S.C. 19090	:	**SUPREME COURT**
FAIRWINDCT, INC., STELLA SOMERS, MICHAEL SOMERS AND SUSAN WAGNER	:	
v.	:	
CONNECTICUT SITING COUNCIL	:	**AUGUST 26, 2013**

MOTION TO STRIKE

Pursuant to Practice Book §§ 60-2(3), 66-2 and 66-3, Plaintiffs-Appellants FairwindCT, Inc., Stella and Michael Somers and Susan Wagner (collectively, "Plaintiffs") hereby move to strike improper matter contained in intervening defendant BNE Energy Inc.'s motion for expedited schedule, dated August 16, 2013 ("BNE Motion"), and an accompanying affidavit executed by its principal, Paul Corey, dated August 9, 2013 ("Corey Affidavit").

I. Brief History

On October 1, 2012, the trial court (Cohn, J.) entered two judgments against Plaintiffs, dismissing their appeals from the Connecticut Siting Council's final Decision and Order (and related Findings of Fact, Conclusions of Law and Opinion), dated June 2, 2011 and June 9, 2011, which approved BNE Energy Inc.'s petitions for declaratory rulings that no certificates of environmental compatibility and public need were required for the construction, maintenance, and operation of two 4.8 MW industrial wind turbine projects located on Flagg Hill Road and Rock Hall Road, Colebrook, Connecticut (Petition Nos. 983 and 984). Plaintiffs timely appealed both judgments. The appeals, S.C. 19090 and S.C. 19091, were transferred to this Court pursuant to Practice Book § 65-1, and consolidated for purposes of the record

and oral argument. These appeals have been fully briefed since mid-June 2013, but the record has not yet been prepared, so the appeals are not yet ready for assignment.

II. Specific Facts

This appeal is one of two that arise out of the decisions of the Connecticut Siting Council (the "Siting Council") to approve petitions filed by BNE Energy Inc. ("BNE") to construct industrial wind turbine projects on residential property in rural Colebrook, Connecticut. The two residential properties are located approximately half a mile away from each other. The petition that is the subject of this appeal was filed on December 6, 2010. The petition that is the subject of S.C. 19091 was filed on December 13, 2010.

The Siting Council held hearings on both petitions in March, April and May of 2011. Plaintiffs participated in those hearings as parties and intervenors under the Connecticut Environmental Protection Act, Connecticut General Statutes § 22a-14 et seq. ("CEPA"). Plaintiffs presented fact and expert witnesses in opposition to BNE's petitions. On June 2, 2011, the Siting Council granted BNE's petition in the matter that is the subject of this appeal. On June 9, 2011, the Siting Council granted BNE's petition in the matter that is the subject of S.C. 19091.

Plaintiffs appealed the Siting Council's decisions to the Superior Court on July 15 and July 21, 2011. Judge Cohn held an evidentiary hearing regarding both appeals in January and February 2012, heard oral argument on June 12, 2012, and issued decisions dismissing Plaintiffs' appeals on October 1, 2012. At no time did BNE move to expedite those proceedings, which took more than 14 months.

Plaintiffs appealed from the trial court's decisions on October 17, 2012. Plaintiffs raised several issues on appeal, including matters of first impression concerning statutory interpretation and implicating the Siting Council's jurisdiction. At the request of all parties,

Plaintiffs' appeals were transferred to this Court and subsequently consolidated for purposes of the record and oral argument. BNE did not seek an expedited schedule when the appeals were filed or after they were transferred.

On January 9, 2013, Plaintiffs filed motions for articulation, and on the same day, filed motions seeking to extend their briefing deadline to 30 days after the trial court's decision on the articulation motions. Although BNE reported that it objected to the extensions, it did not file an opposition to the extensions. Plaintiffs' consolidated brief was filed on March 22, 2013.

On April 11, 2013, BNE joined in its first motion for extension of time in which to file its opposition brief, seeking an additional 16 days. On May 2, 2013, BNE joined in its second motion for extension of time in which to file its opposition brief, seeking an additional five days. Defendants' consolidated briefs were filed on May 13, 2013.

On May 28, 2013, Plaintiffs sought an 11-day extension of time in which to file their consolidated reply brief. BNE consented to the extension. Plaintiffs' consolidated reply brief was filed on June 14, 2013. The consolidated record has not yet been prepared for these appeals.

On August 16, 2013, 10 months after the appeals had been filed, more than five months after the appeals were transferred to this Court, and two months after these appeals were fully briefed, BNE moved, for the first time, for an "expedited schedule." In the BNE Motion, BNE sought to schedule argument on just one of the two appeals, which have been consolidated for purposes of the record and oral argument, on any date in September 2013 – which was just two weeks away at the time of BNE's motion – and asked the Court to bind itself to issuing a decision by the end of November 2013.

Among the grounds for the BNE Motion were: (1) the "significant loss of federal tax incentives for wind energy" and (2) the "potential loss of $500,000 of funds invested by the Connecticut Clean Energy Fund (CCEF) in Colebrook South"; (3) the "delay in generation of Class I renewable energy in the state"; and (4) the "potential loss of significant tax revenue, economic development and jobs that would benefit the Town of Colebrook." (BNE Motion at 5-6.) These "specific facts" in support of the BNE Motion were based on the contents of the Corey affidavit. (Id. (citing to Corey Affidavit ¶ 5).)

Plaintiffs filed a memorandum in opposition to the BNE Motion on August 26, 2013, in which they noted that in addition to its other defects, the BNE Motion contained improper matter that should be stricken. Plaintiffs hereby move the Court to strike from the BNE Motion the Corey Affidavit and all contents of the BNE Motion that directly rely on the Corey Affidavit. (See, e.g., BNE Motion at 1-2, 5-8.)

III. Legal Grounds

This Court has authority to order improper matter stricken pursuant to Practice Book § 60-2(3). The Corey Affidavit and corresponding contents of the BNE Motion should be stricken as improper matter because: (1) the Corey Affidavit does not comport with the requirements of Practice Book §§ 66-2(b) and 66-3; and (2) the Corey Affidavit contains unsupported assertions and wholly conclusory assertions about the state of federal law and other matters that are outside the scope of the record and the issues on appeal.

A. The BNE Motion and Corey Affidavit Do Not Comply with the Requirements of the Practice Book

There is no authority in the appellate rules of the Practice Book for the attachment of affidavits to motions. See §§ 66-1–66-8. Plaintiffs believe that the absence of such authority is, by itself, reason to strike the Corey Affidavit and its contents from the BNE Motion. See,

e.g., Janusauskas v. Fichman, 264 Conn. 796, 804, 826 A.2d 1066, 1072 (2003) (disregarding portions of the plaintiff's appendix that contained "a summary paraphrasing trial testimony" because "nothing in the rules of practice authorizes a paraphrased summary of testimony at trial").

Even assuming, arguendo, that it is permissible for parties to attach affidavits to motions filed before this Court, BNE's papers should be stricken for failure to comply with several procedural and technical requirements of the Practice Book. First, despite the certification of BNE's counsel that "the foregoing," which includes the Corey Affidavit, complies with the requirements of Practice Book § 66-3, the Corey Affidavit does not meet those requirements. The Corey Affidavit is single-spaced, is not one of the two permitted typefaces, does not appear to be in 12-point or larger size font and does not comply with the specific margin requirements of Practice Book § 66-3. Second, the Corey Affidavit, which was filed as part of the BNE Motion, causes the BNE Motion to exceed 10 pages in violation of Practice Book § 66-2(b).[1]

B. The BNE Motion and Corey Affidavit Contain Improper Matter

This Court is bound to consider only facts and evidence presented to the trial court, with very few narrow exceptions. See Practice Book § 60-5; see also Cunningham v. Planning & Zoning Comm'n of Town of Plainville, 90 Conn. App. 273, 278, 876 A.2d 1257, 1260 (2005) (granting defendants' motion to strike from plaintiffs' brief and appendix references to evidence that was not part of the trial record because "we do not take new evidence at this level of appeal"); State v. Dillard, 66 Conn. App. 238, 248 n.11, 784 A.2d

[1] Plaintiffs suspect that if the Corey Affidavit had been filed in compliance with the requirements of Practice Book § 66-3, the BNE Motion would be even longer than its current length of 12 pages.

387, 397 (2001) (declining to consider a computer printout detailing newspaper stories attached to defendant's brief and related argument because "that information was not before the trial court, and, on appeal, we do not take new evidence").[2]

The BNE Motion and Corey Affidavit are express attempts to introduce new evidence at the appeal level. The fact that BNE felt the need to support its argument for expedited scheduling with an affidavit demonstrates that it recognized that the "specific facts" it was offering in support of the BNE Motion were outside of the record, thus preventing BNE from citing to the record or any parties' appendix to support its claims. (Contrast BNE Motion at 2-5 (citing to the (as-yet unprepared) record on appeal and to the appendix to the Siting Council's brief in support of its "Brief History of the Case"), with BNE Motion at 5-8 (citing exclusively to the Corey Affidavit in support of its "Specific Facts on Which the Moving Party Relies").) The Corey Affidavit is deficient because there was no evidence before the trial court about the federal tax incentives[3] or the CCEF loan. (Plaintiffs' counsel has not done an exhaustive search of the Siting Council proceedings, but believes there may have been at most passing references by a witness during those hearings to the CCEF loan; certainly, no documentation of the loan was ever made part of the record at any time.)

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[2] Allowing new evidence, such as the Corey Affidavit, before this Court would also prejudice Plaintiffs, as there is no forum in which Plaintiffs can examine Corey to test the matters stated in the Corey Affidavit.

[3] BNE likely will claim that it could not have introduced evidence of the federal tax incentives before the trial court because the applicable provisions of federal law were not amended to require the beginning of construction by the end of 2013 until after the trial court's decisions were issued. However, BNE admits in the BNE Motion that Congress extended the tax credit deadline from December 2012 to December 2013 – which means that BNE presumably has been aware of an impending tax credit deadline since at least late 2011. (See BNE Motion at 6.)

Moreover, there is no indication that Corey is even a competent affiant to present the "facts" contained in the Corey Affidavit. "Generally, affidavits must be made on the affiant's personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness." State v. Sunrise Herbal Remedies, Inc., 296 Conn. 556, 571-72, 2 A.3d 843 (2010). The Corey Affidavit does not contain facts with which the affiant is personally familiar; instead, it purports to inform the Court of the contents of both state and federal law by summarizing them.[4] (See Corey Affidavit ¶¶ 4, 6.) Neither the Corey Affidavit nor the BNE Motion even identifies the laws that Corey improperly summarizes. The Corey Affidavit also contains wholly conclusory claims and opinions that demonstrate Corey is not a competent affiant. (See, e.g., id. ¶ 4 (opining that a "delayed" decision by this Court "will likely delay financing for the Project as banks, lenders and other investors want certainty before providing funding"), ¶ 5 (opining that "[a] delay in the outcome of the case unnecessarily puts CCEF's investment[5] in Colebrook South at risk since the delay would likely result in the loss of federal tax incentives that are needed to finance the project"[6]).) See Sunrise Herbal Remedies, 296 Conn. at 572 ("[T]he law prefers that a witness testify to facts, based on personal knowledge, rather than opinions inferred from such facts.").

For the above reasons, the Corey Affidavit is procedurally and legally deficient and should be stricken.

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[4] Plaintiffs' opposition to the BNE Motion briefly explains, with references to actual provisions of the federal law at issue, the errors in Corey's improper summary of the law.

[5] This purported jeopardy to the investment made by CCEF is not a matter for which Corey has standing to raise. Apparently, CCEF does not share Corey's concerns as there is no evidence that they have taken any steps to express them.

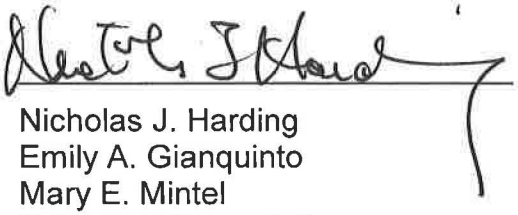
[6] Seemingly, as no similar request to expedite has been made as to the wind turbine project that is the subject of S.C. 19091, that half of the CCEF loan is lost already.

IV. Conclusion

For the foregoing reasons, Plaintiffs ask that the Supreme Court grant their motion to strike as improper matter the Corey Affidavit and the portions of the BNE Motion that expressly rely upon the Corey Affidavit's contents.

PLAINTIFFS-APPELLANTS

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

By: 

Nicholas J. Harding
Emily A. Gianquinto
Mary E. Mintel
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103
Tel. (860) 278-1150
Fax. (860) 240-1002
Juris No. 049362

CERTIFICATION

I hereby certify that the foregoing complies with the requirements of Practice Book § 66-3. I further certify that a copy of the foregoing was served by first-class U.S. mail in accordance with the provisions of Practice Book § 62-7, and by e-mail, on the following counsel of record on August 26, 2013:

For Connecticut Siting Council:

Robert L. Marconi, AAG
Office of the Attorney General–Finance
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2682
Fax: (860) 827-2893
Robert.Marconi@ct.gov

Clare E. Kindall, AAG
Office of the Attorney General–Energy
Department DPUC
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2682
Fax: (860) 827-2893
Clare.Kindall@ct.gov

For BNE Energy, Inc.

Lee D. Hoffman, Esq.
Michael Kurs, Esq.
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel: (860) 424-4300
Fax: (860) 424-4370
LHoffman@pullcom.com
MKurs@pullcom.com

Paul Corey, Esq.
12 Fernwood Road
West Hartford, CT 06119
Tel: (860) 561-5101
Fax: (888) 891-6450
pcorey@bneenergy.com

Nicholas J. Harding