leading to the agency's ruling of "no substantial environmental effect." (A16, A62)

In compliance with agency directions, Dr. Bornemann filed multiple copies of a large number of pre-marked hearing exhibits (A83-A84), and on October 2, 2006, served and filed his Pre-Hearing Memorandum outlining and discussing the issues to be presented at the public hearing. (A75) Simultaneously, copies of all of these documents were served on Nextel's counsel.

Sprint and Nextel were merged in August, 2005.(A87, A89) Counsel for the combined companies waited fifteen months, until just six days prior to the scheduled public

hearing, to notify the Council that Sprint-Nextel had decided not to proceed with construction of the transmitter on the Bornemann property, while reserving the right to reapply to do so at any future time. Now being fully apprised of Plaintiffs' evidence, Nextel's counsel expressly requested the Siting Council to dismiss Petition 763 and to take any action on Nextel's Petition 701 "without prejudice." (A87)

On October 11, 2006, exactly one day before the scheduled public hearing, Nextel filed a written request for party status and simultaneously moved for dismissal of Dr. Bornemann's petition as moot. Nextel's counsel also asked the Council to "decline to issue" the requested subpoena for Nextel documents (regarding the purported CL&P permission to construct the wireless facility and Nextel's purported "form letter."). (A88, A90)

On October 12, 2006 – the date scheduled for the public hearing -- the Siting Council held a Special Meeting at which, without discussion, it:

(1) Granted party status to Sprint-Nextel;

(2) "Vacated" (but did not void) its prior order approving Nextel's Petition No. 701;

(3) Dismissed Dr. Bornemann's Petition No. 763 as moot, on Nextel's motion; and

(4) Denied Dr. Bornemann's motion for reconsideration of the proposed USFWS migratory bird study.

The smoothness of the proceeding had all the earmarks of prearrangement.

The Council refused to hear any objections or argument from counsel for Dr. Bornemann and EMRPI on any of these issues. The Council also failed to consider or act on Dr. Bornemann's request for a subpoena for Nextel documents, or on his request to recuse Commissioner Tait, who instead personally made the motions to dismiss Dr. Bornemann's claims. (A92-A111)

On October 19, 2006, the Council sent letters to the parties setting forth its decision granting all of Nextel's requests. (A112, A113) The Plaintiffs then filed a Complaint in the Connecticut Superior Court appealing the Siting Council's actions. (A114) The Complaint was dismissed by the Superior Court on Defendants' motions on July 27, 2007, on grounds of mootness and lack of standing. (A 119)

ARGUMENT

POINT I

CONNECTICUT GENERAL STATUTES §16-50j(g) AND §16-50q AND THE SITING COUNCIL'S IMPLEMENTING REGULATIONS ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED IN THIS CASE

Dr. Bornemann and EMRPI have challenged[1] the constitutionality of the Connecticut Siting Council's actions under Connecticut General Statutes §16-50j(g) on due process grounds under the Fifth and Fourteenth Amendments of the U.S. Constitution and Section 8 of the Connecticut Constitution. The specific due process issues are:

(1) The Council's failure to give timely notice to the property owner of Nextel's Petitions for a Declaratory Ruling;

(2) The Council's refusal to permit the affected parties to be heard at any time during the entire proceedings.

In addition, Plaintiffs challenge the constitutionality of §16-50q on due process and equal protection grounds for failure to provide a direct statutory right of appeal to parties affected by declaratory rulings. These challenges also apply to related statutes that affect the substance and procedure for Siting Council declaratory proceedings.

[1] A23 – A24; Complaint pars. 3-6, 8-12, 17-33, 36. (A114-A118)

The simple recital of the basic facts conveys the unconstitutionality in a nutshell:

1. Dr. Bornemann received no notice from the Council of its consideration, or of its approval, of the Nextel petition to construct a transmitter and antenna at 145 Beebe Hill Road without a statutory Certification proceeding.

2. Dr. Bornemann did not learn of the Council's action until over a year later when he read about it in the local newspaper.

3. Instead of being invited to intervene in the Nextel Petition proceeding, Dr. Bornemann was required to prepare a separate formal written petition in order to call the Council's attention to the falsities and misstatements in the Nextel Petition.

4. Before he was permitted to file his petition, Dr. Bornemann was required to pay a $500 filing fee to have his petition accepted.

5. After weeks of preparation for a promised hearing on his petition, Dr. Bornemann was denied any hearing whatsoever on the merits of his petition or on his legal objections to the proposed actions of Nextel and the Council to dismiss the petition, and was even denied an opportunity to make an objection to the Council's petition's dismissal.

6. When Plaintiffs appealed the Council's actions, the Council blocked their appeal by successfully moving to dismiss it for lack of standing.

The same disregard of due process was followed on Dr. Bornemann's proposal for a study of the impact of the Nextel wireless facility on birds and wildlife: no opportunity to be heard on the merits, and no opportunity to object or be heard on the rejection of the proposal.

Intervenor EMRPI was likewise denied any opportunity to be heard on the environmental issues or to object to their arbitrary dismissal, although §16-50n(a)(3) gives it party status as a qualified non-profit organization.

The Siting Council proceedings involved material issues directly involving property rights and adverse effects on the environment. Any statute that delegates exclusive jurisdiction over such issues to an administrative agency, and then permits the agency to operate arbitrarily with total disregard of fundamental due process rights of notice and hearing for affected parties is per se unconstitutional.

Under the Fifth and Fourteenth Amendments, notice must be given to persons affected by administrative proceedings, and they must be given an opportunity to be heard. This is fundamental Constitutional doctrine as enunciated in the following decisions by the United States Supreme Court:

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938): After the National Labor Relations Board considered charges brought against an employer by a complaining union and then undertook to void an agreement between the employer and an independent union, the independent union was entitled to notice and an opportunity to participate in the proceedings.

Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941): Due process does not require an administrative agency to hold a hearing at the initial stage, or at any particular point in the proceeding, as long as a hearing is held before the final order becomes effective.

Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950): Where a hearing is required, it must be a fair one, before a tribunal meeting currently prevailing standards of impartiality.

Margan v. United States, 304 U.S. 1, 18–19 (1938): A party must be given an opportunity to present evidence, to know the claims of the opposing party and to have the opportunity to meet them. Those who are brought into contest with the Government in a quasi–judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and an opportunity to be heard upon the proposal, before the final command is issued.

POINT II

THE TRIAL COURT'S HOLDING THAT PLAINTIFFS' APPEAL FROM THE AGENCY'S DISMISSAL OF DR. BORNEMANN'S PETITION 763 IS "MOOT" IS CLEARLY ERRONEOUS ON THE FACTS AND ALSO CONTRARY TO LAW

By granting Nextel the right to re-apply to erect a facility at any time, while denying the Plaintiffs a right to object or to be heard as to (1) Nextel's authority to enter, construct or operate a wireless transmission facility on the Beebe Hill property, or (2) the potential damage to the environment, including harm to migratory birds and other wildlife from a wireless cell transmitter operating at the Beebe Hill location, the Connecticut Siting Council acted arbitrarily and capriciously and deprived both Plaintiffs of their Constitutional and statutory civil rights; placed a cloud on the Bornemann property; and flouted Connecticut's environmental protection statutes and the requirements of the UAPA.

In accepting Nextel's last-minute voluntary cessation of its construction plans – "without prejudice" -- and then granting Nextel's motion to dismiss Dr. Bornemann's Petition on grounds of mootness, the Council violated clear legal standards set by the

United States Supreme Court. That Court has held that voluntary withdrawal or cessation of challenged conduct "without prejudice" does not satisfy the legal criteria for mootness.

> A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.CT. 1070, 71 L.Ed.2d 152. If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. Ibid.
>
> Friends of the Earth v. Laidlaw, 528 U.S. 167, 169 (2000) (Emphasis added.)

See also Washington Legal Foundation v. Henney, 202 F.2d 331, (D.C.Cir. 2000):

> It is a well-recognized principle that a case will not become moot merely because a defendant agrees voluntarily to cease engaging in the challenged conduct, as there remains a risk that the defendant will merely resume the challenged conduct after the case is dismissed. See, e.g., United States v. W. T. Grant, Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Voluntary cessation of challenged conduct will only moot a case if "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., No. 98-222, Slip Op. at 18 (U.S. Jan. 12, 2000), 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)).

A similar standard applies in Connecticut: Loisel v. Rowe, 233 Conn. 370, 382, 383, 660 A.2d 323 (1995) ("Capable of repetition, yet evading review.") In this case, the public importance of the applicability of C.G.S. §26-310 to the actions of the Connecticut Siting Council (See Point II below) is also a major public policy question that independently merits and requires judicial review of Plaintiffs' administrative appeal.

Not only has Nextel failed to demonstrate that the Beebe Hill antenna would never be erected, but it has expressly reserved its right to do so. The Council approved Nextel's request to withdraw its Beebe Hill petition "without prejudice" leaving the door open to initiate another secret proceeding to invade the Bornemann property at any time.

The Council's action dismissing Petition 763 as "moot" was contrary to fact and law. Knowing Nextel's requested right to renew the challenged conduct, it was an abuse of discretion and arbitrary and capricious conduct for the agency to treat Petition 763 as "moot" and to dismiss it. The cell transmitter construction issue is still very much alive. Potential future construction by Sprint-Nextel on Beebe Hill (or by some other company) is very real.

All of the following contested issues raised by Dr. Bornemann's Petition 763 remain open and unresolved:

A. Property Rights and Easement

Dr. Bornemann's Petition 763 to the Siting Council stated:

> **"I. Nextel Made False, Incomplete and Misleading Statements in Petition No. 701.**
>
> In its December 14, 2004 Petition, Nextel made the following false, incomplete and misleading statements:
>
> (a) Ownership of Property. In the first paragraph of its Petition, Nextel stated that the proposed cell tower and equipment would be 'entirely within the existing CL&P property.' It then went on to state that Nextel had "received authorization from CL&P for the project."
>
> In fact the property in question belongs to Petitioner Carl Bornemann and to the family trusts of which he is the authorized representative. It does not belong to

CL&P. Petitioner was never contacted or notified by Nextel, and has never authorized the Nextel installation.

(b) The CL&P Easement Does Not Permit the Erection of Any Buildings. Although Nextel acknowledged later in its Petition that CL&P only holds an easement to the right of way across Petitioner's property, Nextel did not mention that the easement expressly excludes the erection of buildings. Nextel did not attach a copy of the easement to its Petition, which would have shown its limitations. On information and belief, Nextel never informed the Council that the erection of buildings (as proposed by Nextel and approved by the Council) was not authorized under CL&P's easement. A copy of the easement is attached hereto as Exhibit A.

(c) The CL&P Easement Does not Authorize Wireless Communications. As demonstrated by the clear wording of Exhibit A, the easement granted to CL&P relates solely to 'electric transmission and/or distribution lines'. Nowhere does it grant CL&P the right to transmit wireless communications, or digital, video or other wireless applications. The grantee is limited expressly to the use of 'wires.' "

(A21-A22)

These are all continuing issues and did not become moot simply by Nextel withdrawing its 2004 plan to erect a wireless antenna on the site. By reserving its right to reapply at any time, officially approved by the Council's permitting withdrawal "without prejudice," the issue of property and easement rights remains a sword of Damocles, as described in the writings of Cicero – a continuing and constant threat to Plaintiffs.

B. Due Process

The Bornemann Petition 763 stated in its Point II:

"II. Nextel and the Council, Acting Under Color of Law, Deprived Petitioner Bornemann of His 14th Amendment Due Process Rights by Their Failure to Notify or Consult Him About Nextel's Petition for a Declaratory Ruling Before or After Granting Same.

No justification exists for Nextel's and the Council's failure to notify Dr. Bornemann of the Nextel Petition and the Council's determination that a Certificate of Environmental Compatibility and Public Need was not required for the erection of the proposed cell tower on his property in close proximity to his home, with the

> potential of interference with Petitioner's property in such a manner as to amount to a taking. Petitioner was thereby denied both timely notice and a right to be heard. [See First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987)]"
>
> (A23-A24)

Under the Council's standard procedures for Petitions, these same due process abuses continue in effect across the board and are not moot – and will not be moot unless the Court declares the Siting Council's procedures under the enabling statutes and regulations unconstitutional (Point I, supra).

The agency's administrative procedures violate Connecticut's Uniform Administrative Procedures Act and deprive citizens of their due process and other basic rights under Section 8 of the Constitution of the State of Connecticut and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The agency's violations of the UAPA in this case were calculated to deny Plaintiffs a due process hearing, with specific intent to prevent Dr. Bornemann and EMRPI from introducing testimony and exhibits establishing (1) Nextel's lack of authority to construct a transmission facility on Dr. Bornemann's property, and (2) the Council's dereliction of its statutory duties regarding wildlife and protecting the environment. The Council was plainly more concerned with satisfying the telecommunications company than protecting citizens' rights or the public interest.

The issues raised in the proceeding instituted by Dr. Bornemann in Petition No. 763 constituted a "contested case" within the definition of the Uniform Administrative Procedure Act (UAPA), set forth in Connecticut General Statutes Section 4-166. The disputed property rights and environmental issues were required to be determined at the outset by the Connecticut Siting Council as a pre-condition to considering Nextel's original

construction proposal, under both UAPA Sections 4-176(g) and 4-178, as well as under the due process guarantees of the Constitutions of Connecticut and of the United States.

The UAPA guaranteed Dr. Bornemann procedural rights which were deliberately violated and disregarded by the agency. These included:

(a) Opportunity to inspect Nextel records, papers and documents (UAPA Section 4-177c(1));

(b) Right to cross-examine witnesses, present evidence and arguments on Petitions 701 and 763 (UAPA Section 4-177c(2));

(c) Right to request the issuance of a subpoena for the production of Nextel documents (UAPA Section 4-177f); and

(d) Right to recuse any hearing officer who functioned as an investigator in the early stages of the proceeding (UAPA Section 4-176c).

The agency's deprivation of these due process rights served to cover up the false claims and misrepresentations made by Nextel in Petition 701, and to cover up the Council's own neglect of its duties in ruling that the Nextel proposal would not have a substantial adverse environmental effect when it approved Petition 701 without ever conducting an independent investigation into Bornemann property rights or into DEP or other records regarding the potential environmental impact of the Nextel facility. (A15, A16)

Before any state can deprive a person of life, liberty or property, basic due process requirements must be met – notice and hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). See also Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976).

Failure to Give Notice

The Bornemann site is subject to a decades-old power line easement. Nextel claimed it had permission from the power company (CL&P) to erect the cell antenna on an existing transmission tower. No evidence of any such permission was ever presented[2].

The Siting Council personnel who investigated the Nextel proposal never mentioned in their written report the terms of the power company easement, which was available at all times in the public records at the Canaan Town Hall. (See A16) The easement issue has a direct bearing on present and future property rights at 145 Beebe Hill Road, and the Bornemann family cannot be deprived of those property rights by the Siting Council's approval of wireless cell facilities without a due process hearing.

These property issues were clearly spelled out in detail for the Council and Nextel in the Bornemann Pre-Hearing Memorandum. (A75)

UAPA Section 4-177 required the Council to give notice of the pendency of Petition 701 to Dr. Bornemann as representative of the affected property owner, but it failed to do so. (A63) In sharp contrast, the Council sent written notice to the telecommunications company, Nextel, of its approval of Nextel's Petition 701 and did so by Certified Mail, Return Receipt Requested, and inserted formal proof of service of the notice on Nextel in its official file (A15, A18, A19). The Council makes no claim that it ever sent such a notice to the property owner, as required by §4-177, or, after its approval, as required by §4-176(h).

[2] Appellants make an offer of proof that documents subpoenaed from CL&P for the scheduled hearing on Petition 763 show that no such CL&P permission was ever granted.

Denial of Hearing

By blocking the public hearing scheduled for October 12, 2006, the Council prevented evidence relating to the issues of notice and due process from being publicly heard or considered by the Commissioners. Nextel is now free to secretly apply to the Council once again for unlawful authorization to erect a facility on the Bornemann property -- in total disregard of the owner's property rights -- and to do so without challenge, thereby placing a cloud and encumbrance on title to the property, reducing its market value, and exposing present and future residents to unknown health risks.

Motion for Subpoena

At a Siting Council meeting on June 7, 2006, after Dr. Bornemann objected to his lack of notice from Nextel or the Council, the Council's Executive Director suddenly announced that Nextel had just discovered a copy of a "form letter" it claimed to have sent to Dr. Bornemann in December, 2004, advising him of the filing of Petition 701.[3] The newly-discovered letter was date-stamped by the Council on June 6, 2006, eighteen months after it was purportedly mailed and two months after the filing of Petition 763. No copy had ever been placed in the Council's official file prior to the Council's approval of Nextel's Petition 701 in January, 2005.

A 2006 cover fax from Nextel to Council staff showed that the newly-discovered letter had been delivered to the Council following an ex parte conversation between Council staff and Nextel's representative (who never again appeared in the proceedings below).

Dr. Bornemann challenged the authenticity of the purported Nextel form letter and timely moved for the issuance of a Council Subpoena pursuant to UAPA Section 4-177c(1)

[3] This letter constituted an admission by Nextel that Dr. Bornemann was the property owner (or authorized representative) of 145 Beebe Hill Road.

both for records bearing on authenticity of the document, as well as other documents related directly to the issues in the forthcoming public hearing on Petition 763. (A60)

The Council never acted on the subpoena request prior to the hearing, thereby aiding Nextel in cloaking the truth as to the authentication of the conveniently discovered Nextel "form letter" addressed to the property-owner -- which Dr. Bornemann denies ever receiving – and concealing Nextel's actions or inaction regarding the issues of power company permission, the property easement, and any research into potential harm to the environment[4]. The Council's failure to issue the subpoena for production of Nextel documents relevant to the easement and environmental issues raised by Petition 763 left those contested issues wholly unresolved. Appellant Bornemann has thereby been denied his right of access to relevant documents under Section 4-177c(1), and also his right under UAPA Section 4-177c(2) to cross-examine witnesses as to the authenticity of the questioned key document and Nextel's ex parte dealings with Council staff on the contested issue of notice, as well as on Nextel documents relating to the disputed issues of easement and environmental impact.

Lack of Impartiality

The UAPA expressly mandates (Section 4-176e) that "no individual who has personally carried out the function of an investigator in a contested case may serve as a hearing officer in that case." Commissioner Colin Tait served as one of the agency's two investigators who made a site visit and reviewed and recommended approval of Nextel's Petition 701 authorizing the erection of the Nextel cell tower on the Bornemann property. (A16) Commissioner Tait was also one of the two Council representatives who failed to check the terms of the power company easement under which Nextel falsely claimed it had

[4] None of the requested documents have ever been provided to Dr. Bornemann by Nextel.

the right to proceed (although it was at all times available in the Canaan Town Hall), and who totally disregarded the official DEP map and DEP records showing the presence of threatened species in the area where Nextel claimed its facility would have no adverse environmental impact.

Dr. Bornemann's counsel filed a written motion calling for Commissioner Tait's recusal from the hearing on Petition 763. (A62) Instead of Tait voluntarily recusing himself, or the Chair presenting the recusal motion for Council vote, the Chair allowed Tait not only to vote on the issues raised by Petition 763, but also allowed him to be prime mover on every single motion to block Dr. Bornermann from receiving a hearing on his Petition. Simultaneously, the Chair deprived Dr. Bornemann and EMRPI of their right to challenge the Council's actions, and prevented Dr. Bornemann's counsel from objecting or raising any argument to each of Tait's motions and to the Council's actions. (A96, A98, A104, A106, A108, A109)

Denial of Opportunity to Be Heard

Appellant EMR Policy Institute, which was granted intervenor status in the Siting Council proceedings, was particularly concerned as an environmental public education organization in expressing and presenting supporting scientific studies concerning the potential harm of the Nextel antenna and transmissions on birds and other wildlife in the major flyway and inland wetland area next to Beebe Hill.

The Council summarily denied Dr. Bornemann's motion for reconsideration of the wildlife impact issue – simultaneously cutting off EMRPI's right to be heard on the issue. The following is the official transcript of what happened:

> MR. PHELPS [CSC Executive Director]: Mr. Chairman, do we first need to take up the action of the Motion for Reconsideration though?

MR. MARCONI [Assistant AG]: I would say we could do so, but I would say also that it is rendered moot by the vacating of 701.
MR. PHELPS: Well, give us some direction. Do you want us to vote on it or –
MR. MARCONI: I would – I would recommend that.
CHAIRMAN CARUSO: So –
MR. TAIT: I move that we deny the Motion to Reconsider a letter – our letter to the Fish and Wildlife Service.
CHAIRMAN CARUSO: And there's a second by –
MR. WILENSKY: Second.
CHAIRMAN CARUSO: -- Mr. Wilensky. I will note that not having voted on the original one, it would not be proper for me to vote on the Motion to Reconsider, so I will abstain at this point. Any further discussion?
MS. GABRIEL SEYMOUR [Dr. Bornemann's and EMPRI's Counsel]: May I be heard?
CHAIRMAN CARUSO: No, I'm sorry. This is a Council meeting.
MS. SEYMOUR: I'm counsel for Petitioner Bornemann.
CHAIRMAN CARUSO: I'm sorry – I'm sorry, no. This is a meeting of the Council.
MS. SEYMOUR: If the Council proposes to vote –
CHAIRMAN CARUSO: I'm sorry, this is a meeting of the Council. It is not a public hearing. So unfortunately, I will not be able to hear you. Thank you.
MS. SEYMOUR: May – may my objection be noted for the record?
A VOICE: She needs to come forward and identify herself.
CHAIRMAN CARUSO: I don't think so because she is not participating. Thank you. Yes, we have a motion on the floor to deny the Motion to Reconsider. Any further comments and questions by the Council? Hearing none, we'll put it to a vote. All those in favor, signify by saying aye.
A VOICE: Aye.
CHAIRMAN CARUSO: Opposed? Motion carries.

(A103-A105) (Emphasis added.)

C. Adverse Environmental Effects

Dr. Bornemann's Petition 763 twice pointed out the adverse environmental effects of Nextel's proposed wireless cell operation at 145 Beebe Hill Road:

> "(d) Nextel's Petition Does Not Mention the Existence of Nearby Historic or Natural Resources or Wetlands. The various maps attached to Nextel's Petition No. 701 do not indicate the proximity of the proposed Beebe Hill Cell Tower to the Appalachian Trail, to trout fishing locations below the Great Falls of the Upper Housatonic River, or to the significant wetlands and nature preserves all of which are within the operating range of the electro-magnetic radiation emissions from the proposed tower.

Nextel Petition 701 entirely fails to mention significant historic structures within the tower's range, including the Beebe Hill School and the c.1740 Asahel Beebe house, which played a significant role in the American Revolution.

Attached as Exhibit B, is an expanded section of the USCGS topo map showing the proximity of the Beebe Hill Cell Tower to Robbins Swamp and Hollenbeck River, both of them calcareous wetlands of major environmental significance.

As to the importance of protecting these resources, See Connecticut Environmental Protection Act Sections 22a-1 – 22a-2a; 22a-36 – 22a-45; 23-5a – 23-5g; 23-8; 23-66; 26-303 – 26-314."

* * *

"III. Nextel Misled The Council By Its Unsupported Summary Assertion that the Beebe Hill Cell Tower "Will Not Have a Substantial Adverse Environmental Effect."

Connecticut Environmental Protection Act Section 26-310 provides:

'Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species. (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section, each agency shall use the best scientific data available.' (Emphasis added)

Nextel's Petition 701 failed to inform the Council that the Beebe Hill Cell Tower would be located near Connecticut's largest protected inland wetland containing rare and endangered plant and vertebrate and invertebrate species. (See Exhibit C.) State Geological and Natural History Survey Bulletin No. 57 lists 13 species of salamanders and newts and 13 species of toads and frogs as indigenous to Connecticut's woods and wetlands. (See Exhibit D.) These species are important to the environment in controlling insects and in providing food for birds, small animals, reptiles, turtles and fish. Nextel does not address the potential impact the transmission of modulated ultra-high frequency radio waves will have on these environmentally significant species.

Nextel also failed to inform the Council that the area surrounding the proposed Beebe Hill Cell Tower has been confirmed as a major habitat for 57 different species of birds, many of them song birds from Central and South America that migrate here each summer to breed, as shown by the State Geological and Natural History Survey of Connecticut (Bulletin 113) published in 1994, by the Department of Environmental Protection. Species that use the Beebe Hill Cell Tower transmission area as a breeding ground include the:

Northern Goshawk
American Kestrel
Ruffed Grouse
Wild Turkey
American Woodcock
Belted Kingfisher
Piliated Woodpecker
Eastern Wood-Pewee
Least Flycatcher
Northern Rough-Winged Swallow
Bank Swallow
Cliff Swallow
Blue-Gray Gnatcatcher
Yellow-Throated Vireo
Golden Winged Warbler
Purple Finch

A recent study by scientists in Spain shows that birds that nest in close proximity to cell transmission towers have significantly lower reproduction rates than those that nest at greater distances from them. (See Exhibit E.) Other studies raise similar possibilities. Nextel should have informed the Council of the existence of these studies and their relevancy to the Beebe Hill Cell Tower site and vicinity."

(A23-A25) (Emphasis in original.)

Applicable State Law

Connecticut General Statutes Sec. 26-303 declares that it is the policy of the State to protect endangered species:

> **Sec. 26-303. Findings. Policy.** The General Assembly finds that certain species of wildlife and plants have been rendered extinct as a consequence of man's activities and that other species of wildlife and plants are in danger of or threatened with extinction or have been otherwise reduced or may become extinct or reduced because of destruction, modification or severe curtailment of their habitats,

> exploitation for commercial, scientific, education, or private use or because of disease, predation or other facts; that such species are of ecological, scientific, educational, historical, economic, recreational and aesthetic value to the people of the state, and that the conservation, protection and enhancement of such species and their habitats are of state-wide concern. Therefore the General Assembly declares it is a policy of the state to conserve, protect, restore and enhance any endangered or threatened species and essential habitat.

Each state agency, including the Siting Council, is directed to conserve endangered wildlife and habitats under C.G.S. Sec. 26-310:

> **Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species.** (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section each agency shall use the best scientific data available.

In its original Petition to construct and operate a wireless cell transmitter on Beebe Hill (A1), Nextel failed to disclose to the Council, and the Council itself failed to investigate, whether the proposed Beebe Hill cell antenna would be located in the proximity of any threatened or endangered species. Such information was readily available on request from the Connecticut Department of Environmental Protection (as well as NDDB maps on DEP's website) and could also have been determined from a careful site inspection. It is particularly significant that the Siting Council itself ruled that the Nextel wireless transmitter "would not have a substantial adverse environmental effect" (A15). The agency thereafter never considered the Plaintiffs' overwhelming evidence contradicting its earlier ruling, but instead embraced the opportunity to dismiss Petition 763 and the scheduled public hearing at which that evidence would have become public on Nextel's motion on October 12, 2006.

Pursuant to the agency's rules, Dr. Bornemann's counsel had assembled, pre-marked and submitted multiple copies of exhibits for the proposed public hearing showing the presence of numerous species of birds, fish, amphibians, plants, and other wildlife in the Beebe Hill vicinity, and establishing that it is a major flyway for migratory birds. (A 83) With the assistance of EMR Policy Institute, Dr. Bornemann's counsel also marked and submitted various scientific studies from different parts of the world showing the potential environmental harm to birds and their habitats that can be caused by wireless cell transmission facilities operating at the frequency proposed by Nextel. (A84)

Intervenor EMR Policy Institute also submitted a detailed sworn statement by its President, Janet Newton, on the potential harm from the Nextel transmitter on birds and wildlife. (A64)

The result of Nextel's concealment (with the Siting Council's aid) of potential adverse environmental harm was to enable the company to avoid the $25,000 filing fee and $25,000 municipality deposit, as well as the expense and effort involved in conducting a "certification" proceeding. (See C.G.S. §16-50l).

The agency's cover-up of its own error in blindly accepting the telecommunication company's claim of no adverse environmental effect was a shocking dereliction of its public responsibility.

D. Need for Independent Study

Petition 763 pointed out to the Council the opportunity and need to conduct research into the adverse environmental impact of wireless cell transmissions on birds and other wildlife.

"IV. <u>The Council Should Direct Nextel to Pay the Costs of An Adequate Independent Study of the Impact of Cell Tower Emissions on the Breeding and Reproduction of Birds, Amphibians and other Wildlife in the Habitats and NaturalAreas in the Region Surrounding the Proposed Beebe Hill Cell Tower.</u>

The Council's website states that its responsibilities include:

"The Council is responsible for:
***
"3) encouraging research to develop new and improved methods…of transmitting and receiving…telecommunications signals with minimal damage to the environment;…."

The Council's website also notes that Section 16-50j-41 of its regulations authorizes the Council to institute investigations 'at any time.'

Nextel should be directed to pay to the Council adequate funds to cover the cost of a thorough independent investigation and research into ways to minimize the impact of emissions from Nextel cell tower installation on nesting birds, amphibians, plants and wildlife.

To the Petitioner's knowledge, no Federal agency, including the Federal Communications Commission, has conducted such research, and no Federal statute preempts the State's ability to research ways to minimize damage to birds, amphibians, plants and wildlife from non-thermal electro-magnetic radiation emitted from the Nextel telecommunications tower." (A25-A26)

<u>Failure to Establish Regulations</u>

Section 16-50t imposes an affirmative duty on the Connecticut Siting Council "to prescribe and establish" regulations and standards "relating to (1)…protection of fish and wildlife."

Sec. 16-50t. Regulations and standards. Hearing. Certain expenditures excluded in computation of fair net return. (a) The council shall prescribe and establish such reasonable regulations and standards in accordance with the provisions of chapter 54 as it deems necessary and in the public interest with respect to application fees, siting of facilities <u>and environmental standards applicable to facilities, including, but not limited to, regulations or standards relating to</u>: (1) Reliability, effluents, thermal effects, air and water emissions, <u>protection of fish and wildlife and other environmental factors</u>; ***

(Emphasis added.)

No such regulations and standards have ever been prescribed or established by the Council as mandated by law. This Court should direct the agency to correct that failure to fulfill its responsibilities without further delay.

The Siting Council had an express duty to consider proposed studies of potential harm to wildlife as part of its statutory responsibility, including the study proposed by Dr. Bornemann, to be designed by the USFWS, the nation's leading official caretaker of wild species. In addition to the Council's duty under Section 26-310 to "use the best scientific data available" to protect endangered species, The Connecticut Public Utility Environmental Standards Act (Chapter 277a) expresses the State's policy to encourage research to achieve "minimal damage to the environment":

> **Sec. 16-50g. Legislative finding and purpose.** The legislature finds that the power generating plants and transmission lines for electricity and fuels, community antenna television towers and telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state. The purposes of this chapter are: To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state; to encourage research to develop new and improved methods of *** transmitting and receiving television and telecommunications with minimal damage to the environment and other values described above ***.
>
> (Emphasis added.)

The USFWS Study Proposal

In support of Dr. Bornemann's Petition 763, the U.S. Fish and Wildlife Service offered to design a study on the impact on migratory birds of structures like Nextel's, explaining:

> Migratory birds, especially neotropical songbirds, continue to face growing threats from human development, including the installation of tall structures such as communication towers, power transmission lines, wind turbines, tall buildings, bridges and monuments. The U.S. Fish and Wildlife Service (Service) has reported that more than 60 bird species of conservation concern are known to be impacted by communication towers.
>
> In addition to collision mortality related to birds striking towers and their guy-support wires, a threat dealing with the impacts of radiation is beginning to be documented in Europe. Tower-emitted radiation appears to be impacting breeding and resident bird populations as new communication towers – especially cellular telephone communication facilities – are installed in areas where migratory birds historically breed or reside.
>
> (USFWS letter of April 27, 2006) (Emphasis added.) (A 47)

On May 17, 2006 the Connecticut Siting Council unanimously rejected the USFWS offer, on the mistaken assertion that such a study would violate the preemption provisions of the Telecommunications Act of 1996. (A49) Petitioner's counsel promptly moved for reconsideration. (A50) That motion was pending unresolved on October 12, 2006. As noted above, the Assistant Attorney General recommended that Dr. Bornemann's motion for reconsideration also be denied as "moot" following the dismissal of Dr. Bornemann's Petition No. 763, and the Council acted accordingly. (A105) For the same reasons as set forth above, the issue of harm to wildlife from operation of a wireless cell transmitter on or near Beebe Hill is not moot as long as Nextel reserves its right to operate such a facility at any time.

The issue of whether Connecticut's wildlife protection statutes are preempted by the Telecommunications Act is not moot.[5] As noted above, Nextel has expressly reserved its right to erect a cell tower at this or a "nearby" site. The Council granted Nextel's request to dismiss Petition 701 "without prejudice" expressly to permit future construction at the site. (A97) Moreover, the Council's obligation to conduct research into wildlife protection applies to every cell transmission site considered by the Siting Council in locations near bird and wildlife nesting areas and habitats so the question has wider application to migratory bird flyways and endangered species habitats elsewhere in Connecticut.

The Connecticut Siting Council has wholly failed to meet its statutory obligation to conduct research and issue regulations to protect "fish and wildlife and other environmental factors" under State law C.G.S. §16-50t (supra).

The Siting Council has an affirmative duty to comply with all applicable Connecticut statutes relating to construction of telecommunications facilities in the vicinity of Beebe Hill. The Connecticut Siting Council should be ordered to conduct a thorough independent scientific study of the environmental effects on migratory birds and other wildlife caused by cellular emissions from its telecommunications facilities without further delay; and to adopt regulations and standards for the protection of wildlife based on the "best scientific data available" – all mandated by Connecticut General Statutes Section 16-50t.

E. Costs and Attorneys Fees

Plaintiffs continue their intention to seek costs and attorneys fees under appropriate authority upon the successful completion of this proceeding vindicating Plaintiffs' civil and constitutional rights. Like the other issues set out above, this one also is not moot.

[5] Appellants have filed a declaratory judgment action that is now pending in the U.S. District Court (Docket No. 3:06cv01416(VLB)) requesting a ruling on the question.

POINT III

PLAINTIFFS WERE "STATUTORILY AGGRIEVED," AND THE TRIAL COURT'S FACTUAL BASIS FOR DISMISSAL OF THEIR COMPLAINT FOR LACK OF STANDING WAS CLEARLY ERRONEOUS

There are two separate grounds for establishing standing, both of which are present here. Those grounds have been repeatedly acknowledged by the Connecticut Supreme Court:

> "Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. Steeneck v. University of Bridgport, supra, 235 Conn. At 579, 668 A.2d 688"
>
> Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc., 275 Conn. 363, 370, 880 A.2d 138 (2005)

The Connecticut Supreme Court explained "statutory aggrievement" as follows:

> "'Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation.' (Internal quotation marks omitted.) Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 487, 815 A.2d 1188 (2003). A statute need not specifically provide that certain persons come within its protection in order to establish aggrievement as long as that protection may be implied fairly. Buchholz's Appeal from Probate, 9 Conn.App. 413, 421-22, 519 A.2d 615 (1987); see, e.g., Tomlinson v. Board of Education, 226 Conn. 704, 721, 629 A.2d 333 (1993)."
>
> Ibid.

In his Memorandum of Decision below, the trial judge stated, "No claim has been made by the plaintiffs that they are statutorily aggrieved." (A125) He was mistaken. The Complaint initiating this administrative appeal repeatedly pleaded statutory aggrievement (under the UAPA; State environmental protection laws; and State and Federal Constitutions) in paragraphs 11, 14, 16, 27-30, 32-41 and 44. (A115-A118)

The trial court's Memorandum of Decision was clearly erroneous on its facts because it never recognized or addressed the foregoing allegations of "statutory aggrievement" that were clearly set forth in the pleadings before the court.

In addition to statutory aggrievement, Dr. Bornemann was also classically aggrieved by the agency's allowing Nextel to reapply to build a wireless transmission facility on the Bornemann property instead of ruling on the issue of whether the CL&P easement permits any telecommunications company to erect a wireless antenna. The Siting Council placed a cloud on the Bornemann property which reduced its market value as well as posing unknown health risks to Dr. Bornemann and future residents of the property. (Complaint Pars. 27, 28, 29, 32, 33, 36, 41, 42, 43, 44.) (A116-A118)

Like any parcel of real property, 145 Beebe Hill Road is unique. Aggrievement in relation to that unique property and its surroundings affects a specific, personal and legal interest in the Connecticut Siting Council's proceedings that is only incidentally applicable, if at all, to members of the community as a whole.

Plaintiff EMRPI had express statutory standing as a qualified non-profit corporation under CGS §16-50n(a)(3) and was therefore entitled to appeal from the Council's order as of right under §16-50q.

The trial court's claim that the Appellate Court is unable to grant practical relief to appellants is equally erroneous. The following relief is both practical and within the Court's powers:

A. A full evidentiary hearing on the easement property rights at 145 Beebe Hill Road.

B. A full evidentiary hearing on potential harm to the environment from a wireless facility at 145 Beebe Hill Road.

C. Ordering the CSC to perform its statutory responsibilities under C.G.S. 26-310, 16-50g and 16-50t to protect birds and wildlife at and near 145 Beebe Hill Road (and elsewhere in the State).

D. Suspension of construction of telecommunications facilities anywhere in the vicinity of Beebe Hill until completion of a full and independent research study into the potential harm to migratory birds and wildlife and the CSC's adoption of research-based regulations to mitigate such potential harm.

E. Direction to the CSC to follow mandated procedures under UAPA and constitutional due process guarantees, including adequate notice, access to relevant documents, impartiality, and fair and objective hearings in carrying out its functions and responsibilities in future proceedings.

Property Ownership

To bolster its ruling on the plaintiff's lack of standing, the trial court manufactured a non-existent issue concerning the ownership of the property on which Dr. Bornemann has lived for over forty years. It has been clear from the earliest stage of the proceedings that the Bornemann property was held in a family trust. (A21, A22). The Attorney General has never disputed Dr. Bornemann's right to bring this proceeding, (Hearing Tr. p. 93, l.4). Nextel's counsel indicated at the hearing below his willingness to stipulate to ownership by the trust (Hearing Transcript, p.98, l.12).

[For the Court's convenience, the precise current status of the property ownership is set forth in an affidavit from Dr. Bornemann's oldest son, a courtesy copy of which is included in the Appendix at A129.]

The bottom line of the present estate-planning arrangement at 145 Beebe Hill Road is that Dr. Bornemann is both the tenant and the representative of his children who are owners of record, fully authorized to challenge the unlawful procedures of the Connecticut Siting Council and the injury the Council and Nextel have done to the property by creating a continuing threat of erection of a wireless cell transmitter a short distance from the family

home at 145 Beebe Hill Road. Plainly he has standing to represent his own and his family's interests.

CONCLUSION

The trial court's decision of July 27, 2007 should be reversed, and the decisions and actions of the Connecticut Siting Council in the proceedings on Petition No. 763 should in turn be overturned on the following legal grounds:

1. The issues raised by Petition No. 763 have not been rendered "moot" by Nextel's last-minute withdrawal of its plan to build the Beebe Hill wireless facility, while continuing to reserve its right to reapply for construction at a future time, under a procedure that denies the property any notice or right to be heard;

2. The Council has failed to perform its statutory duty to protect migratory birds, wildlife and threatened species; to conduct appropriate studies; and to issue regulations to minimize the environmental impact of telecommunications facilities; and

3. In dealing with issues involving property rights of private persons, the Council is required to comply fully with constitutional due process requirements and all relevant provisions of the UAPA, and particularly to insure that all interested parties receive notice and an opportunity to be heard at public hearings – and be treated with courtesy, fairness and impartiality.

RELIEF REQUESTED

The Court is requested to declare C.G.S. §16-50j(g), §16-50q, and all related statutes and implementing regulations unconstitutional on their face and as applied in this case, and to order and direct the Connecticut Siting Council to take the steps outlined above at pages 28 and 29, and, in addition, directing the Siting Council to do the following:

1. To independently investigate the accuracy of all claims and representations made by telecommunications companies in petitions for declaratory rulings relating to the construction, installation or operation of wireless towers, antennas or transmission facilities.

2. To comply with Connecticut General Statutes §26-310 when considering the siting of future wireless towers, antennas or transmission facilities;

3. To order or conduct an independent scientifically sound study of the impact of construction, installation or operation of wireless towers, antennas or transmission facilities on migratory birds and other wildlife, and seek the guidance and advice of the USFWS;

4. To issue appropriate regulations to minimize the impact of construction, installation or operation of wireless towers, antennas or transmission facilities on birds, fish, wildlife and the environment pursuant to C.G.S. §16-50t, and, pending the issuance of such regulations, to require that any future applicant to construct, install or operate a wireless tower, antenna or transmission facility in, or within two miles of, any DEP NDDB designated sensitive area must conduct a thorough independent and reliable scientific study of the potential impact of the construction, installation or operation of such tower, antenna, or facility on migratory birds, wildlife and endangered, threatened or listed species, and to develop appropriate and effective measures to minimize any such impact;

5. To develop, publish and carry out agency regulations and administrative procedures with respect to petitions for declaratory rulings that fully conform to the notice and hearing provisions of the UAPA and applicable Constitutional requirements;

6. To authorize any interested person to reopen any prior Siting Council approval of a petition for declaratory ruling allowing the construction, installation, or operation of any wireless tower, antenna, or other transmission facility anywhere in the State of Connecticut,

based on the Siting Council's failure to give actual notice and an opportunity to be heard to abutting and nearby property owners and to other interested persons, including qualified non-profit organizations; and

7. To direct the trial court to award costs and reasonable attorneys fees to Plaintiffs' counsel for vindication of Plaintiffs' constitutional rights and the correction of unlawful Siting Council procedures.

Respectfully submitted,

_____
GABRIEL NORTH SEYMOUR
Juris No. 424367
200 Route 126
Falls Village, CT 06031
Telephone: (860) 824-1411
Facsimile: (212) 455-2502
certiorari@earthlink.net

_____
WHITNEY NORTH SEYMOUR, JR.
Admitted pro hac vice
425 Lexington Avenue, Room 1721
New York, NY 10017
Telephone: (212) 455-7640
Facsimile: (212) 455-2502
Email: wseymour@stblaw.com

Attorneys for Plaintiffs-Appellants

August 30, 2007

CERTIFICATE OF SERVICE

This is to certify that on this _____ day of August, 2007, a copy of the foregoing was mailed first class mail, postage prepaid, to the following:

Robert L. Marconi, Esq.
Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Telephone: (860) 827-2682
Facsimile: (860) 827-2893
Email: robert.marconi@po.state.ct.us

Elizabeth Arana Fowler, Esq.
Brown Rudnick Berlack Israels LLP
City Place 1, 38th Floor
185 Asylum Street
Hartford, CT 06103-3402
Telephone: (860) 509-6500
Facsimile: (860) 509-6501
Email: efowler@brownrudnick.com

Wayne F. Dennison, Esq.
Brown Rudnick Berlack Israels
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8247
Facsimile: (617) 289-0438
Email: wdennison@brownrudnick.com

Honorable George Levine
Superior Court – Administrative Appeals
20 Franklin Square
New Britain, CT 06051

_____
Gabriel North Seymour

CERTIFICATE OF COMPLIANCE

This is to certify that to the best of the undersigned's knowledge and belief, the appellants have complied with all of the provisions of P.B. §67-2.

_____
Gabriel North Seymour

August 30, 2007