TOWN OF WASHINGTON CONSERVATION COMMISSION
BRYAN TOWN HALL
WASHINGTON DEPOT, CT 06794

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

In Re:

APPLICATION OF SBA TOWERS II, LLC ("SBA") FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS FACILITY AT ONE OF TWO ALTERNATE SITES AT RABBIT HILL ROAD IN WARREN, CONNECTICUT

DOCKET: 378

June 22, 2009

TOWN OF WASHINGTON CONSERVATION COMMISSION'S BRIEF IN RESPONSE TO CROWW'S MOTION TO REJECT SBA'S VOLUNTARY WITHDRAWAL AND TO DISMISS THE APPPLICATION WITH PREJUDICE, AND IN FURTHER SUPPORT OF WCC'S MOTION TO DISMISS AND FOR COSTS; and MEMORANDUM IN SUPPORT OF MOTION FOR RULING BY THE CONNECTICUT SITING COUNCIL THAT NO CELL TOWER SUCH AS THAT PROPOSED UNDER THIS APPLICATION MAY BE CONSTRUCTED ON 422a RESTRICTED LAND, AND MOTION FOR RULING ACKNOWLEDGING THAT THE COUNCIL DOES AFFECT PROPERTY RIGHTS AND IN FUTURE WILL REQUIRE PROOF OF BONA FIDE TITLE TO LAND FOR ACTIVITIES OF THE KIND PROPOSED IN ANY APPLICATION PRESENTED TO THE COUNCIL BEFORE THE COUNCIL WILL PROCEED TO ACT ON THE APPLICATION OR OPEN ANY PROCEEDING ON IT

In further support of its Motion to Dismiss and Request for Costs filed on May 26, 2009, the Town of Washington Conservation Commission [WCC] submits this brief also in response to CROWW'S Motion to Reject SBA's Voluntary Withdrawal and to Dismiss the Application with Prejudice. WCC also submits the affidavits of its representatives herein in further support of its motion.

The Washington Conservation Commission has also moved this Council for a Ruling by this Council that no cell tower may be constructed on 422a restricted land, and

for a ruling acknowledging that the Council does affect property rights and in future will require proof of bona fide title to land for activities of the kind proposed in any application presented to the Council before the Council will proceed to act on the application or open any proceeding on such application. That Motion is supported by facts, law and argument in this memorandum.

History of Town of Washington Conservation Commission's [WCC] Motions on this Docket:

The Town of Washington has advanced the following substantive motions and requests in this matter:

A. Late February-early March, 2009 efforts to obtain full technical reports from Applicant SBA for the newly proposed "Site B" and resistance thereto, brought to the Siting Council's attention by letter in early March, 2009; and expression of Washington's opposition to the siting, including providing the formal legal position of the Connecticut Department of Agriculture and the Connecticut Attorney General to the Siting Council's own legal counsel by email copy on September 13, 2008;

B. April 1, 2009 Unanimous Resolution of the Conservation Commission of the Town of Washington in opposition to the application, transmitted to the Council by First Selectman Mark Lyon and Commission Chair Susan Payne on April 3, 2009;

C. April 22, 2009 Letter to the Siting Council requesting environmental impact study of the subject area;

D. May 26, 2009 Motion to Dismiss and Request for Costs.

E. June 11, 2009, brief in further support of motion to dismiss and request for costs, and endorsing and adopting the jurisdictional argument of the May 14, 2009 Department of Agriculture Motion to Dismiss for lack of subject matter jurisdiction.

F. June 22, 2009, brief in further support of motion to dismiss the application, with prejudice and with costs assessed against the applicant for bad faith.

G. June 22, 2009, Motion for a Ruling by this Council that no cell tower may be constructed on 422a restricted land, and for a ruling acknowledging that the Council does affect property rights and in future will require proof of bona fide title to land for activities of the kind proposed in any application presented to the Council before the Council will proceed to act on the application or open any proceeding on such application.

Applicant's Lack of Candor and Bad Faith

Subsequent to our town's efforts to obtain proper technical reports regarding the alternate "Site B" on this application, Counsel for SBA, Carrie Larson, wrote to Washington First Selectman Lyon stating:

> The Town of Washington has been aware, since November, that SBA intends to propose the alternate Site B in its application to the Siting Council. As stated previously, the proposal of Site B is within the scope of the original technical report filed in August, 2008. It is on the same parcel of property and is only 730 feet away from Site A.

(Letter from Counsel to SBA, Dated February 20, 2009 to First Selectman Mark Lyon, Town of Washington, and part of this record.) (Emphasis added.)

In fact, SBA had no lease for a "Site B" as it later acknowledged during the course of these proceedings. (Transcript of Hearing on Docket 378 of June 2, 2009, page 110 at lines 15-21.)

The Notice of Lease filed in the Warren Land Records at Volume 69 pages 316-324 on October 26, 2005 and attached to the Application as Exhibit C mentions no such Site, and the Executive Summary suggests that Exhibit C contains "notices of lease."

No Mention of Site B

That Exhibit contained only one Notice of Lease, described as the entire property at 131 Rabbit Hill Road, at Warren Land Records Volume 69 page 320 "As listed in the Warren Assessor's office as: map 4, lot 10." (Exhibit C to Application.)

The map attached as "Exhibit B" to the land records in Warren in the Notice of Lease entitled "Description of Tower, Antennas, Equipment Building and Equipment and Rights of Way," The Premises are described and/or depicted as follows: "Please see attached pages," and specifically referring to "Tenant will install a livestock fence around the access road to the equipment compound to prevent livestock from exiting the pasture area." (Ibid.)

The "attached pages" contain a tower elevation and compound plan and a map of the site showing the Site finally proposed as Site A. No mention is made of a Site B.

The Siting Council should not countenance such applicant sleight-of-hand abusing state citizens' rights by advancing an application that has no specific site in view at the time it formally "consults" towns, nor any specific site in view when it formally files its application with the Council in defiance of statutory requirements for such specifics.

Interpretation of Restrictions on Property

In its Reply to SBA's Objection to CROWW's Motion to Dismiss the Application filed with the Council on May 21, 2009, the day the Council opened the hearing on this Application, in spite of the Department of Agriculture's jurisdictional objection, CROWW stated (at page 1):

SBA states at page 2 of its Objection, that "There is nothing in the statutorily defined powers of CSC to suggest that the interpretation of restrictions on any property can or should be determined by the CSC."

And stated again (at page 3):

SBA states that if the State Department of Agriculture "believes that its rights to the property need to be determined, their proper route would be to take the issue to Superior Court." But property rights are not merely determined in court, because they are not merely affected in court. SBA asserts the illusory shield that the Fifth and Fourteenth Amendments do not protect against arbitrary action by a state agency in entertaining meritless applications on property.

We agree with CROWW's position. The Siting Council is not in the business of generating conflicts that must be battled out in court.

The application has since proved to be unsustainable by SBA, resulting in its withdrawal. In the process of what has amounted to land speculation, SBA has involved large numbers of people in participating in these proceedings. If the Council were to allow SBA's withdrawal to "moot" these proceedings, the Council will be rendering a disservice to the State it serves and will be violating the due process rights of the Conservation Commission and the other parties to this proceeding.

Due Process and Equal Protection

Both the State and Federal Constitutions provide for due process in conjunction with equal protection. This means that there is no requirement that the Council take motions in the order of their filing, just as there is no requirement that the Council take withdrawals in the order of their filing. The docket does not belong to the applicant. The docket belongs to the citizens of the state that the Council serves under rules that are not simply regulations but are Constitutional guarantees.

By entertaining an application on land to which the Applicant had no proper claim and an application that contained a jurisdictional defect, if the Council were to close this docket leaving the Department of Agriculture and the Washington Conservation Commission as parties in this proceeding empty-handed, denying them a ruling on the premise of the application - which defied state restrictions on farmland - then this docket will have been a nullity -- a very expensive nullity -- from start to finish.

Rendering Rulings to Resolve Conflicts

The Council now has an opportunity to redeem the nullity by rendering a binding opinion in this forum that future claims to 422a land are prohibited.

Should the Council determine that SBA's attempted withdrawal "moots" the issue, the Washington Conservation Commission asserts that the question remains before the Council as long as the Council has opened these proceedings for the purpose of entertaining the application. The Council's jurisdiction is not put in operation by an application. It is brought into effect by the opening of a docket by the fulfillment of the "notice" requirements prescribed by state law, generated by the applicant the moment certified notices are placed in the mail.

Just as the applicant invokes the Council's jurisdiction by the filing of the application -- an integral part of which are the proofs of service that are required to be filed as well -- due process for those to whom formal notice is given is invoked by the proof of service required to be filed with the Council on the application. The proof of service is an integral part of this application and docket (Exhibit S to the Application).

Where parties duly served have petitioned the Council to address issues raised in the docket, under constitutional guarantees to petition, for equal protection and due

process, the Council must render a decision or risk violating fundamental rights. These pending issues are not obliterated by one party's decision to withdraw.

Proof of Service Cloaks Every Party With Due Process Protections

Disposing of the application therefore does not automatically dispose of the petitions and motions filed by the other parties. Having initiated the proceedings does not give the Applicant the power to simply terminate the proceedings at will. Rather, the Applicant, just like the other parties to this docket, must bear the potential for an adverse ruling from the state agency whose jurisdiction the Applicant invoked.

And having entertained the application and opened these proceedings, the Council may now render a decision on the legality of such a proposal, thus benefiting, rather than injuring the citizens of this State on and through this docket.

If the Council fails to render a decision on the motions before it, it effects a denial of process to citizens of the very State that it serves.

Controversy

The controversy before the Council has been known to the Council through its legal representative since the legal opinion of prohibition of the proposed use was recorded in the Conservation Commission's email of September 13, 2008, long before the Application here was filed. That notice of a controversy has extended itself into these proceedings -- not by virtue of the Applicant's propositions, but by the proposition of a municipality of the State of Connecticut, supported by a legal opinion of the Attorney General of the State. The Commission's involvement here was not voluntary, but was required the minute the applicant served formal notice upon it.

SBA's defiance of that legal opinion in filing its application created the controversy that the Council must now resolve. If its purpose in filing an application on land where it knew there were legally binding restrictions was to learn if such activity would be permitted, then the controversy is properly joined and the parties to the controversy are entitled to an answer in the form of a ruling from this body.

If the Council takes the position espoused by SBA, that if the State Department of Agriculture "believes that its rights to the property need to be determined, their proper route would be to take the issue to Superior Court." (SBA Objection to CROWW's Motion to Dismiss the Application filed with the Council on May 21, 2009, page 3), then the Council would have extended the special privilege (prohibited under the State and Federal Constitutions) of an applicant being able to invoke jurisdiction for purposes of pure speculation, and then, without fanfare or ceremony, equally foreclose the Council's jurisdiction at its whim -- a right not extended to the other parties in this proceeding.

The Council took up subject matter jurisdiction on this docket and despite formal motions from the Department of Agriculture not to proceed, did proceed to hear the substance of an application to a use for 422a restricted land that might or might not survive a legal challenge to that use.

The legal challenge has been joined by the Applicant. It may not now change its mind about participating in the challenge through withdrawal. The question is active before this Council until it renders a decision on the question, for which the citizens that are parties to this docket look to it.

Equally, the question of whether rights to property can only be determined by the Superior Court is a chimera, where this Council is obligated, under Conn. Gen. Stat. §16-

50o(c) to entertain only applications where the full terms of any agreement entered into by the applicant....in connection with the construction or operation of the facility is a record requirement:

> (c) The applicant shall submit into the record the full text of the terms of any agreement, and a statement of any consideration therefor, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information or trade secrets.

Clearly such submission is not intended to be an afterthought or a post script which would violate all principles of due process. The provision is meant to protect the property and process rights of all concerned, or why create a record, and why provide formal notice to anyone other than the applicant himself?

That requirement to provide the specifics of the agreement regarding Site B was completely ignored by this applicant, and indeed the applicant acknowledged on the record that the lease for Site B was not executed until April 7, 2009, six weeks after the application had been submitted. This alone should have voided the application from the outset, which would have prevented the violations of due process already inflicted on the other parties to these proceedings to whom actual notice was rendered and who have formally and fully participated at great cost in order to vindicate their rights.

Ultra Vires and Misrepresentations

It is the Conservation Commission's position that the Council has acted outside its jurisdiction by entertaining an application (with regard to proposed Site A) that had a jurisdictional defect, and in entertaining an application that had a jurisdictional defect due to fatally defective municipal consultation (violation of the 60 day rule) previously

asserted by WCC in this proceeding, but overruled by the Council; by entertaining an application in which the applicant was defiant of statutory notice requirements to the Department of Agriculture and the expressed legal opinion of the Chief Executive Officer of the State and her lawyer that the proposed activity was prohibited, thereby fully knowing that a legal battle would result even if the applicant should be successful in obtaining a certificate in this forum; and by entertaining an application with such manifest misrepresentations as:

- [I]ncluded in this Application as Exhibit C is a copy of SBA's notices of lease for the Property at either Site. (App. at 3)
- As of February, 2009, The Town of Warren does not have a Plan of Conservation and Development (App. at 19)
- The Applicant respectfully submits that the reports and other supporting documentation included in this Application contain the relevant site specific information required by statute and the Council's regulations. (App. at 3)
- [N]o federally regulated wetlands or watercourses will be impacted by the proposed Facility ate either Site.(App. at 17)
- The visibility of the Site A Facility will largely be mitigated by the surrounding vegetation. (App. at 14)
- The Site B Facility will be visually buffered by the surrounding topography in the area. (App. at 15)
- Pursuant to CGS §16-50p(a)(3)(G), then, Site A can be approved by the Council since the construction and maintenance of Site A will not result in

a material decrease in acreage and productivity of arable land at the Property. (App. at 18)

The Town of Washington Conservation Commission therefore asks the Council to dismiss the SBA application with prejudice, assessing against the applicant the costs and legal expenses of all parties and intervenors.

Argument in Support of WCC Motion for Ruling on C.G.S. 422a Land Proposals; And for Ruling that the Interpretation of Restrictions Can and Must be Determined by the Siting Council Before it Imposes on Citizens and Town Officials to Defend Property Rights

This Council has entertained an application that has materially injured the Town of Washington's Conservation Commission and its members, and through them the Town itself by:

Site A

A. The Council opened proceedings on an application to consider a site ("Site A") in a matter with a jurisdictional defect. As a threshold matter, the application was defective, therefore neither the site, proceedings to consider the site, nor the application should have been entertained by the Council;

Site B

B. The Council opened proceedings on an application to consider a site ("Site B") application for which violated the 60-day mandatory statutory municipal consultation period. The Council has overruled the Town of Washington's requests for compliance with this municipal consultation period. SBA argued that Site B was simply an alternative to Site A;

C. The Council opened proceedings on an application on Site B despite the Conservation Commission's assertion that the applicant failed to provide the Town of

Washington the technical reports and drawings on Site B that it required for appropriate review of the site, in order to permit the Town and its duly elected and appointed officials, operating under statutory mandates, to perform due diligence reviews of the proposals;

D. Before an application was submitted, the Council knew through its legal counsel of the Department of Agriculture's and the Attorney General of the State of Connecticut's legal opinion that the Tanner land under 422a restriction prohibited the activity proposed;

E. During the course of these proceedings it came out in testimony that there was no lease for Site B executed at the time the application was filed with the Council;

The fact that SBA did not timely supply these legally mandated technical drawings and plans to a Town entitled to these by law, in addition to the facts disclosed only on cross examination of the Applicant's witnesses that no lease for Site B even existed at the time the application was filed on February 27, 2009, demonstrates that SBA's application was a speculation on a potential site -- a safety valve to an application that was jurisdictionally defective and in defiance of state law.

The Council was created for the purposes described under Conn. Gen. Stat. §16-50k to issue certificates:

> * * * no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, or 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 <u>without having first obtained a certificate of environmental compatibility and public need</u>, hereinafter referred to as a "certificate", issued with respect to such facility or modification by the council* * *
>
> (Emphasis added.)

SBA submitted an application for a certificate on one site where it failed to notify the holder of development restrictions on the property making its submission to the Council defective; SBA submitted an application for a second site where it had no lease and was unprepared to fulfill the requirements of C.G.S. §16-50o; SBA submitted an application for a second site where it defied the statutory provisions for a strict 60-day period for municipal review, and the Council has approved that defiance; and SBA submitted an application in defiance of a state-owned restriction duly registered in the land records of the Town of Warren of which the applicant had actual knowledge well before SBA invoked the jurisdiction of the Siting Council of the State of Connecticut.

Property Rights

As a quasi-judicial Council commissioned under state law for the purpose of siting power and industry infrastructure on any parcel of property within the bounds of the State, any and all action by this Council by its very nature affects property and property rights. It not only effectively licenses industrial action on property, but in the process affects surrounding properties and property rights, especially of those to whom actual notice is given, as supplied by law. Conn. Gen. Stat. Section §16-50l(b) provides

> (b) Each application shall be accompanied by proof of service of a copy of such application on: (1) Each municipality in which any portion of such facility is to be located, both as primarily proposed and in the alternative locations listed, and any adjoining municipality having a boundary not more than two thousand five hundred feet from such facility, which copy shall be served on the chief executive officer of each such municipality and shall include notice of the date on or about which the application is to be filed, and the zoning commissions, planning commissions, planning and zoning commissions, conservation commissions and inland wetlands agencies of each such municipality, and the regional planning agencies which encompass each such municipality; * * * A notice of such an application for a certificate for a facility described in subdivision (3), (4), (5) or (6) of subsection (a) of section 16-50i shall also be sent, by certified or registered mail, to each person appearing of record as an owner of property which abuts the proposed primary or alternative sites on which

the facility would be located. Such notice shall be sent at the same time that notice of such application is given to the general public.

(Emphasis added.)

Notice is only one leg of the three-legged stool known as due process. The bases for a grant of party or intervenor status providing an opportunity to be heard in the proceeding, in order to meaningfully affect the outcome of the proceeding supplies another leg. The third leg is the requirement of an impartial adjudicator.

The statutory scheme has provided for notice and an opportunity to be heard. These provisions are present in the statute because the subject matter affects property rights. Once actual notice is given, mere participation by a party (filing formal request to participate) formalizes the status comprehended by the statute: a party in interest.

That interest is a property interest.

Therefore, the Council may not simply dispose of a docket just because the Applicant withdraws the application.

Initiation of Process

The act of filing the application was not what initiated the "process" for which the elements of due process (notice, an opportunity to be heard, an impartial adjudicator) were provided for. What initiated the "process" for which the elements of due process were provided for was the "actual notice" of the "proof of service of a copy of such application" on the entities provided for under C.G.S. §16-50l(b).

Once such formal service is rendered, the protections of equal protection guaranteed by the State and Federal Constitutions are triggered, and the proceeding must dispose equally of those petitions brought by any party who has received actual notice

and has been entitled to and been granted party or intervenor status to the proceeding for an opportunity to be heard to meaningfully affect the outcome of the proceedings.

Once opened, if the docket were not affecting property rights, then there would have been no need for the Town of Washington to have been given notice, or to have participated in this docket, and the Conservation Commission of the Town of Washington would not have taken the trouble to do so. But not to participate would have been to waive rights most fundamental to the Town and its residents.

It is therefore self-evident that all applications to the Council have the potential to affect property rights, just as it is self-evident that for a party opposed to a particular application not to participate would affect property rights by effectively waiving them. This is the entire basis behind the concept and provision for "due process" without which neither life, liberty nor property may be deprived.

That is what SBA and the Council here are in the process of affecting:

First, by entertaining an application without a proper lease on the property SBA sought permission to build on; Second by entertaining an application without proper municipal consultation period or a lease in place at the time the application was filed with the Council; Third, by causing a situation in which parties had no choice but to participate or waive fundamental liberty rights, and risk major injury to those rights; resulting in material injury in terms of time and resources, including significant financial expenditures and loss of personal time and opportunities; Fourth, constituting a deprivation of due process where more protection is extended to the applicant than is extended to all the other parties and intervenors to this proceeding, effecting a violation

of equal protection: if the petitions in the form of motions and requests to this Council by all other parties and intervenors to this docket are not addressed individually.

For the Council not to grant the Town of Washington Conservation Commission's motion for costs, for prejudice on the application applying to Sites A and B, is the procedural equivalent of saying that the citizens of this State do not merit the special protections extended to the industry applicants that appear before this Council. The only resolution to these deprivations is the rendering of decisions called for by these parties' petitions.

Motion for Ruling

For these reasons, the Town of Washington Conservation Commission has moved this Council, acting, as it is, ultra vires, and having effected material injury to the Town of Washington Conservation Commission in costs and time responding to this application, to render a decision of some value to the State and its residents, that:

a.) no cell tower may be constructed on 422a land to which the State of Connecticut owns the development rights; and that

b.) the Council does affect property rights and therefore requires proof of bona fide title consistent with Conn. Gen. Stat. §16-50o(c) from any applicant of its right to use the land described in any future application in the fashion the application describes,

in order to prevent all future harm such as that sustained by the Washington Conservation Commission in this frustrating effort to protect and defend the rights of the citizens of our Town in fulfillment of our statutory duty defending against an application that the applicant has suddenly decided it no longer wishes to press.

In support of its Motions, the Town of Washington Conservation Commission asserts its rights under Connecticut General Statutes §16-50o(c); under the Constitution of the State of Connecticut, Article I, Sections 1, 10, 11, 14, 18, 20; Article 4, Section 12; Article 10; and Article 11, Section 1; and under the Constitution of the United States Article VI and Amendments I, V, and XIV.

Additionally, in taking up this application with a jurisdictional defect, the Council has caused the Attorney General of the State of Connecticut -- a servant to the citizens of the State -- to appear in opposition to himself. This anomaly should have been prevented upon receipt of the notice emailed by the Town of Washington Conservation Commission to the Applicant notifying and warning it of the Department of Agriculture's formal opinion of the Attorney General of the State of Connecticut that no such use is permitted, notice that was given simultaneously to this Council's legal Counsel on September 13, 2008 (See WCC brief filed on June 9, 2009 Exhibits A and B) long before any application was filed. While the Council may not refuse to hear an application, it may set the standards for invoking its jurisdiction to entertain an application, which it has failed to do here.

Conclusion

For the foregoing reasons, and in light of the attached affidavits of Susan Payne and the undersigned representative of the Town of Washington Conservation Commission, the Commission moves this Council to dismiss the SBA application with prejudice, assessing against the applicant the costs and legal expenses of all parties and intervenors for wrongfully wasting everyone's time since SBA knew from the outset, and before it invoked the Council's jurisdiction, that it had no rightful claim to the land for

which it applied to this State agency for certification and invoking due process for the participants by effecting statutory notice, misled this Council about the statutory prohibition through an artificial exception, failed to comply with Connecticut statutory municipal consultation time periods and the lease and site specifics requirements, all of which were required to be integral parts of an application before it is submitted for consideration. These acts constitute bad faith making the applicant subject to all the costs and expenses incurred by all parties herein.

Respectfully,

Diane Dupuis
Chairperson of the Cell Tower Committee
Conservation Commission
Town of Washington, Bryan Town Hall, Washington Depot, CT 06794

CERTIFICATE OF SERVICE

This is to certify that on this date, an original and 15 copies of the foregoing was mailed by first class mail to the Connecticut Siting Council at 10 Franklin Square, New Britain, CT, and that a copy was mailed by first class mail, postage prepaid, to the following:

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June 22, 2009