SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19090 AND S.C. 19091

FAIRWINDCT, INC., STELLA SOMERS,
MICHAEL SOMERS AND SUSAN WAGNER

PLAINTIFFS-APPELLANTS

v.

CONNECTICUT SITING COUNCIL

DEFENDANT-APPELLEE

AND

BNE ENERGY, INC.

INTERVENING DEFENDANT-APPELLEE

BRIEF OF PLAINTIFFS-APPELLANTS

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NATURE OF PROCEEDINGS AND FACTS OF CASE

In a pair of proceedings designated by the Connecticut Siting Council ("Council") as Petitions 983 and 984,[1] BNE Energy Inc. ("BNE") petitioned for two declaratory rulings approving the siting of industrial wind turbine projects located on residential properties located approximately half a mile from each other in rural Colebrook. In divided votes, the Council approved both petitions. This brief addresses two appeals from Superior Court decisions dismissing plaintiffs' administrative appeals from those final decisions.

Each of BNE's petitions, filed December 6 and 13, 2010, sought a ruling that BNE was not required to obtain a certificate of environmental compatibility and public need ("certificate") in order to construct, maintain and operate at each site three 1.6 megawatt ("MW") turbines manufactured by General Electric ("GE"), with tower heights of 328 feet and blade lengths of up to 164 feet (a total height of up to 492 feet). (See R.___.) BNE attached to its petitions numerous exhibits, including site plans, water quality reports, "interim" studies of bats and birds on the sites and noise assessments. (See R.__.)

The Council noticed the petitions for a public hearing, which began on March 22, 2011, and continued the next night.[2] The evidentiary hearing on the Flagg Hill Road Project began on March 23, 2011, and continued on three non-consecutive days over the next six weeks, closing on April 26, 2011. Evidence on the Rock Hall Road Project began late on April 26, 2011, with rulings only, continued on April 28, 2011, and closed on May 5, 2011.[3] (R.__.)

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[1] Petition 983 is also known as Wind Colebrook South or the Flagg Hill Road Project. The proposed project site is on Flagg Hill Road, off of Route 44. (See R.__.) Petition 984 is also known as Wind Colebrook North or the Rock Hall Road Project. The proposed project site is at the intersection of Winsted-Norfolk Road (Route 44) and Rock Hall Road. (See R.__.) Petition 983 is the subject of S.C. 19090 and Petition 984 is the subject of S.C. 19091.

[2] The Council issued a single hearing notice for both petitions. (See A240.)

[3] In addition to the two Colebrook petitions filed in December 2010, BNE filed a petition for a two-turbine project in Prospect, Connecticut on November 10, 2010 (the

Plaintiff FairwindCT, Inc. ("FairwindCT") is a Connecticut non-profit corporation located in Colebrook and incorporated in December 2010. FairwindCT was formed by several Colebrook residents to educate the public about the regulation and use of industrial wind generation projects in Connecticut. FairwindCT's supporters include residents of Colebrook, Winchester, Norfolk and other Connecticut towns. (See R.__.) Plaintiffs Stella Somers and Susan Wagner are officers and directors of FairwindCT.

Plaintiffs Stella and Michael Somers own a property known as Rock Hall, which is on the National Register of Historic Places (the "National Register"). Rock Hall was designed and built in 1911 and 1912 by Addison Mizner, who is known as "The Architect of Palm Beach." The nearly 23-acre estate contains landscaping features from the original design and is home to a 10,000-square-foot manor house built in Mizner's signature Spanish Mediterranean Revival style. Today, Rock Hall is the only surviving Mizner-designed residence north of the Mason-Dixon line. The Somers have invested years and a significant amount of money to turn Rock Hall into a world-class luxury resort-style hotel, which has received accolades for its peaceful, serene surroundings. Rock Hall is located approximately half a mile north of the Rock Hall Road Project and is within 1.5 miles of the Flagg Hill Road Project. (See A248-52.)

Plaintiff Susan Wagner owns residential property abutting the east and southeast boundaries of the Rock Hall Road Project and located within approximately one mile of the Flagg Hill Road Project. Two of the turbine locations proposed by BNE for the Rock Hall

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"Prospect Project"). Because the three petitions were filed within a five-week period, the proceedings overlapped and the Council considered all three petitions concurrently during hearings that began on February 23, 2011, and concluded on May 5, 2011. (See R.__.) FairwindCT participated in all three proceedings. On May 12, 2011, the Council denied the Prospect Project on the grounds that it would have substantial adverse visual effects. (See A304.) (In response to motions to supplement, the trial court permitted the parties to attach to their briefs relevant documents from the Prospect Project proceedings. (See A448.))

Road Project would be 530 feet or less from Wagner's property line. Wagner and her late husband purchased the property for its "quiet, serene, untouched natural landscape" and built a home there in order to "enjoy a peaceful life in retirement." (See A261-64.)

Plaintiffs were granted party status by the Council and also filed verified intervention pleadings pursuant to the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-14 et seq. ("CEPA"). (See R.__.) Plaintiffs participated in the hearings and submitted testimony and evidence regarding the inadequacy of BNE's petitions on matters of public safety and environmental impact, including evidence documenting BNE's failure to: provide for adequate setbacks from residential property lines, homes and roads;[4] comply with state noise regulations; submit any on-site surveys for bats and birds; conduct any on-site surveys for endangered, threatened or special concern species, wetlands, vernal pools, or fauna; submit site plans that adequately characterized the significant engineering challenges of the project sites; submit any evidence supporting its claims that the projects complied with water quality standards; and inform the Council that the projects were in proximity to Rock Hall, a historic property entitled to protection under federal and state law, all in accordance with applicable law, guidelines and best development practices. (See, e.g., R.__.)

During the hearings, plaintiffs repeatedly objected to procedural decisions by the Council on the grounds that they violated plaintiffs' rights to fundamental fairness. Plaintiffs objected to the Council's decisions to permit BNE to file numerous documents under seal, including information from GE regarding safety, noise, technical data and construction

[4] For the Flagg Hill Road Project, BNE's petition proposed siting one turbine just 140 feet from a residential property south of the site; for the Rock Hall Road Project, BNE's petition proposed siting one turbine just 153 feet from a residential property north of the site. (See R.__.) Because BNE sought approval of turbines measuring 492 feet tall, including up to 50-meter blades, those setbacks were likely to result in turbine blades overhanging onto neighboring residential properties.

specifications, as well as wind data collected by BNE at the project sites, while not affording plaintiffs the right to take notes on the documents or to cross-examine witnesses about the information in the documents, even where such information was publicly available. (See R.__.) Plaintiffs objected to the Council's decisions to permit BNE to submit, both before and during the hearings, additional exhibits, testimony and other evidence that substantially changed its petitions and amounted to more than 2200 pages of new evidence. Each time BNE submitted new evidence that changed its petitions, plaintiffs moved for a continuance or to strike the new evidence. The Council denied every motion. (See R.__.) Over plaintiffs' objections, the Council also prevented plaintiffs from cross-examining a key witness and refused to hear evidence on the cumulative impacts of the two proposed projects. (See R.__.) Additional facts related to plaintiffs' fundamental fairness claim are detailed in section V.

The Council issued its "final decision packages" on June 2 and June 9, 2011, each of which contained a decision and order, findings of fact, opinion and conclusions of law. The Flagg Hill Road Project decision package also contained a written dissent. (R.__.) By a vote of 6 to 1,[5] the Council approved both petitions subject to a list of conditions, including the requirement of an additional ex parte proceeding known as a development and management plan ("D&M plan"). (R.__.) Many of those conditions have not been satisfied as of the time of the filing of this brief, nearly two years after the Council's decisions. (See R.__.)

Plaintiffs appealed from both decisions. (See R.__.) Following a hearing, briefing and argument, the Superior Court (Cohn, J.), dismissed the appeals in a pair of opinions

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[5] The Council is composed of nine members for these types of proceedings. Conn. Gen. Stat. § 16-50j(b). Three members recused themselves from consideration of both petitions. (See R.__.) One of the three, former Chairman Daniel F. Caruso, subsequently resigned because of inappropriate conduct during the related Prospect Project proceeding and was replaced by Chairman Robert Stein, who voted on the petition. (See R.__.)

dated October 1, 2012. (R.__.) Plaintiffs appealed to the Appellate Court, and the matters were subsequently transferred to this Court and consolidated in part.

ARGUMENT

I. GENERAL STATUTES § 16-50k(a) DOES NOT GIVE THE COUNCIL JURISDICTION OVER THE PETITIONS

The legislature delegated to the Council authority to govern certain matters that have traditionally been within each town's home-rule authority to regulate what happens within town borders. Any legislative grant of authority permitting the Council to act on such matters must be express, because administrative agencies "are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." See Castro v. Viera, 207 Conn. 420, 428 (1988); see also Stern v. Conn. Med. Examining Bd., 208 Conn. 492, 502 (1988). The legislative grant to the Council permitting it to consider certain matters by expedited siting applies to "customer-side . . . or grid-side distributed resources projects or facilities." See Conn. Gen. Stat. § 16-50k(a). BNE's petitions did not propose projects or facilities meeting the statutory requirements for expedited siting because they were not approved by the Department of Public Utility Control ("DPUC")[6] and they do not generate electricity from "fuel." The Council therefore had had no power to act on the petitions and acted in excess of its authority by issuing the declaratory rulings.

A. Standard of Review

This Court's review is plenary. See S. New Eng. Tel. Co. v. Dep't of Pub. Util. Control, 274 Conn. 119, 127 (2005).The Council's determination of law regarding the construction and interpretation of a statute is not entitled to special deference because § 16-50k(a) "has

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[6] As of July 1, 2011, DPUC was renamed the Public Utilities Regulatory Authority and became part of DEEP. Plaintiffs refer to the agency as DPUC throughout this brief.

not previously been subjected to judicial scrutiny" or time-tested agency interpretations; see MacDermid, Inc. v. Dep't of Envtl. Prot., 257 Conn. 128, 137 (2001); nor does this issue involve the type of "extremely complex and technical regulatory and policy considerations" that would warrant the more deferential standard of review articulated in Wheelabrator Lisbon, Inc. v. Department of Public Utility Control, 283 Conn. 672, 692 (2007).

B. The Council's Exclusive Jurisdiction Extends Only to Facilities

The legislature granted the Council exclusive authority to approve the siting, construction and modification of facilities by both applications for certificates and petitions for declaratory rulings. See Conn. Gen. Stat. §§ 16-50k(a), 16-50x(a). The bulk of the Council's docket consists of applications for certificates, filed pursuant to the first portion of § 16-50k(a), which provides:

> Except as provided in subsection (b) of section 16-50z, no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a "certificate", issued with respect to such facility or modification by the council. . . .

Since 1998, the legislature has exempted certain types of facilities from the often lengthy certification process, instead authorizing the Council to approve a select group of facilities by way of a petition for declaratory ruling under the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 et seq. ("UAPA"). See P.A. 98-28, § 49. BNE sought approval for its proposed projects under this expedited petition process, which is provided for in the second portion of § 16-50k(a):

> Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling (A) the construction of a facility solely for the purpose of generating electricity, other than an electric generating facility that uses nuclear

> materials or coal as fuel, at a site where an electric generating facility operated prior to July 1, 2004, (B) the construction or location of any fuel cell, unless the council finds a substantial adverse environmental effect, or of any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Environmental Protection, and (C) the siting of temporary generation solicited by the Department of Public Utility Control pursuant to section 16-19ss.

Several of the issues raised in these appeals require the Court to determine the meaning of that statutory language. There are two reasonable interpretations that may apply to BNE's petitions.[7] Either the Council may approve by declaratory ruling any "grid-side distributed resources project" or "grid-side distributed resources facility" meeting the additional size and air and water quality requirements, or the Council may approve by declaratory ruling any "grid-side distributed resources project" or "facility" meeting those additional requirements. Under either interpretation, the Council did not have the authority to consider BNE's petitions.[8]

C. <u>BNE Did Not Petition the Council for Approval of "Grid-Side Distributed Resources" Projects or Facilities</u>

The plain language of § 16-50k(a) authorizes the Council to approve the expedited siting of a "grid-side distributed resources project or facility," by way of declaratory ruling "in the exercise of [the Council's] jurisdiction over the siting of generating facilities." The

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[7] The parties agree that BNE did not propose "customer-side distributed resources" projects or facilities, because any electricity generated by the proposed projects would not be used on the premises by a retail end user, but would instead be "connected to the transmission or distribution system." <u>See</u> Conn. Gen. Stat. §§ 16-1(a)(40) & 43. The "customer-side" language of the statute is therefore not relevant to this analysis.

[8] Before the trial court, BNE argued that §16-50k(a) gave the Council jurisdiction over "projects." That argument would so greatly expand the Council's jurisdiction that it would render useless much of the statutory scheme governing the Council. The Council does not have authority over, for example, development projects such as shopping malls. The only reasonable reading of § 16-50k(a) that expands the Council's authority requires consideration of the entire phrase, i.e., "grid-side distributed resources projects." Moreover, under either interpretation, the Council's jurisdiction over such "projects" would not be exclusive. <u>See</u> Conn. Gen. Stat. § 16-50x(a).

legislature defined “grid-side distributed resources” as:

> the generation of electricity from a unit with a rating of not more than sixty-five megawatts that is connected to the transmission or distribution system, which units may include, but are not limited to, units used primarily to generate electricity to meet peak demand.

Conn. Gen. Stat. § 16-1(a)(43). An analysis of this definition and related statutes reveals that BNE did not propose “grid-side distributed resources project[s] or facility[ies].”

A proper analysis of this issue requires a review of the past statutory incarnations of § 16-50k(a). See Conn. Gen. Stat. § 1-2z; Bd. of Pub. Utils. Comm’rs of Norwich v. Yankee Gas Servs. Co., 236 Conn. 287, 295-96 (1996). When the Council was first created in 1971,[9] the legislature provided only one method by which facilities could be approved: applications for certificates. The Council was not authorized to consider petitions for declaratory ruling until 1998, when the legislature first amended § 16-50k(a) to permit the expedited approval of certain types of facilities by way of declaratory ruling. See P.A. 98-28, § 49 (declaratory rulings authorized for proposals to locate new facilities on sites where facilities previously operated). The legislature made two additional categories of facilities eligible for expedited siting by declaratory ruling in 2000 and 2003. See P.A. 00-93 (declaratory rulings authorized for approval of fuel cells); P.A. 03-140, § 6 (declaratory rulings authorized for siting of certain temporary generation facilities solicited by DPUC).

In 2005, the legislature again amended § 16-50k to authorize approval by declaratory ruling “grid-side distributed resources project or facility.” See P.A. 05-1, § 18; see also id. § 1 (adding definition of “grid-side distributed resources”). The trial court relied on that language to support its conclusion (without discussion) that the Council had jurisdiction over the petition because it was at least a “resource project,” if not a facility. (See R.__.) The context in which

[9] The Council was originally known as the Power Facility Evaluation Council. See P.A. 575, § 4 (1971).

the “distributed resources project or facility” language was added to § 16-50k(a), however, demonstrates that BNE did not propose “grid-side distributed resources projects or facilities.”

Public Act 05-1, “An Act Concerning Energy Independence” (the “Act”), established several initiatives aimed at reducing the costs of wholesale electricity for Connecticut consumers (referred to as federally mandated congestion charges (FMCCs) in § 16-1(a)(41)) and providing a reliable, competitively priced electricity supply. See, e.g., P.A. 05-1, §§ 8-9 (directing DPUC to create programs granting awards to consumers and developing financing program for consumers to fund capital costs of customer-side distributed resources projects), § 16 (requiring DPUC to establish program administering new requirements that electric distribution companies and suppliers obtain certain percentages of generation supply from Class III resources). (See also R.__ (according to Council, “legislative purpose” of the Act “was to incent distributed resource projects and reduce peak electric demand”).)

As part of the Act, the legislature required DPUC to “conduct a proceeding to develop and issue a request for proposals to solicit the development of long-term projects designed to reduce” FMCCs, including customer- and grid-side distributed resources projects. P.A. 05-1, § 12(c). The legislature further provided that DPUC was to evaluate any proposals received and could approve one or more, giving preference to proposals that resulted in the greatest reduction of FMCCs, and stated that any proposals “approved pursuant to this section are eligible for expedited siting pursuant to subsection (a) of section 16-50k of the general statutes, as amended by this act.” See id. § 12(g) (emphasis added) (codified as Conn. Gen. Stat. § 16-245m(g) (“[m]easures to reduce federally mandated congestion charges”)).The legislature therefore expressly provided this expedited siting avenue only for a “grid-side distributed resources project or facility” that had been approved

by DPUC to reduce FMCCs. BNE's petitions were not approved by DPUC to reduce FMCCs under § 16-245m; thus, they do not propose "grid-side distributed resources projects or facilities" that are eligible for expedited siting under § 16-50k(a).

D. BNE Did Not Propose "Facilities" Because Wind Is Not a "Fuel"

An alternative reading of the language of § 16-50k(a) would also provide the Council with the authority to approve by declaratory ruling "facilities" that have a capacity of sixty-five megawatts or less and comply with the air and water quality standards of the Department of Environmental Protection ("DEP").[10] The Council did not have authority to approve BNE's petitions under this interpretation because the proposed projects do not use "fuel" and therefore do not satisfy the definition of "facility."

"Facility" is defined by § 16-50i(a) to include certain electric and fuel transmission lines, certain electric substations and switchyards, community antenna television and telecommunication towers, and "any electric generating or storage facility using any fuel, including nuclear materials . . . ." (Emphasis added.) The only definition of "facility" that BNE's petitions could possibly meet is an "electric generating . . . facility using any fuel." See Conn. Gen. Stat. § 16-50i(a)(3). That industrial wind turbines may generate electricity is not in dispute. The jurisdictional question is therefore dependent on the meaning of "any fuel."

Section 1-2z mandates that this Court must first look to "the text of the statute itself and its relationship to other statutes," and may not consider "extratextual evidence of the meaning of the statute" unless the text is ambiguous and yields "absurd or unworkable results." The term "fuel" is not defined within the Public Utility Environmental Standards Act, Conn. Gen. Stat. § 16-50g et seq. ("PUESA"), which is chapter 277a of the General Statutes.

[10] As of July 1, 2011, DEP became the Department of Energy and Environmental Protection ("DEEP"). Plaintiffs refer to the agency as DEP throughout this brief.

"Such silence does not, however, necessarily equate to ambiguity . . . Rather, [t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." Mayfield v. Goshen Volunteer Fire Co., 301 Conn. 739, 745 (2011) (citations and quotation marks omitted).

The only definition of "fuel" contained in the General Statutes appears in § 16a-17 and cannot be used to interpret § 16-50i because the legislature expressly prohibited the application of that definition beyond four specific statutory provisions. Generally, courts must interpret statutes consistently, so that an identical word "should not be read to have differing meanings unless there is some indication from the legislature that it intended such a result." See, e.g., Yankee Gas Servs. Co., 236 Conn. at 295 (emphasis added). Section 16a-17(1) provides that "'[f]uel' includes electricity, natural gas, petroleum products, coal and coal products, wood fuels, radioactive materials and any other resource yielding energy . . . ." The catch-all phrase "any other resource yielding energy" may be broad enough to include wind. But the definition is expressly limited to apply only to "sections 16a-17 to 16a-20, inclusive," which address the penalties for the illegal creation of a fuel shortage. See Conn. Gen. Stat. §§ 16a-17–20. Thus, the only definition of "fuel" that might, in a stretch and out of context,[11] include wind, is in an unrelated statute with expressly limited application, which means that the legislature clearly indicated it did not intend for that definition to be used to define "fuel" elsewhere in the statutes.[12] See Yankee Gas Servs. Co., 236 Conn. at 295. Section 16a-17 cannot inform the Court's analysis.

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[11] Given the context of this statutory definition, § 16a-17 cannot include wind as a "fuel" because wind is not subject to market manipulation.

[12] Moreover, because § 16a-17 defines fuel to include electricity, using that definition to interpret § 16-50i would lead to an absurd definition of facility, i.e., "any electric generating or storage facility using any [electricity], including nuclear material."

In the absence of a statutory definition,

> we turn to General Statutes § 1-1(a), which provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

Mayfield, 301 Conn. at 745-46. "In the absence of a definition of '[a word]' in the statute itself, '[w]e may presume . . . that the legislature intended [the word] to have its ordinary meaning in the English language, as gleaned from the context of its use.'" Scholastic Book Clubs, Inc. v. Comm'r of Revenue Servs., 304 Conn. 204, 216 (2012). "To ascertain the commonly approved usage of a word, we look to the dictionary definition of the term." Mayfield, 301 Conn. at 746.

Merriam-Webster defines "fuel" as "a material used to produce heat or power by burning." Webster's Ninth New Collegiate Dictionary 496 (1987). Another dictionary defines "fuel" as "combustible matter, as coal, wood, oil, or gas, used to maintain fire in order to create heat or power, or as an energy source for engines, power plants, or reactors." Random House Webster's College Dictionary 523 (1997). This trend continues in other publications, where "fuel" is defined as "[m]aterial for burning; combustible matter as used for fire, or as a source of heat or power"; Shorter Oxford English Dictionary on Historical Principles 1045 (5th ed. 2002); and as "something consumed to produce energy, especially: (a) A material such as wood, coal, gas or oil burned to produce heat or power. (b) Fissionable material used in a nuclear reactor. (c) Nutritive material metabolized by a living organism." Am. Heritage Dictionary of the English Language 708 (5th ed. 2011). Based on the commonly approved usage of the word, then, "fuel" is something that is burned or consumed to produce energy, such as coal, wood, oil and gas. Wind is not burned or consumed to produce energy. Because wind is not "fuel," BNE's petitions did not propose

"facilities" under the plain meaning of the statute.

The Council and the trial court determined that certain definitions for phrases found within title 16 of the General Statutes were relevant to defining "fuel" for the purposes of this analysis. For example, "renewable fuel resources" includes "Class I renewable energy sources," which includes "energy derived from . . . wind." See Conn. Gen. Stat. §§ 16-1(a)(22) & (26). The Council argued, and the trial court apparently agreed, that the reference to "fuel" in § 16-50i must include within its reach "renewable fuel resources," so that wind is a "fuel." (See R.__.) That interpretation would mean that "fuel" and "renewable fuel resources" are interchangeable terms, and would render superfluous the legislature's deliberate distinction, thereby violating "cardinal principles of statutory interpretation." See Am. Promotional Events, Inc. v. Blumenthal, 285 Conn. 192, 203 (2008).

The legislature has had multiple opportunities to amend § 16-50i to define facility with reference to "renewable fuel resources" or "renewable energy sources." Instead, the relevant portion of § 16-50i(a)(3) has not changed since PUESA's adoption in 1971. See P.A. 575, § 3 (1971). At the time the legislature enacted Public Act 79-214, which added the definition of "renewable fuel resources" to § 16-1(a), it could have also amended § 16-50i to define facility with reference to "renewable fuel resources." It did not do so, although it did make other amendments to § 16-50i(a) at the time. See P.A. 79-214, §§ 1, 3. In 1981, when the legislature amended the definition of "renewable fuel resources," it again amended § 16-50i(a) – but did not amend the definition of facility to include those using "renewable fuel resources." See P.A. 81-439, §§ 2, 4. In 1998, the legislature amended the definition of "renewable fuel resources," added definitions of Class I and Class II renewable energy sources, and amended § 16-50i – but once again chose not to expand the definition of facility to encompass electric

generators using "renewable fuel resources." See P.A. 98-28, §§ 1, 99. Those decisions must be assumed to have purpose and meaning, and because the Court interprets statutes with the goal of giving effect to the legislature's intent, any argument that renders superfluous the definition of "renewable fuel resources" must be rejected.[13] See Am. Promotional Events, 285 Conn. at 203; Vibert v. Bd. of Educ., 260 Conn. 167, 176 (2002).

In sum, BNE's petitions did not propose grid-side distributed resources projects or facilities. Because the Council did not have jurisdiction over BNE's petitions, its decisions violated statutory provisions, exceeded its authority and were otherwise unlawful, and must be vacated pursuant to § 4-183(j). See Pereira v. State Bd. of Educ., 304 Conn. 1, 41 (2012).

II. THE LEGISLATURE DID NOT AUTHORIZE THE COUNCIL TO ATTACH CONDITIONS TO DECLARATORY RULINGS

As discussed above, the Council granted BNE approval using the expedited process known as a petition for declaratory ruling, and did so even though BNE plainly had not met the necessary requirements. Within 180 days from the filing of BNE's petitions, the Council issued decisions declaring that BNE need not apply for certificates. (R.__.) However, those decisions were subject to a host of conditions, including the requirement of additional phases of the proceedings, i.e., D&M plans, that were to take place well beyond statutory deadlines

[13] The trial court reasoned that the phrase "any fuel" somehow changed the above analysis by making it "appropriate" to consider the phrase "in relationship to other provisions of the general statutes, before considering dictionary definitions," and therefore did not examine the dictionary definitions at all. (R.__ (emphasis added).) The authorities upon which the trial court relied do not support that proposition. See Mayfield, 301 Conn. at 745-46 (looking first to dictionary definitions for the meaning of "political subdivision" after finding no definition within the relevant title of the General Statutes, then examining other unrelated statutes to confirm the accuracy of that definition); Yankee Gas Servs., 236 Conn. at 295-96 (construing the meaning of "territory" in a special act by looking at the use of the word in relevant earlier special acts and dictionary definitions). This Court has repeatedly and expressly reaffirmed its "long-standing practice of ascertaining the commonly approved meaning of a word by looking to its dictionary definition." See Rivers v. City of New Britain, 288 Conn. 1, 17 n.14 (2008).

for decisions (and are, in fact, still not completed as of the filing of this brief).[14] (See R.__.) In fact, one of the Council's conditions would permit BNE to later demonstrate compliance with water quality standards, even though such compliance is a prerequisite to obtaining a declaratory ruling. See Conn. Gen. Stat. § 16-50k(a). The Council does not have the authority to approve petitions for declaratory ruling subject to conditions. It particularly does not have the authority to attach as a condition a D&M plan, thereby allowing petitioners to demonstrate compliance with statutory prerequisites to granting a petition at some point after approval. The Council's decisions were in excess of its statutory authority, rendering them void, and severely prejudiced plaintiffs by depriving them of the ability to test evidence by cross-examination.

A. Standard of Review

This Court's review is plenary. The Council's determination of law regarding this issue is not entitled to special deference because this is an issue of first impression and does not concern "complex and technical regulatory and policy considerations." See Wheelabrator, 283 Conn. at 692; MacDermid, 257 Conn. at 137.

B. Conditions May Only Attach to Certificates, Not to Declaratory Rulings

As previously discussed, the Council is entirely a creature of statute and may only take actions that the legislature has expressly authorized. See, e.g., Ethics Comm'n of

[14] Other conditions attached to the Council's grant of the petitions included, but were not limited to: providing the Council with copies of permits needed from other agencies, including the DEP and the U.S. Army Corps of Engineers ("Army Corps"); providing detailed site plans; moving the locations of turbines so their blades would not overhang onto abutting residential properties; conducting pre-construction surveys and taking other measures to protect and repair the town of Colebrook's infrastructure during and after construction; providing erosion and sediment control plans and stormwater management plans in compliance with water quality standards; designing wetland crossings on both sites; making other changes to the site plans recommended by BNE's herpetological expert; submitting "ongoing" bat and bird studies; and providing post-construction noise monitoring and bat and bird study protocols. (See R.__.)

Glastonbury v. Freedom of Info. Comm'n, 302 Conn. 1, 8 (2011); S. New Eng. Tel. Co., 261 Conn. at 21-22 (administrative bodies "cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power"). Petitions and applications differ in many respects, but one of the most important distinctions is that the legislature expressly granted the Council authority to grant applications subject to conditions, including the requirement of a D&M plan. The legislature did not authorize the Council to approve petitions subject to conditions.

Declaratory rulings are governed by § 16-50k(a), the UAPA and the Council's regulations. A petition for declaratory ruling costs just $500 to file, does not require a hearing, and must be decided within 180 days, unless the parties agree to a longer period of time.[15] See Conn. Gen. Stat. § 4-176; Regs., Conn. State Agencies §§ 16-50j-38–40.[16] By contrast, an application for a certificate, which BNE asked the Council to declare was not needed for its projects, requires a hearing, may take in excess of 18 months to decide, and requires the applicant to pay a filing fee of up to $25,000 and a municipal participation fee of $25,000. See Conn. Gen. Stat. §§ 16-50*l*(a),16-50bb.

There are very clearly two different procedures reflected in the statutes governing the Council. Section 16-50p(a)(1) provides the Council with the express authority to grant applications subject to conditions:

> In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.

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[15] Failure to meet the 180-day deadline is effectively a denial of the petition. See Conn. Gen. Stat. § 4-176(i).

[16] On August 28, 2012, the legislative review committee approved the Council's proposed amended regulations. All citations to the Council's regulations cited in this brief are to the version of the Council's regulations in effect at the time BNE filed its petition.

(Emphasis added.) There is no similar provision for petitions.

Further, several provisions of PUESA make explicit reference to the D&M plan as attaching only to applications and thereby evidence the substantive distinction between applications and petitions. For example, § 16-50j(c), concerning the composition of the Council, specifies that ad hoc members "shall be appointed by the chief elected official of the municipality they represent and shall continue their membership until the council issues a letter of completion of the development and management plan to the applicant." (Emphasis added.) The use of "applicant" and absence of "petitioner" indicates that D&M plans are limited to applications for certificates, not petitions for rulings that no certificate is needed.

Similarly, § 16-50v(h) provides:

> With regard to any facility described in subsection (a) of section 16-50i, the council shall, by regulation, establish such fees and assessments as are necessary to meet the expenses of the council and its staff in conducting field inspections of (1) a certified project constructed pursuant to a development and management plan, or (2) a completed project for which a declaratory or advisory ruling has been issued.

(Emphasis added.) The legislature distinguished between "certified projects" constructed pursuant to D&M plans and "completed projects for which a declaratory . . . ruling has been issued." The language of § 16-50*l*(d), concerning applications to amend certificates, again expressly provides that D&M plans may be conditions of certification proceedings:

> No such resolution for amendment of a certificate shall be adopted after the commencement of site preparation or construction of the certificated facility or, in the case of a facility for which approval by the council of a right-of-way development and management plan or other detailed construction plan is a condition of the certificate, after approval of that part of the plan which includes the portion of the facility proposed for modification.

(Emphasis added.) Each of these statutory provisions indicates that D&M plans are conditions that may be attached only to certificates. BNE filed a petition for a declaratory ruling, not an application for a certificate.

Even the Council's own regulations echo this statutory distinction and do not refer to any authority to attach D&M plans to petitions. The Council's regulations provide for D&M plans for rights-of-way "for any proposed electric transmission or fuel transmission facility for which the council issues a certificate" and for "proposed cable antenna television or telecommunications towers and associated equipment or a modification to an existing tower site . . . ." Regs., Conn. State Agencies, §§ 16-50j-60(b), 16-50j-75(a). The siting of cable antenna television and telecommunications towers and associated equipment is considered by the Council via certification proceedings. See Conn. Gen. Stat. § 16-50k. In contrast, the regulations concerning petitions for declaratory ruling make no mention of D&M plans.[17] See Regs., Conn. State Agencies § 16-50j-38–40.

The trial court's (very brief) discussion of this issue focused on the "obvious legislative intent" supposedly reflected in the legislature's enactment of Public Act 11-245, which was enacted and codified as § 16-50kk after the Council's decision on these petitions and required the Council to adopt regulations concerning approval of industrial wind turbine projects. (See R.__.) The trial court did not explain why it deviated from the general rule that where the statutory language is plain and unambiguous, there is no reason to resort to legislative history; nor did the trial court explain why it resorted to that legislative history where the express language of the act makes the act prospective. The legislative history of § 16-50kk would only be relevant to this analysis if the statute were "intended to be clarifying," meaning that it

[17] While plaintiffs' appeals to the trial court were pending, the Council amended its regulations and has also been drafting new regulations in accordance with the mandate of Public Act 11-245. The new regulations, read in connection with the revised regulations, include a requirement for the preparation of a D&M plan for any "proposed wind turbine facility," whether submitted by application or petition. (See A166-74.) This change is evidence that the Council's regulations as in effect during the proceedings on BNE's petitions did not provide for D&M plans.

should be applied retroactively as "a declaration of the legislature's original intent rather than a change in the existing statute.'" In re Michael S., 258 Conn. 621, 629 (2001). Public Act 11 245 was not enacted to clarify existing law; it was enacted to change the existing law.

PUESA and the Council's own regulations set the limits of the Council's jurisdiction and its ability to command preparation of a D&M plan as a condition to approval of a project. Those authorities reveal that D&M plans do not apply to petitions. Absent a grant of express authority from the legislature, the Council does not have the authority sua sponte to begin applying a D&M plan, or any other condition, to its petition proceedings. See Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4 (1996).

C. The Council Illegally Employed a Condition to Permit BNE to Satisfy Statutory Prerequisites to Approval at Some Point After Approval

The Council's unauthorized use of the D&M plan prejudiced plaintiffs in several ways. Use of the D&M plan violated plaintiffs' rights to fundamental fairness because D&M proceedings do not involve a hearing – meaning that plaintiffs had no opportunity to cross-examine BNE and its consultants on the nearly 2,000 pages of new evidence submitted by BNE after the hearing closed.[18] Instead, plaintiffs were limited to submitting "comments" on the new evidence, which amounted to complete re-designs of the proposed projects with respect to site engineering and water quality issues and has included additional scientific surveys. (See R.__.) The trial court's refusal to supplement the record with evidence from the D&M proceedings and testimony from plaintiffs' experts explaining the import of that evidence prevented plaintiffs from demonstrating specific prejudice resulting from that lack of cross-examination. (See R.__; A428-30, A473-74.) Plaintiffs made offers of proof that the extensive D&M revisions showed that the projects at day 180 did not comply with DEP water

[18] See section V of this brief for discussion of plaintiffs' fundamental fairness claim.

quality standards. (See A457-61, A468-69.)

Moreover, even if this Court were to determine that BNE's petitions were eligible for approval by declaratory ruling (see section I above), the Council was still only authorized to approve each petition "as long as such project meets air and water quality standards" of the DEP. See Conn. Gen. Stat. § 16-50k(a). The Council's attachment of D&M plan conditions to its approvals permitted BNE to continue to try to bring its proposed projects into compliance with water quality standards at some point after the 180-day deadline. BNE had the burden of establishing compliance with water quality standards at day 180. BNE did not satisfy those standards. The Council even conceded that fact in its opinions for both petitions, when it stated the following:

> The Council understands that designing the access road to the turbines on this site poses challenges regarding water quality . . . However, the Council believes these design challenges can be met, so that the project would not have an adverse impact on water quality.
>
> By ordering a Development and Management (D&M) phase for the project, the Council will assure that the project would be designed to meet DEP water quality standards, in conformance with the 2004 Connecticut Stormwater Quality Manual, 2000 DOT Drainage Manual and the 2002 Connecticut Guidelines for Soil Erosion and Sediment Control.

(R.__.) The Council did not state that the "design challenges" were met such that the projects will not have an adverse impact on water quality. Rather, the Council stated that it believed the design challenges "can be met" at some later point such that the projects would (eventually) be designed to meet water quality standards. Section § 16-50k(a) directs that a prerequisite to approval of a petition is compliance with DEP water quality standards. The Council's decision effectively punted the issue of compliance with water quality standards to some later point in time, in violation of the applicable statutes.

The Council attached conditions to the petitions, thereby failing to act "under the

precise circumstances and in the manner particularly prescribed by the enabling legislation." See Ethics Comm'n, 302 Conn. at 8. The Council's decisions granting BNE's petitions therefore violated statutory provisions, exceeded its statutory authority and were otherwise unlawful and must be vacated. See Conn. Gen. Stat. § 4-183(j); Pereira, 304 Conn. at 41.

III. GENERAL STATUTES § 16-50k(a) DOES NOT AUTHORIZE THE COUNCIL TO IGNORE THE REQUIREMENTS OF STATE NOISE LAW

One of the biggest concerns about siting wind turbines in proximity to people is the noise generated by turbine operation. During the hearings, BNE offered evidence about the noise that might reach neighboring homes, but was silent about the noise that would reach neighboring property lines. The express language of this state's noise law prohibits stationary noise sources, such as wind turbines, from generating excessive noise beyond their property boundaries. BNE and the Council ignored that key statutory and regulatory prohibition against noise that might reach beyond the borders of the project sites. The trial court determined, without citation or analysis, that the Council had the authority to disregard the clear noise law of this state. Both the Council and the trial court were wrong as a matter of law.

A. Standard of Review

This Court's review is plenary. Ordinarily, the Council's finding that the petitions comply with DEP's noise regulations would be entitled to deference under the substantial evidence test. See, e.g., Conn. Gen. Stat. § 4-183(j); Cadlerock Props. Joint Venture, L.P. v. Comm'r of Envtl. Prot., 253 Conn. 661, 676-77 (2000). Here, however, the Council's finding demonstrates that it ignored the plain and unambiguous statutory and regulatory language that establishes that the measure of compliance with noise regulations in this state is at the property line, not "the nearest residence" or "the nearest residential receptor." The Council's conclusion was based on an erroneous interpretation and application of Connecticut noise

law, which the Court must review de novo. See S. New Eng. Tel. Co., 261 Conn. at 21-22. Moreover, the Council's determination of law regarding this issue is not entitled to special deference because it does not concern "complex and technical regulatory and policy considerations." See Wheelabrator, 283 Conn. at 692.

B. The Council Failed to Apply State Noise Law

The Council received a significant amount of evidence from BNE and plaintiffs regarding the noise levels that will be associated with the operation of the turbines at both sites. (See R.__.) BNE insisted that its petitions complied with DEP noise regulations based on noise modeling conducted from the turbine locations to "the nearest residence." (R.__.) Plaintiffs repeatedly informed the Council that the noise regulations adopted by DEP pursuant to a legislative grant of authority require compliance at the property line, not at residences. (See R.__; A409.) BNE stated that it modeled the noise levels to "residential receptors," i.e., residential dwellings, because "the noise criteria regulations from Connecticut call for the receptor locations to be areas where people sleep." (A403; see also A410-11, A419.)

The Council concluded, in its opinions for each petition: "On balance, the Council is satisfied that noise emitted by the project would meet Connecticut DEP allowable limits at the nearest residential receptors . . . ." (See R.__.) That conclusion demonstrates a gross misunderstanding and application of the state law regarding noise. There can be no dispute that BNE did not present evidence of noise levels at the property lines, because the noise studies submitted by BNE modeled noise levels only to the nearest residential dwellings. (See R.__.) The only evidence in the record regarding the noise levels at the proper point of compliance, i.e., the property line, was submitted by plaintiffs and demonstrates that the project violates state noise regulations. (See A272-73, 277-78; see also A403 ("[w]e haven't

completed an evaluation of the property lines").) Accordingly, the Council simply could not make a finding of compliance at the property lines.

C. State Noise Law Requires that Noise Emitters Demonstrate Compliance with Noise Levels at the Property Line

Since July 1, 1974, Connecticut has had a strong public policy with respect to noise. That public policy is reflected in § 22a-67, in which the legislature "finds and declares" in relevant part that "[t]he policy of the state is to promote an environment free from noise that jeopardizes the health and welfare of the citizens of the state of Connecticut." The legislature commanded that "[s]tate agencies shall, to the fullest extent consistent with their authorities under the state law administered by them, carry out the programs within their control in such a manner as to further the policy stated in section 22a-67." Conn. Gen. Stat. § 22a-72(a).

The legislature tasked the DEP Commissioner with the responsibility of developing, adopting, maintaining and enforcing "a comprehensive state-wide program of noise regulation" that was to include "[c]ontrols on environmental noise through the regulation or restriction of the use and operation of any stationary noise source," and the establishment of "ambient noise standards for stationary noise sources which in the commissioner's judgment are major sources of noise when measured from beyond the property line of such source . . ." Conn. Gen. Stat. § 22a-69(a)(1) & (a)(2) (emphasis added). DEP adopted such regulations, effective June 15, 1978. See Regs., Conn. State Agencies § 22a-69-1 et seq.[19]

The DEP regulations contain an unambiguous requirement for noise regulation compliance to take place at the property line. Regulation § 22a-69-3.1 provides: "No person shall cause or allow the emission of excessive noise beyond the boundary of his/her Noise

[19] By default, the Colebrook rules are the DEP noise regulations, because Colebrook has not adopted an ordinance providing for the reduction or elimination of excessive noise and the administration thereof. See Conn. Gen. Stat. § 22a-69(b)(2).

Zone so as to violate any provisions of these Regulations." (Emphasis added.) "Noise Zone" means "an individual unit of land or a group of contiguous parcels under the same ownership as indicated by public land records and, as relates to noise emitters, includes contiguous publicly dedicated street and highway rights-of-way, railroad rights-of-way and waters of the State." Regs., Conn. State Agencies § 22a-69-1.1(o). The boundary of a Noise Zone, then, is a property line, and compliance must be demonstrated at that property line.

All of the allowable noise levels contained within the regulations restrict emission of noise beyond property boundaries. See, e.g., Regs., Conn. State Agencies §§ 22a-69-3.2(b) ("No person shall cause or allow the emission of impulse noise . . . to any Noise Zone."), 22a-69-3.3 ("Continuous noise measured beyond the boundary of the Noise Zone of the noise emitter . . . shall be considered excessive noise . . ."), 22a-69-3.4 ("No person shall emit beyond his/her property infrasonic or ultrasonic sound . . ."). Regulation § 22a-69-4(g), which governs the methods for measuring noise, is even more explicit. It directs that "[m]easurements taken to determine compliance with Section 3 [Allowable noise levels] shall be taken at about one foot beyond the boundary of the Emitter Noise Zone within the receptor's Noise Zone." (Emphasis added.) The mandate that measurements be taken within one foot of the property boundary – rather than one foot from a residential dwelling – makes clear that the proper point of compliance is not where people sleep.

The plain meaning of § 22a-69 demonstrates that the legislature intended for compliance with noise standards to be measured at the property line of sources of noise. The regulations enacted in accordance with that statute plainly require the same. Connecticut courts that have examined our state noise regulations have analyzed compliance with the regulations at the property line, rather than at the residence. See, e.g., Russell v. Thierry,

2001 WL 1734441, at *1-3; JZ, Inc. v. Planning & Zoning Comm'n of East Hartford, 2008 WL 4378733, at *4 (rev'd on other grounds). Even the Council has never before determined that a project complied with state noise regulations by meeting a specific level at the nearest residence, but instead has examined noise levels at the property lines. These petitions are the only cases in which the Council has used a point other than the property lines as a point of noise compliance. (See, e.g., A234 ("The Council is satisfied that noise levels during plant operations would not exceed a 61 dBA noise level during the day and 51 dBA during the night at the nearest residential property boundary, as required by State noise regulations."); A238 ("Noise levels during plant operation are expected to be 62 dBA, which is below the Class B land use noise limit of 66 dBA at a residential property boundary") (emphases added).) See City of Hartford v. Hartford Mun. Emps. Ass'n, 259 Conn. 251, 262 (2002) ("an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable").

Despite these facts, the trial court made a cursory reference to the "mission" of the council being to balance public need and environmental impact,"[20] and then concluded, without citation, that:

> [T]he council had the authority to find that a reasonable approach to noise pollution was to measure the harm at residences rather than property lines. Further, the council was not bound solely by the DEP regulations to the extent that these regulations require testing at property lines.

(R.__.)[21] That conclusion ignores the fact that the legislature delegated authority for noise

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[20] The Council did not conduct any balancing in coming to its decision. Instead, it pretended that the petition complied with state noise regulations by deliberately ignoring the proper point of compliance. (See R.__.)

[21] When plaintiffs asked the trial court to articulate the legal basis for its conclusion, the trial court responded that it "holds that the Siting Council is not required by the DEP noise

regulation to DEP, not to the Council. See Conn. Gen. Stat. § 22a-69(a). The regulations adopted by DEP in accordance with that delegation provide that "[a]ny person who owns or operates any stationary noise source" may apply to DEP for a variance from the requirements of the noise regulations. See Regs., Conn. State Agencies § 22a-69-7. Applications for variances may not be considered by DEP absent notice and a hearing. Regs., Conn. State Agencies § 22a-69-7.1(e). BNE did not apply for or obtain such a variance, and given the nature of the legislature's delegation, the Council certainly does not have jurisdiction to grant BNE a variance. Moreover, § 22a-72(c) specifically provides that "[e]ach . . . agency . . . having jurisdiction over any property or facility, . . . shall comply with federal and state requirements respecting control and abatement of environmental noise." The Council did not comply with those requirements.

The trial court's conclusion would also render the statute unworkable, because it would result in one state agency, the Council, having the authority to site projects that disregard state noise law, and would subsequently require another state agency, DEP, to later enforce its regulations and likely shut down those same projects for their inevitable noise violations. See Rivers, 288 Conn. at 17-18 (defining "unworkable," as used in § 1-2z, to mean "not capable of being put into practice successfully"); see also Longley v. State Emps. Retirement Comm'n, 284 Conn. 149, 171-72 (2007) ("It is a fundamental principle of statutory construction that courts must interpret statutes using common sense and assume that the legislature intended a reasonable and rational result.").

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regulations to measure noise volume at the plaintiffs' property lines." (R.__.) The trial court's response is certainly erroneous with regard to Wagner, whose property shares a boundary with the Rock Hall Road Project site. The Council was required by law to consider noise levels at the property lines of the proposed project sites, including the noise volume at Wagner's property line.

The only rational, reasonable and workable interpretation of the noise law of this state mandates that the Council may only approve projects that comply with DEP's noise regulations at the property line. The Council's failure to properly apply the DEP noise regulations violated statutory provisions, exceeded its statutory authority and was otherwise unlawful. Its decision must therefore be vacated pursuant to § 4-183(j).

IV. THE COUNCIL HAD NO EVIDENCE TO SUPPORT APPROVAL OF THE ROCK HALL ROAD PROJECT WITH SHORTER HUB HEIGHTS

In its Rock Hall Road Project petition, BNE sought a ruling that no certificate was needed to site three wind turbines with up to 50-meter blades at 100-meter hub heights. (See R.__.) The Council granted the petition conditioned on the use of wind turbines with 40.3-meter diameter blades at 80-meter hub heights.[22] BNE did not offer any evidence relating to 80-meter hub heights, and only raised that possible revision of its petition in the final two minutes of the Council hearing, after the close of evidence. The Council's finding that "[t]urbines with hubs that are 80 meters in height would be feasible at the Colebrook North site" was not supported by any evidence in the record, let alone substantial evidence. (See R.__.)

A. Standard of Review

This Court's review is subject to the substantial evidence rule. Based on the standards set forth in General Statutes § 4-183(j), plaintiffs have the burden of proof to "establish that substantial evidence does not exist in the record as a whole to support the agency's decision." See Tarullo v. Inland Wetlands & Watercourses Comm'n, 263 Conn. 572, 584 (2003). "This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." MacDermid,

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[22] As discussed above, the Council had no authority to place any conditions on the granting of BNE's petition. (See section II of this brief.)

257 Conn. at 136. “An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.” Cadlerock, 253 Conn. at 676. Factual determinations will be upheld if reasonably supported by substantial evidence in the hearing record. See Miko v. Comm'n on Human Rights & Opportunities, 220 Conn. 192, 200-201 (1991).

B. The Record Contains No Evidence About 80-Meter Hub Heights

The Council's finding that “80 meters [hub heights] would be feasible at the Colebrook North site” and the Council's decision to condition its approval on the use of 80-meter hub heights were not based on substantial evidence. BNE did not ask for approval of 80-meter hubs; it did not address 80-meter hubs in its petition, any design or other specification; 80-meter hubs were not addressed in any evidence offered during the hearing. Instead, the conditional approval – and the Council's finding – were based solely on the closing plea of Paul Corey, one of BNE's principals. After the close of evidence, in the last two minutes of the hearing on the Rock Hall Road Project, Corey told the Council:

> In addition – you know, obviously there's been some concerns on visual impacts and so forth. And the – the Colebrook sites are different than Prospect. In Colebrook the 80 meter hub height does work. And if the Council were to decide and determine that hundred meter hub heights are just too tall, we would – certainly would like the opportunity to be at 80 meters and make it work. And we're committed to doing that. And we understand this is the first wind project in Connecticut and we'll try our best to make it work and accommodate and mitigate to the fullest extent possible.

(A426-427.) Plaintiffs immediately moved to strike that closing request as being unsupported by the evidence. (A426.) The Acting Chairman did not strike the request, but instead ruled “[w]e'll take it for what it's worth.” (Id.) Corey's closing plea was apparently worth quite a lot, since the Council's decision to approve the petition conditioned on the use of 80-meter hubs was based solely and expressly on his unsupported statement. (See R.__ (finding regarding

the “feasibility” of 80 meter hubs referenced back to Corey’s statement); R.__ (“The petitioner stated that the 80-meter (262-foot) tall turbine towers would also be viable at the site; therefore, the Council will order the turbines to be no higher than 80 meters at the hub.” (emphasis added)).)

There is no question that plaintiffs were prejudiced by the Council’s decision to approve what amounted to a different project than on the basis of that closing plea. All of the evidence offered by BNE in support of the petition was based on 100-meter hub heights. The noise analysis, the shadow flicker analysis, ice throw studies, visibility analysis, the engineering site plans – all involved turbines with 100-meter hubs. No offer was made as to the water quality or air quality impacts of the 80-meter hub height turbines. No offer was made as to the impact of the 80-meter hubs at all, meaning that the Council’s decision deprived plaintiffs of the opportunity to cross-examine BNE on the stated “viability” of the 80-meter hub heights, as well as the potential impact of the reduced height on issues including but not limited to water quality, noise, and visual impact.

For example, perhaps the lower hub height means that the trees on the site will interfere more with the turbines’ operation, so that more trees will need to be cleared. Clearing larger numbers of trees likely would increase the erosion on the site and therefore is directly relevant to the question of whether the project complies with water quality standards. The Council had no evidence on this issue, which is obviously relevant to its inquiry under § 16-50k(a). Perhaps the shorter hub heights would increase the potential bird and bat fatalities because the lower turbine blades will now be located entirely within the typical flight path of those animals. The Council had no evidence on these environmental issues.

The lack of evidence regarding the noise impact of the shorter turbine hub height was

particularly prejudicial to plaintiffs. As plaintiffs' noise expert testified before the trial court, "the shorter hub height makes the wind turbine closer to the property, and distance is the big factor in determining what sound is received at an abutter. So, in this case, the effect is a shorter distance from the source of sound [i.e., the hub] to the receiver."[23] (See A452-53.) Based on information contained in the improperly sealed documents (see section V of this brief), which revealed that the maximum noise levels of the turbines are actually two decibels higher than those used by BNE in its calculations, plaintiffs' expert was able to determine that use of the shorter hub heights would result in "about a three decibel increase" in noise levels at the property lines. (A454.)

Nor did the Council have any actual evidence to support Corey's claim that the 80-meter turbines were "feasible." BNE repeatedly told the Council that "passing" a process conducted by GE, known as the mechanical loads analysis or assessment ("MLA"), meant that GE had approved the turbine locations as technically feasible. (See, e.g., R.__; A416-17, A422.) Plaintiffs' review during the pendency of this appeal of the evidence improperly sealed by the Council showed that BNE never filed an MLA for the 80-meter hub heights. Given the absence of such evidence from the record, the Council may well have approved a petition for a project that has not "passed" the manufacturer's own feasibility analysis.

The Council opined that its "determination of minimal visual impact to the Rock Hall Property is based on the 100 meter hubs and 82.5 meter rotor diameter and notes visibility will be improved by using 80 meter hubs at the proposed turbine locations." (R.__.) That opinion regarding lessened visibility impact is not supported by any evidence in the record,

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[23] During the evidentiary hearings held by the trial court, plaintiffs presented the testimony of several witnesses to satisfy their burden of showing that they were materially prejudiced by the procedural irregularities in the Council's process. See Adriani v. Comm'n on Human Rights & Opportunities, 220 Conn. 307, 327-29 (1991).

because BNE did not submit any visual impact analyses using the 80-meter hub heights. In fact, the only evidence in the record regarding 80-meter hub heights is a letter from the State Historic Preservation Office, relaying its conclusion that even the shorter hub height would have an adverse effect on the characteristics of Rock Hall that made it eligible for inclusion on the National Register. (See A307-309.) Obviously, the impact on the Somers' historic property was significant to them, and the Council's decision to deprive them of the opportunity to present evidence and cross-examine BNE on the impact of 80-meter hub heights prejudiced them.

The trial court did not consider the absolute lack of evidence supporting the Council's decision because (1) it concluded that the 80-meter hub height condition was a "non-environmental issue," and (2) it determined that the scope of plaintiffs' classical aggrievement, and therefore the scope of judicial review, was limited to air and water quality issues by § 16-50k(a). (See R.__ n.9 ("As they have correctly qualified only for environmental standing, the plaintiffs cannot raise the non-environmental issues of hub height . . .").) The trial court's conclusion that the 80-meter hub height was a "non-environmental issue" is erroneous, since, as described above, the change to shorter hub heights would result in increased noise levels and could also have implications for other environmental concerns, including water quality, wildlife fatalities and protection of historic resources.[24] The trial court's limitation on the scope of classical aggrievement and judicial review is also erroneous, because it leads to the conclusion that the Council must approve and the courts must affirm petitions that could, on their face, present significant public health and safety issues. This Court must interpret the law so as not to reach an absurd result. See Conn. Gen. Stat. § 1-2z.

[24] Protection of historic resources is addressed within CEPA. See Conn. Gen. Stat. § 22a-19a.

Quite simply, there was no "substantial evidence in the administrative record to support the agency's finding" that 80-meter hub heights were feasible on the site and were apparently preferable to the 100-meter hub heights. See Cadlerock, 253 Conn. at 676-77. In fact, there was no evidence at all to support that finding. By accepting Corey's last-minute closing plea to support a significant change to the petition, the Council acted in the absence of substantial evidence and "unreasonably, arbitrarily, illegally [and] in abuse of its discretion." The Council's decision must be vacated pursuant to § 4-183(j).

V. THE COUNCIL VIOLATED PLAINTIFFS' RIGHT TO FUNDAMENTAL FAIRNESS BY PREVENTING MEANINGFUL CROSS-EXAMINATION

The Council infringed on plantiffs' common-law rights to fundamental fairness by refusing to continue the proceedings when BNE produced thousands of pages of new evidence, denying plaintiffs the opportunity to examine the author of a key document upon which the Council relied, refusing to permit plaintiffs to inquire about matters upon which the Council later made findings and improperly sealing thousands of pages of evidence. See Grimes v. Conservation Comm'n of Litchfield, 243 Conn. 266, 273 (1997) (the conduct of administrative hearings must not "violate the fundamentals of natural justice"). Even in an administrative hearing, all parties[25] "have an opportunity to know the facts on which the commission is asked to act, to cross-examine witnesses and to offer rebuttal evidence." Pizzola v. Planning & Zoning Comm'n of Plainville, 167 Conn. 202, 207 (1974); see also Conn. Gen. Stat. § 4-178(5) (parties "may conduct cross-examinations required for a full and true disclosure of the facts"); Conn. Gen. Stat. § 16-50o(a) (same). Indeed, due to the often relaxed rules of evidence used in administrative hearings, cross-examination has an elevated

[25] In its opinions, the trial court stated the plaintiffs were "not at the level of parties" during the hearings before the Council. (R.__.) This is incorrect, as plaintiffs were made parties to both proceedings by the Council. (R.__.)

importance. See Wadell v. Bd. of Zoning Appeals of New Haven, 136 Conn. 1, 8 (1949). "[An administrative body] is not limited by the strict rules . . . [b]ut the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." Id. at 9. The Council repeatedly deprived plaintiffs of the right to meaningful cross-examination, thereby preventing a "full and true disclosure of the facts" and violating plaintiffs' rights to fundamental fairness.

A. Standard of Review

This Court's review is plenary. See Megin v. Zoning Bd. of Appeals of New Milford, 106 Conn. App. 602, 608 (2008).

B. Plaintiffs Were Prejudiced by the Council's Refusal to Permit Cross-Examination of Frederick Riese

The Council rejected plaintiffs' attempts to cross-examine Frederick Riese of the DEP, who authored two letters that were relied upon by the Council as if they were expert reports. By statute, the Council is required to "consult with and solicit written comments from" certain state agencies, including DEP, before commencing a hearing, and any comments received become part of the record of the hearing. See Conn. Gen. Stat. § 16-50j(h). DEP submitted by letter written comments authored by Riese about both petitions ("the Riese letters"). (See A280-93.) Plaintiffs immediately noted numerous deficiencies in the Riese letters, including silence regarding water quality issues and BNE's failure to conduct raptor, vernal pool, fauna and bird migration surveys, accompanied by a focus on the potential visibility of the projects, which is not within DEP's purview. (See id.) In light of those serious deficiencies, and aware that the Council likely would rely on the Riese letters, since they were authored by an employee of a state agency charged with protecting the environment, plaintiffs amended their

witness lists to include Riese one day after receiving the Riese letters.[26] (See R.__.) The Council refused to permit the amendment and barred plaintiffs from cross-examining Riese because he submitted the letters "pursuant to a request from the Council that is statutorily required when the Council commences a public hearing," he was not a witness for any party to the proceeding and he had not filed pre-filed testimony. (See R.__; see also A402.)

In other words, the Council made the Riese letters, which functioned effectively as expert reports, part of the record and then prevented plaintiffs from cross-examining the author of those letters because they were submitted only as a response to a statutory mandate to consult with state agencies, rather than as pre-filed testimony. The Council did not explain why the comment letters could not be treated as Riese's pre-filed testimony. The language of § 16-50j(h), which requires that the Council consult with agencies including DEP, also commands that "[c]opies of such comments shall be made available to all parties prior to the commencement of the hearing."[27] By the plain language of the statute, then, the legislature required that written comments from state agencies – which have expertise in areas related to petitions and applications brought before the Council – be made part of the record and provided to the parties prior to the commencement of any hearing. The only logical and reasonable interpretation of that requirement is to ensure that the parties have the

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[26] During the proceedings for the Prospect Project, FairwindCT subpoenaed Riese for testimony after the filing of a similar letter. BNE objected to the subpoena and moved to quash, claiming that plaintiffs' subpoena was procedurally improper because plaintiffs had not listed Riese on their witness list. The Council refused to permit plaintiffs to call Riese in that proceeding. (See R.__.) In an effort to avoid that procedural trap in these proceedings, plaintiffs amended their witness lists before issuing subpoenas to Riese.

[27] Originally, the Council was required to consult with and obtain written comments from certain state agencies prior to rendering its decision. See P.A. 575, § 5 (1971). The legislature amended that language in 1975 to require consultation and written comments prior to the commencement of any hearing. At that time, the legislature also added the requirement of providing copies of the comments to the parties. See P.A. 75-375, § 2.

opportunity to review the agency comments and, if necessary, "conduct such cross-examination as may be required for a full and true disclosure of the facts." See Conn. Gen. Stat. § 16-50o(a); see also Conn. Gen. Stat. § 4-178(5).

There is no question that the Council ultimately relied upon the Riese letters – they are cited several times in the Council's findings of fact and decisions, and in the findings of fact for the Flagg Hill Road Project, the Council made an express finding that the Riese letter was "referred to in various portions of the Environmental Impacts section." (See R.__.) The Council therefore prevented plaintiffs from obtaining a full and true disclosure of the facts with respect to evidence that it relied upon. The Council's heavy reliance on the Riese letters demonstrates why "[c]ross-examination may be crucial . . . where reports are submitted from . . . agencies who do not attend the public hearing." See Douglas Bldg., Inc. v. Woodstock Inland Wetlands & Watercourses Agency, 2006 WL 3114439, at *9 (warning that because of the "considerable deference" given to such reports, "counsel should object to the admission of harmful reports unless the maker of the report is available for cross-examination"); see also Timber Trails Assocs. v. Planning & Zoning Comm'n of Sherman, 1994 WL 161284, at *6 ("Calling another expert to contradict is a poor substitute for obtaining a witness's concession of a relevant point in cross-examination."). Certainly, if the Riese letters had criticized the petitions, BNE would have wanted, and likely demanded, the opportunity to examine Riese. Parties opposing a proposed development should have the same right.

The Council also opined that plaintiffs failed to show how they were prejudiced by their inability to cross-examine Riese. (See R.__.) Obviously, without being "grant[ed] an opportunity to cross-examine the preparer" of the Riese letters, plaintiffs were unable to offer the Council specific examples of harm they suffered, and instead generally pointed to the

Council's violation of "basic principles of procedural due process." See Douglas Bldg., 2006 WL 3114439, at *10. That violation of fundamental fairness was not resolved by plaintiffs' ability to offer their own written and testimonial evidence to rebut the Riese letters, because plaintiffs' due process right consisted of the right to cross-examine Riese directly. See Wadell, 136 Conn. at 8 ("[c]ross-examination is the greatest aid to the ascertainment of the truth which the advocate possesses"); see also Timber Trails Assocs., 1994 WL 161284, at *6 ("[A]n aggrieved party cannot be foreclosed from directly challenging pontification of an expert . . . Otherwise, the right of direct cross-examination would be a hollow one."). When plaintiffs attempted to show more specific evidence of their prejudice by presenting testimony from one of their experts who is familiar with Riese's background, the trial court refused to hear it. (See A469-71.) Plaintiffs attempted to make an offer of proof regarding Riese's lack of expertise on numerous issues recited in his letters and his lack of education with regards to water quality issues, but the trial court refused to hear the offer of proof. (See A471-72.)

After the close of evidence before the trial court, plaintiffs had an opportunity to gather additional evidence of their prejudice when Riese contacted one of plaintiffs' attorneys in response to a FOIA request. During that conversation, Riese made numerous comments that demonstrated his utter lack of familiarity with the contents of the petitions and the characteristics of the proposed project sites. Plaintiffs moved the trial court to supplement the briefs and records in each appeal with affidavits from their attorney describing the conversation and Riese's factual misstatements. (See R.__; A396-97 (Riese stating that "there are only a few hundred square feet of wetlands" on the sites and the only area of concern was a "very small stream" that a person could "easily step over," so that the Army Corps would have no jurisdiction, when BNE's petitions state that the wetlands systems

occupy significant portions of both sites, including an open-water beaver pond and Mill Brook, a perennial watercourse, and the Army Corps had already in fact asserted jurisdiction over the projects); A448 (parties stipulating to Army Corps jurisdiction).) The trial court denied the motions, thereby depriving plaintiffs of their opportunity to show prejudice. (R.__.)

C. Plaintiffs Were Prejudiced by the Council's Refusal to Permit Cross-Examination About the Cumulative Impacts of the Two Petitions

BNE's petitions to the Council sought approval for industrial wind turbine projects located less than one mile apart from one another, but the Council refused to permit plaintiffs to present evidence and cross-examine witnesses about the cumulative impacts of siting the two projects in close proximity to each other. The Council's decision to consider each petition in an artificial vacuum violated plaintiffs' rights to fundamental fairness and prevented a full and true disclosure of the facts.

Plaintiffs twice moved to consolidate the proceedings on BNE's petitions, given that the two projects: (1) are very similar; (2) were proposed by BNE using the same consultants; (3) involved many of the same parties; (4) were noticed together; (5) relied on the same evidence for wildlife impacts; and (6) were filed within one week of each other. (See R.__; see also A401-402, A406-407.) Those motions were denied. (See R.__.) Plaintiffs sought to present evidence of the cumulative effects of siting both projects, and sought to cross-examine BNE's witnesses about those cumulative effects.[28] The Council prevented plaintiffs and the other parties from doing so. During the proceeding on BNE's petition for the Flagg Hill Road Project, plaintiffs' counsel objected to a Council ruling that witnesses could not talk about the effects of the Rock Hall Road Project – and the Council chair informed the parties

[28] In proceedings concerning applications for certificates, the Council is required to consider "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities . . . ." See Conn. Gen. Stat. § 16-50p(a)(3)(B).

that they could “talk about cumulative impact” when the evidentiary hearings on the Rock Hall Road Project began. (See A407-408 (“Again this is about Colebrook South since this one came first. When we get to the next one, then we can talk about the cumulative impact.”).) Later in the same hearing, the Council chair granted BNE’s motion to strike a witness’s response about her home’s proximity to both projects and again told the parties that they could talk about cumulative effects when the Council considered the Rock Hall Road Project petition. (See A410.)

Once the Council took up the Rock Hall Road Project, that wrong was compounded when the Council chair “corrected” his earlier rulings and again prevented plaintiffs from asking about the cumulative effects of the two projects. (See A417-18.) Despite refusing to permit cross-examination on the cumulative impacts of the two proposed projects, the Council stated in its opinion for the Rock Hall Road Project that it had “reviewed possible cumulative impacts from both wind turbine projects (Petitions 983 and 984) at certain properties,” found “no cumulative impacts in terms of noise, ice drop/throw or shadow flicker” and determined that “cumulative impacts in terms of visibility are not substantial.” (R.__.) Given the Council’s refusal to permit cross-examination and evidence regarding the cumulative effects of BNE’s two proposed Colebrook projects, the Council’s findings that there would be “no cumulative impacts” or that any cumulative impacts would not be “substantial” is hardly surprising. Plaintiffs were prejudiced by the Council’s actions.

D. Plaintiffs Were Prejudiced by the Council’s Overreaching Protective Orders and the Trial Court’s Continuation of those Orders

Plaintiffs were also prevented from cross-examining witnesses on the contents of documents filed under seal by BNE. During the hearings, and in response to interrogatories issued by plaintiffs, BNE asked the Council to permit it to file numerous documents under

seal, including information from GE regarding safety, noise, technical data and construction specifications, as well as wind data collected by BNE at the project sites. (See R.__; A326-28.) The Council granted BNE's requests to file under seal and for protective orders but made the orders even more restrictive than those sought by BNE. (See A294-301.) Under the terms of the Council's protective orders, parties authorized to review the sealed information were permitted do so only at the Council's offices during the Council's limited business hours. (See A296, A300.) The sealed information could not be copied, reviewers were not permitted to take notes and the parties were only permitted to inquire about the contents of the sealed information by issuing under seal written interrogatories to BNE. (A295, A299.) Moreover, because the protective orders were not entered until well into the hearings on these petitions (and for the Rock Hall Road Project, not until only one day was left in the hearing), plaintiffs did not even have a reasonable opportunity to attempt to issue written interrogatories. (See R.__; A294-301.) Plaintiffs filed multiple objections to the Council's sealing decisions in the dockets for both petitions, to no avail. (See R.__; see also, e.g., A332-58, A365-81, A420.)

On appeal, BNE asked that the trial court continue to seal the documents; plaintiffs objected and asked the trial court to order the Council to file them publicly. (See R.__; see also A310-23; A432-35.) The trial court made a finding that BNE had met its burden of showing a need for confidentiality that overrode "the public's interest in viewing such materials"; See Conn. Practice Book § 11-20A(c); and entered protective orders that permitted plaintiffs to take notes on the sealed documents and to discuss those notes with their experts, but did not provide plaintiffs with copies and did not permit the experts to actually review the sealed documents themselves. (See R.__; see also A435-39, A442-45.)

Plaintiffs reviewed the documents and because they were able to (for the first time) record the exact titles of documents, they discovered that many are available in the public domain or contain the type of information that has been made public by GE in the past. They also discovered information in the documents that would have significantly aided in the preparation of their case before the Council.

1. The Sealed Documents Were Not Exempt from Disclosure

The presumption is that anything filed with any state agency is public. See Conn. Gen. Stat. § 1-210. Exceptions to this rule, aimed at protecting trade secrets, require evidence that the filings (1) "derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use" and are not (2) "the subject of efforts that are reasonable under the circumstances to maintain secrecy." See Conn. Gen. Stat. § 1-210(5)(A).[29] The documents filed under seal do not satisfy those requirements.

Despite this presumption, the Council blindly accepted BNE's claim that the material was proprietary and warranted protection because "[t]he GE and BNE documents sought to be protected . . . are clearly marked 'confidential and proprietary – do not copy without consent.'" (See R.__.) Contrary to the Council's assertion, many of the sealed documents are not marked "confidential and proprietary." (See R.__.) But more significantly, the Council failed to properly analyze the factors set out by this Court in determining whether information

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[29] The Council's rules also permit parties to seek protective orders to prevent the public disclosure of critical energy infrastructure information ("CEII"), which has been afforded protection from disclosure under federal regulation. CEII contains "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure" and "means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters." 18 C.F.R. § 388.113(c)(1) & (2). The petitions do not meet that criteria.

is a trade secret; see Town & Country House & Homes Serv., Inc. v. Evans, 150 Conn. 314, 319 (1963); and also failed to put on BNE the burden of proving the FOIA exemption by providing "more than general or conclusory statements in support of its contention"; Dir., Dep't of Info. Tech. of Greenwich v. Freedom of Info. Comm'n, 274 Conn. 179, 194 (2005).

Had the Council properly analyzed the issue, it could not have concluded that the documents filed under seal warranted such protection from public disclosure. As an initial matter, several documents filed under seal are already public.[30] One, titled "GE Wind – Setback Considerations for Wind Turbine Siting," has been public for years.[31] (See R.__; A189.) Despite this fact, plaintiffs were prohibited from cross-examining BNE's witnesses about the contents of the document, which contains several formulas that GE uses as guidelines for safe setbacks.[32] (See A419.) Another sealed document that can be found in the public domain is a glossy brochure for GE's turbine series that includes a timeline of GE's development of the 1.5 MW wind turbine series, which is available on GE's website. (See R__; A216.) A third is a fact sheet dated May 2010, which was available on GE's website at the time of the hearings but has since been replaced by an updated version dated May 2011.

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[30] The trial court held that "the GE setback document was merely printed on a New York state website and there has been no demonstration that this publication led to public availability." (R.__.) Plaintiffs can think of no clearer demonstration of "public availability" than free and easy access to a document hosted on the website of a state agency.

[31] Before the trial court, BNE finally agreed that the document could be filed publicly.

[32] The setback requirements contained in GE's "Setback Considerations" document, which plaintiffs were not permitted to ask questions about during the Council proceedings, are slightly ambiguous, but they require that the setbacks at turbine sites where icing is likely be no more than 1.5 x (Hub Height + Rotor Diameter). (See A189.) Plaintiffs believe the petitions violated several provisions of GE's setback requirements. At a minimum, the Rock Hall Road Project did not comply because a public road is several hundred feet too close to one of the turbines, and the Flagg Hill Road Project did not comply because one turbine was less than 145 feet from the occupied residential property boundary immediately south of the project site. (See A193 (identifying "[p]ublic roads" and "[r]emote boundaries to property not owned by wind farm" as "object[s] of concern within setback distance").)

(See R__; A188.) A fourth document – "Technical Description & Data" for the GE 1.6 xle – was also inappropriately sealed because it can be found online. (See R__; A202.) Two of these documents, which are marketing brochures used by GE to promote its wind turbine business, are not even marked confidential, despite statements to the contrary by the Council and its staff attorney. (See R.__; A188, A216-31, A406.) Anything in the public domain is certainly not entitled to be treated as a trade secret, because "[i]n order to qualify for a trade secret exemption . . ., [a] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means.'" See Dir., Dep't of Info. Tech., 274 Conn. at 194. These public documents should not have been sealed.

BNE was also permitted to file under seal a document containing the "Noise emission characteristics" of GE's 1.6 series of wind turbines. (See R.__.) This document contains information about the sound power levels of GE's turbines under various wind speeds and includes other noise information, such as tonality and octave band spectra. GE documents containing the same type of information about two older GE wind turbine series, i.e., the 1.5 MW series and the 2.5 MW series, are available online. (See, e.g., A195-201, A211-215.) Plaintiffs' expert also testified that this type of information is regularly provided by manufacturers of equipment that generates noise. (See A421.) This type of information is not a proprietary trade secret.

Sealed documents titled "Specification Site Roads and Crane Pad" contain information that would have permitted plaintiffs to test the validity of BNE's site plans, which could have a significant impact on compliance with water quality standards. (See R.__.) These documents contain specifications for off-site roads required to make transportation of the turbines

possible, and contains construction specifications for on-site roads and the crane pads, i.e., the area needed for the construction of the cranes used to build the wind turbines. This type of information is not a proprietary trade secret.

Also under seal are several different versions of MLAs prepared by GE for each of the sites. (See R.__.) BNE repeatedly told the Council that the MLAs confirm that the proposed turbine locations, hub heights and blade lengths would "work" on the sites. (See R.__; see also A416, A422.) These documents are highly technical in nature. Even once the trial court permitted plaintiffs to take notes, they could not draw any useful substantive conclusions from them without being permitted to provide copies to their experts. The MLAs have no independent economic value because the documents are specific to BNE's projects on BNE's sites, so they are not proprietary trade secrets.

Finally, the Council improperly sealed the wind data collected on the project sites. (See R.__.) The wind data is compiled in static PDF files of Excel spreadsheets containing approximately 1,598,280 cells of information. The documents are more than 2500 pages long. The sheer volume of this information, when combined with the restrictive sealing orders of both the Council and the trial court, rendered it useless to plaintiffs. Because the wind data was filed under seal, plaintiffs were denied the opportunity to analyze and cross-examine BNE's witnesses about that analysis. Like the MLA, the wind data has no independent economic value; at most, the data has the potential to add to the value of project sites if BNE were to sell them another developer. It is therefore not a proprietary trade secret.

2. The Sealed Documents Contained Information that Was Highly Relevant to the Issues before the Council

Not having access to the sealed documents prejudiced plaintiffs by failing to provide them with "a fair opportunity to cross-examine witnesses, to inspect documents presented

and to offer evidence in explanation or rebuttal." See Pizzola, 167 Conn. at 207. Two specific examples of the prejudice suffered by plaintiffs due to the Council's sealing order are described below, but without the assistance of their experts to more fully examine the contents of some of the more technical information, including the MLAs and the wind data, plaintiffs simply do not know the total extent of the prejudice they suffered by not being permitted to properly analyze and cross-examine witnesses regarding these documents.

The wrongfully sealed noise emissions characteristic document revealed a two-decibel "uncertainty level" for the turbines, which means that the "maximum" noise level reported by BNE and relied upon by the Council was not the "maximum" level at all. (See A453-54, A411, A417, A421.) BNE repeatedly stated – and the Council found – that based on the projected levels of noise from BNE, the projects would not violate the state noise regulations at the nearest residences. That determination was based on the Council's findings that BNE's noise modeling used "sound levels contained within GE's specifications" based on "worst case conditions" (R.__), and that the "maximum sound-level" of the turbines "is 106 dBA" (R.__). The sealed evidence reveals that the Council's finding is incorrect, because the evidence provided by BNE and subject to cross-examination was incorrect.

Lacking meaningful access to the sealed documents, plaintiffs' noise expert used 106 decibels, the purported "maximum" sound level reported by BNE, to conduct his own modeling to the property lines. If accurate information on the maximum sound level of the turbines had been available for plaintiffs to use during cross-examination, plaintiffs could have further challenged the veracity of BNE's noise consultant. Adding two decibels to the maximum sound level would have increased the projected noise levels at the nearest residences, more likely than not violating the noise regulations even under defendants'

incorrect interpretation of the proper point of compliance. (See section III of this brief.) Plaintiffs were denied the right to even cross-examine BNE's noise consultant on his alleged "worst-case scenario" analysis because the two-decibel uncertainty level was contained in a document erroneously deemed confidential and proprietary by the Council.

The wrongful sealing of the specification documents likewise prejudiced plaintiffs. During the hearing before the Council, plaintiffs' civil engineer, William Carboni, testified that he had doubts about the sufficiency of the road widths and clearing amounts shown in BNE's plans. He suspected, based on his independent research of constructing wind turbine sites, that BNE's plans were inadequate, and that the actual amount of clearing could be significantly larger. (See R.__.) BNE's engineer repeatedly testified that the site plans complied with GE's requirements. (See R.__.) The information contained in the specification documents includes clearance required for large trucks and cranes to turn on site and details about the necessary road and pad surface that will guarantee the sites can support the large equipment. The documents indicate that BNE must provide additional clearing space for parking, storage of site containers, toilets and equipment, all of which must be leveled and constructed with clean fine gravel stone, and they provide limitations on the acceptable gradients and declines for the cranes needed to construct the turbines.

Carboni told the trial court that his testimony before the Council would have been impacted if he had known the manufacturer's gradient requirements, the sloping of the crane pad assembly areas, the parking area sizes, the distance that all soil piles and obstacles must be from crane pads, the load-rating impacts and many other details contained in the specifications document. (See A463.) ("Depending on what their specifications were, it could have changed the grading, the amount of area that had to be cleared, which affects the water

quality.").) Michael Klein, plaintiffs' biologist and soil and wetland scientist, testified that "the size of the road, the grading of the road, the width of the road, the type of the structures that are required to pass water under the road has a strong influence on what the impacts of that road construction are." (A466-67.) He also described the impacts on water quality that may result from the changes to site plans dictated by the information in the specification document and the road improvements required by the heavy equipment described therein. (Id.)

As Klein and Carboni's testimony before the trial court established, the extent of tree clearing and the potential for road reconstruction are very significant for analysis of compliance with water quality standards, compliance that was required for approval of the petitions. The information in these documents could have been used to show that BNE had deliberately misrepresented the impacts of developing the sites by providing site plans with narrower roads and smaller clearing areas than would ultimately be required. Plaintiffs were materially prejudiced by the Council's refusal to permit cross-examination of witnesses regarding the contents of the sealed documents.

E. The Council Denied Plaintiffs Adequate Time in Which to Intelligently Prepare for Cross-Examination

The Council refused, on numerous occasions, to grant continuances following BNE's submission of what amounted to an entirely new petition, including the submission of nearly 700 pages and 500 pages of new evidence, respectively, just days before the hearings for the Flagg Hill Road and Rock Hall Road petitions began. (See R.__.) See Rullo v. Gen. Motors Corp., 208 Conn. 74, 79 (1988) ("[a] continuance is ordinarily the proper method for dealing with a late disclosure").

On December 6 and 13, 2010, in support of and as part of its petitions, BNE submitted thirteen exhibits. Those exhibits included site plans, stormwater management plans, erosion

and sediment control plans, terrestrial wildlife habitat and wetland impact analyses, visual resource evaluations, “interim” reports on bat acoustic studies, “final” reports on breeding bird surveys and noise evaluations. (See R.__.) On February 24, 2011, more than two months later and more than one-third into the 180-day deadline, BNE submitted new shadow flicker reports attached to interrogatory responses, thereby apparently revising its visual resources evaluations submitted with its petitions. (See R.__.) BNE's amendments did not stop there.

Under the Council's schedule for the hearings, all pre-filed testimony and interrogatory responses were to be submitted by March 15, 2011. The Council gave BNE a ten-day extension of that deadline for submission of its pre-filed testimony (and more than 500 pages of new evidence) with respect to the Rock Hall Road Project petition, over the objections of plaintiffs and other parties. (See R.__.) The hearings on the Rock Hall Road Project took place in one week, between April 26, 2011 and May 5, 2011, making the extensions particularly significant. Plaintiffs' request for a corresponding ten-day extension of the proceeding deadline was denied. (See R.__.) BNE sought and received a second extension, this time for six days, of the Council's published deadlines for responding to interrogatories, again over plaintiffs' objections. That extension meant plaintiffs received interrogatory responses the day before the Rock Hall Road Project hearing began, and further prejudiced plaintiffs by again shortening their preparation time. (See R.__.)

Between March 15 and March 25, 2011, more than halfway into the 180-day deadline, after public hearings on both petitions had begun and after evidence had started in the Flagg Hill Road Project proceeding, BNE substantially revised both of its petitions by submitting substantial new evidence, including: new sets of site plans, which redesigned the access roads on the sites and, for the Rock Hall Road Project, moved one turbine location more than

800 feet to the north; new stormwater management and erosion and sediment control plans, which amounted to hundreds of new pages of evidence and calculations; “supplemental” reports that, for the first time, provided information about the potential visual impact of the shorter blade lengths that were eventually approved by the Council for both petitions, as well as supplemental shadow flicker reports analyzing flicker likely to result from the shorter blades; “final” bat acoustic reports, which replaced the “interim” reports attached to BNE’s petitions; and four ice throw reports (one for each blade length at each site).[33] (See R.__.)

On April 20, 2011, after the hearing on the Flagg Hill Road Project had begun, BNE submitted the first on-site wildlife assessment of any kind. All parties were required to cross-examine Dr. Michael Klemens, who authored the report, the very next day, because Klemens was not available to attend the last day of the evidentiary hearing. (See R.__ ; A407-408, A411, A425.) BNE was permitted to disclose and file a similar report from Klemens on May 3, 2011 – less than 48 hours before the close of the Rock Hall Road Project hearing. (See R.__.) These instances of late filing were particularly detrimental to plaintiffs because Klemens made several discoveries that contradicted assertions made by BNE in its petitions, including the presence of valuable habitats on both sites likely to support several state-listed species. (See R.__.) Klemens’ survey was the only on-site survey for any wildlife conducted by BNE on the Rock Hall Road Project site. Plaintiffs should have been granted a continuance so that their own experts could review this and other significant changes to

[33] BNE also revealed its plans to perform spring migratory bird studies on the sites and additional acoustic bat monitoring on the sites from May to October 2011. The results of these surveys were not to be available until well after the Council rendered its decision on this petition – meaning that plaintiffs never had an opportunity to cross-examine BNE on their contents. (See R.__.)

BNE's petition before their only opportunity for cross-examination.[34]

The Council continued to let BNE submit crucial evidence late in the proceeding without providing continuances, thereby denying plaintiffs the ability to conduct effective cross-examination. On May 5, 2011, as plaintiffs' counsel were leaving their office to attend the last day of hearing on the Rock Hall Road Project, they received in the morning mail rebuttal testimony from one of BNE's consultants regarding the visual impact of the proposed project. The testimony included a DVD of a graphic simulation of the proposed turbines in motion. (See R.__; A422-25.) Plaintiffs objected to entering the exhibit into evidence because they had not had the opportunity to review it and therefore could not cross-examine witnesses regarding its contents. (A423-25.) The acting chair of the Council ruled that BNE's witness could testify and be cross-examined about the exhibit.[35] Based on later questioning from Council members, it was clear that they had reviewed the animation contained in the exhibit, since it had been hand delivered to their offices the day before plaintiffs' counsel received it in the mail. (A421-22 ("I watched with interest the disk last night . . . of windmills in operation.").)

In sum, the Council's decisions were not based on the petitions filed by BNE in early December 2010 and noticed by the Council in February 2011. Instead, they were based on the significant alterations and additions to the petition submitted by BNE after the notice was issued, more than halfway into the 180-day statutory time limit and in some cases, just hours before the only opportunity for cross-examination. The Council's failure to grant continuances

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[34] Klemens' findings also required BNE to again amend its site plans, stormwater management plans and erosion and sediment control plans – changes that were not made to the petitions before the close of the hearings, and would not be made until months later, in the D&M plans. (See R.__; A403-405, A412.)

[35] When plaintiff's counsel asked "how can I cross-examine on something that I haven't [seen]," the acting chair replied flippantly "[o]h, you're good." (A424.) A compliment is no substitute for an opportunity to review and prepare for cross-examination.

following the submission of this new information prejudiced plaintiffs, and its extensions of BNE's filing deadlines, deprived plaintiffs of the opportunity to prepare intelligently for the hearing and conduct meaningful cross-examination.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reverse the judgments of the trial court and remand these cases to that court with direction to sustain plaintiffs' appeals and vacate the Council's decisions.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing complies with the form and font requirements of Practice Book § 62-7 and that the font used is Arial size 12. I further certify that a copy of the foregoing was mailed on March 22, 2013 to the following counsel of record by first-class mail, postage prepaid, and was also served by e-mail:

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